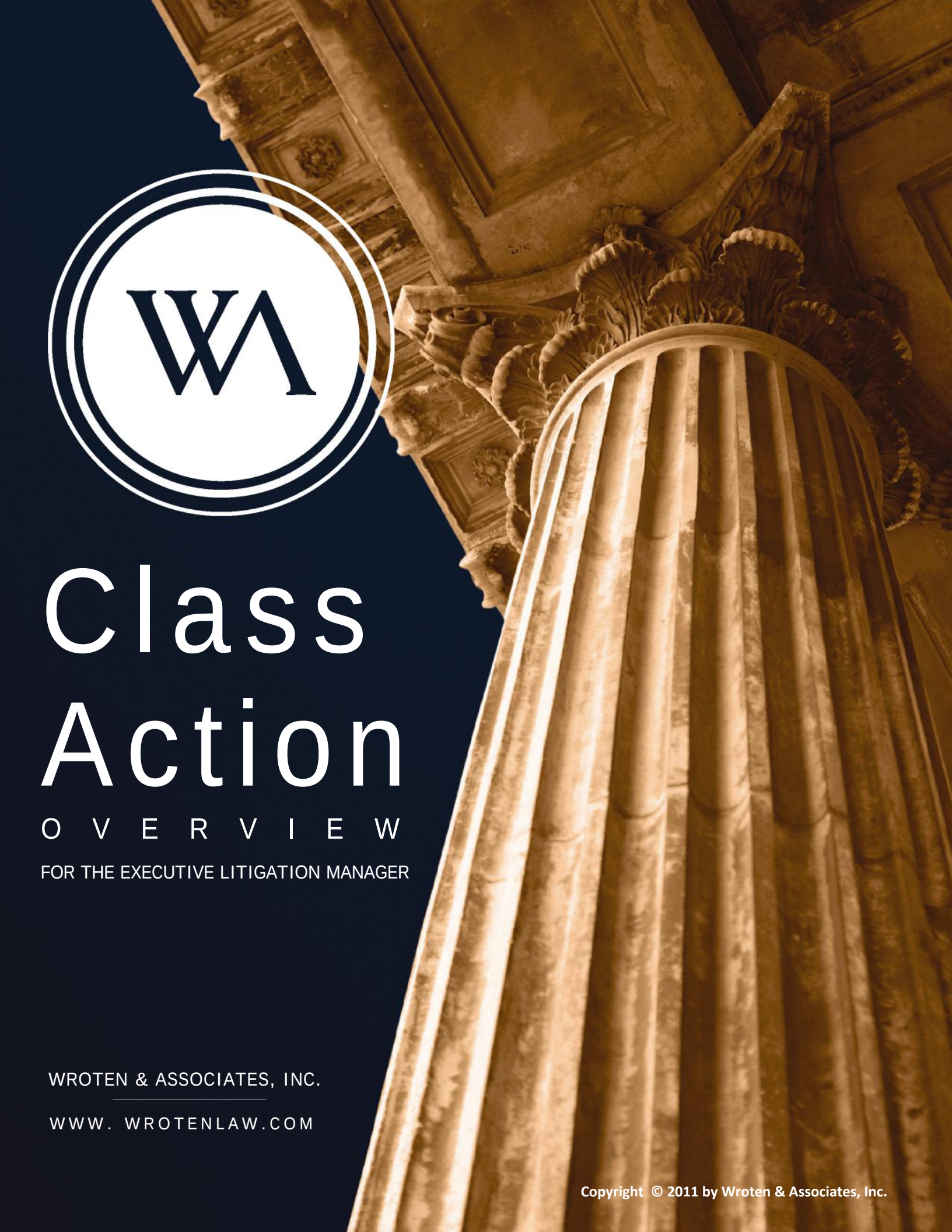


Class Action

OVERVIEW

FOR THE EXECUTIVE LITIGATION MANAGER

WROTEN & ASSOCIATES, INC.

WWW. WROTENLAW.COM

About the Editors

Kippy Wroten

Ms. Wroten has brought more than 100 trials to verdict during her career that began in 1988 as a Deputy District Attorney and evolved into the defense of nursing homes when she served as the long term care practice group leader for a major medical malpractice defense firm. Ms. Wroten's legal experience culminated in 2006 when she launched Wroten & Associates, a law firm dedicated to meeting the unique litigation and risk management needs of today's long term care provider. As part of her work advocating on behalf of the LTC industry Ms. Wroten has been an invited lecturer on a variety of long term care issues at conferences hosted by the Defense Research Institute, the Association of Southern California Defense Counsel, the Southern California Association of Healthcare Risk Managers, the University of California, Irvine, the University of Southern California, Chapman University College of Law, and numerous multi-facility and independent LTC operators. Representative Matters: Perlin vs. Fountain View Management, Inc., 163 Cal. App. 4th 656 (2008) and Carehouse Convalescent Hospital vs. Superior Court, 143 Cal. App. 4th 1558 (2006).

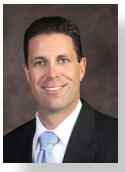
Regina Casey

With over 24 years of experience defending the healthcare professional, Regina Casey brings a unique blend of legal and nursing skills to her work as a defense advocate. Regina's expertise enables her to assist care providers in avoiding litigation through pro-active risk management, including the investigation of sentinel events, educating staff on best practices, and early intervention to resolve problems when patient complaints or operational issues arise. Prior to graduating with honors from the University of Maryland Law School, Ms. Casey practiced as a registered nurse for ten years, graduating magna cum laude from Duke University (Bachelor's of Science in Nursing) and earning her Masters of Science in Nursing at Catholic University of America. Regina's experience also encompasses specialty training as a mediation expert through Pepperdine University. In her career, she has settled hundreds of cases through the mediation process or direct negotiations.

Laura Sitar

Laura Sitar brings together her years of experience as a human resources executive and as an attorney to provide employment related risk management and litigation defense to the healthcare professional. Ms. Sitar graduated summa cum laude and valedictorian from Western State University College of Law after working 15 years as a human resource manager for 2000 employees of a multi-state public company. Ms. Sitar's blend of litigation and corporate experience provides the edge needed to navigate the unique human resource challenges facing today's long term care company.

Darryl Ross



Darryl Ross maintains a diverse litigation practice with experience handling all aspects of civil litigation including arbitrations, class actions, complex settlements, trials (jury and court), and appeals. Mr. Ross' practice focuses on the defense of nursing homes and residential care facilities. He has successfully handled a wide variety of health care matters for public and private entities including insurance coverage issues, product liability claims, interpretation, advice and enforcement of medical staff bylaws. Mr. Ross is a frequent speaker at industry conferences and forums and has given numerous Webinars for clients on a variety of issues impacting their operations. Recent presentations include How to Deal with a Challenging Resident?, What Rights Do Facilities Have When They Discover A Sex Offender is Living in the Building?, How to Protect the QA Process, and Difficult Physicians And The Issues They Present.

TABLE OF CONTENTS

Page

CHAPTER 1 INTRODUCTION TO CLASS ACTIONS 2

I. Class Action Definition 2

II. Popular Class Action Themes Against Long Term Care Providers 3

Class Action Claims Based On Regulatory Violations 3

Class Action Claims Based On Labor Code Violations 4

Violation Of Labor Code § 226.7 5

Violation Of Labor Code §§ 201, 203 And 226 5

California Consumer Protection Class Action Claims 5

Violation Of The Unfair Competition Law 6

Violation Of The False Advertising Act 7

Violations Of Consumer Legal Remedies Act 7

III. Damages And Other Relief Provided 7

CHAPTER 2 LITIGATION MANAGEMENT PLAN 10

Initial Proceedings 11

Pre-Certification Discovery 12

Class Certification Motion 13

Merit Discovery 13

Final Pre-Trial Proceedings 14

CHAPTER 3 INITIAL PROCEEDINGS AND PLEADINGS 16

I. Preservation/Legal Holds 16

Litigation Holds 16

Preservation 17

II. Response To CLRA Letter 19

III. Evaluation Of Forum 21
IV. State v. Federal Court Jurisdiction 21
Tests Under § 1331 21
Removal 22
Class Action Fairness Act Hurdles For Removal 22
Local Controversy Exception 23
Home State Controversy Exception 23
Timing: 25
Situations That Can Create A New 30-Day Window 26
Staffing Regulations 28
Procedural Requirements For Notice Of Removal 29
Burden: 29
Remand 30
V. Analysis Of Venue 30
Timing: 32
Motion For Transfer/Change Of Venue 32
VI. Evaluation Of Courtroom Assignment 32
Challenge To The Judge 32
Timing: 33
VII. Designating Case As Complex 33
VIII. Demurrer 34
Timing: 34
Considerations 35
Abstention 35
Attacking Punitive Damages 36

Corporate Law 37
Health & Safety Code § 1430(b) 39
Lacks A Private Right Of Action....39
Enforceability Of 3.2 NHPPD 40
IX. Motion To Strike....40
Timing:....41
Punitive Damages 41
References To Actions By The Department Of Public Health Services 41
The Use Of "Buzz Words"....41
X. Preparing For Discovery & Initiating Your Defense....42
CHAPTER 4 PRE-CERTIFICATION DISCOVERY....42
I. Pre-Certification Discovery v. Merit Discovery....42
II. Pre-Certification....45
III. Pre-Certification Discovery-Plaintiff's Burden....46
IV. Class Action Discovery And Privacy 47
V. Discovery From Unnamed Class Members 50
CHAPTER 5 CLASS CERTIFICATION....52
I. Requirements For Certification....52
A. Ascertainable Class....53
B. Community Of Interest 54
C. Class Action Is Superior Method....55
II. Issues In The Long Term Care Setting 56
Defeating Typicality 56
Defeating Commonality....57
Individual Issues Predominate Within Medical Negligence Claims 57

Individual Issues Predominate § 1430(b) Claims 58

A Section 1430(b) Claim Vindicates Individual Residents' Rights And Turns On Individual Issues 59

Health & Safety Code § 1276.5 Raises Predominantly Individual Issues 60

A Section 1599.1(a) Claim Requires Individualized Analysis 61

Plaintiffs Cannot Prove "Reliance" In UCL Claims On A Class-Wide Basis 62

III. Appellate Review Of Decision Granting Class Certification 64

Abuse Of Discretion Standard 64

Timing: 65

Rehearing 65

Review By California Supreme Court 65

Amicus Curiae 65

IV. Providing Post-Certification Notice To Class Members 66

Contents 67

Cost Of Class Notice 68

Opt-In v. Opt-Out 70

V. Decertification 71

CHAPTER 6 MERIT DISCOVERY 73

I. E-Discovery 73

California Electronic Discovery 74

ESI Ground Rules 75

Privileged ESI 76

II. Discovery Of Insurance Information 77

III. Depositions 77

IV. Corporate Compliance 77

Corporate Compliance Programs....78

Federal Legislative Reform And Quality Assurance Programs....78

Patient Protection And Affordability Care Act (PPPACA) Compliance and Ethics Program....80

V. State Regulatory Agencies....80

Subpoenas For Department Of Public Health Statements Of Deficiency And Plans Of Correction....81

Common Plaintiffs' Arguments To Compel Further Discovery Into Department Of Public Health Documents....82

Obtain Licensing And Certification File From DPH....83

VI. Privacy....84

CHAPTER 7 FINAL PRE-TRIAL PROCEEDINGS....86

I. Trial Management Order....86

II. Jury Issues....86

Jury Consultant....86

Jury Questionnaire....87

III. Motions In Limine....88

Grounds For Making A Motion In Limine....89

Department Of Public Health Documents....92

Statements Of Deficiency....92

Statements Of Deficiencies Constitute Inadmissible Expressions Of Opinion And The Making Of A Conclusion....93

Plans Of Correction Are Not Admissible Under Health & Safety Code § 1280 Or 42 Federal Regulations §405.1907....94

Statements Of Deficiency Do Not Establish A Pattern Or Practice Of Wrongful Conduct....95

IV. Bifurcation....96

Bifurcation Of Financial Issues....96

Requirement To Bifurcate Right To Recover Punitive Damages.....98
Defendants May Be Prejudiced If Bifurcation Is Not Granted.....98
Bifurcation Of Legal Versus Equitable Issues.....99
V. Pre-Trial Preparation Of Verdict Forms.....99
VI. Preparing For Your Appeals.....99
CHAPTER 8 CLASS ACTION SETTLEMENTS.....100
I. Motion For Approval Of Settlement.....100
Attorney's Fees.....100
Notice Of Settlement To Class.....100
Standing To Object To The Settlement.....101
II. Settlement Hearing.....101
Settlement Effective Date.....102
III. Dismissal.....102
Notice Of Dismissal To The Class.....102
FINAL WORD.....103
GLOSSARY.....104
Appendix A STATE NURSE STAFFING REQUIREMENTS.....112
Appendix B CORPORATE CONSIDERATIONS.....168
Appendix C DOCUMENT LIST.....177
Appendix D STAFFING RATIO - REQUEST FOR PRODUCTION CHECKLIST.....179
Appendix E ADMINISTRATOR/DON MEETING CHECKLIST.....181

CLASS ACTION OVERVIEW

FOR THE EXECUTIVE LITIGATION MANAGER

PREFACE

Class action cases are by definition complex matters that require both subject matter and strategic management expertise. When facing a class action suit one of the first steps taken is the development of a projected litigation management plan. Ideally, this plan will anticipate the variety of litigation demands side by side with projections of anticipated costs. Although a review of specific facts are required before any litigation management plan can be developed, we hope that the litigation benchmarks outlined in the following pages will aid the executive litigation manager in participating in the creation and execution of a responsible litigation management plan.

The material within these pages is the result of more than a decade of work representing the long term care provider and is born from the team effort of countless professionals I've been honored to work with. While the names are too numerous to list I do want to specially recognize the contribution of our Wroten & Associates Senior Attorneys Sarah Gates and Carmen Sciabica who have been instrumental in bringing order to this vast area of law.

CHAPTER 1

INTRODUCTION TO CLASS ACTIONS

Time tested Elder Abuse themes have been transformed into a burgeoning area for class action litigation, particularly in the context of regulatory violations and consumer protection class actions. Undeterred by courts' refusals to certify personal injury and wrongful death cases given their fact specific and individualized nature, Plaintiffs' counsel are increasingly filing class actions against long term care facilities under Health & Safety Code § 1430(b) and California's Unfair Competition Law and Consumer Legal Remedies Act. These claims take traditional inflammatory Elder Abuse allegations involving a myriad of regulatory violations including under-staffing and turn them into broader violations of business practices and consumers' rights. Add to the mix the steadily increasing numbers of wage and hour class action claims filed against this labor intensive industry and the resulting class action fervor is likely to affect the long term care industry for years to come.

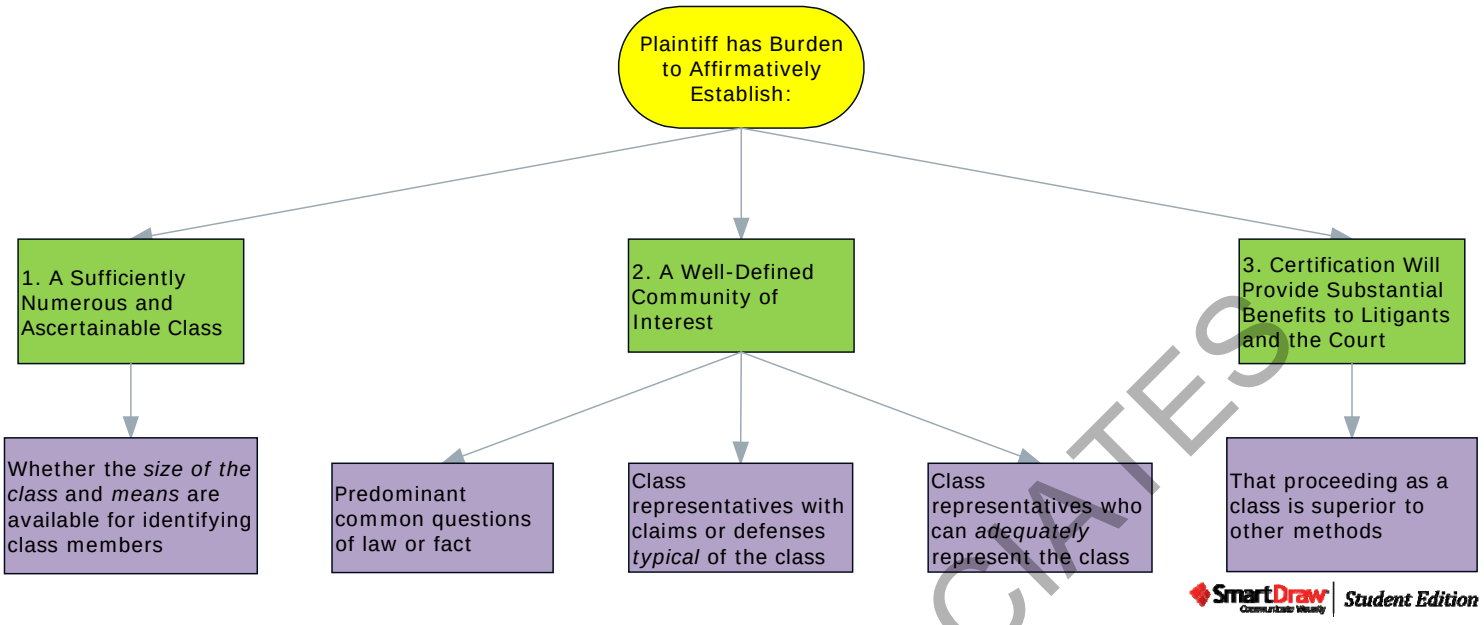
I. Class Action Definition

A class action is a legal case where one or more members of a large group of persons sue as representatives of the larger group without requiring every person in the larger group to join in the Complaint. The class action procedure is available in federal court and in most state courts under Federal Rules of Civil Procedure, Rule 23. While California has not adopted the federal rules, California law governing class actions generally mirrors federal requirements for the maintenance of a class suit. The following is an overview of the those requirements.

Under Federal law a class action may be certified if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Federal Rules of Civil Procedure, Rule 23(a). With that similarity in mind, we will highlight California law as it relates to class action litigation under the belief that ultimately, most class action claims brought in California against long term care providers will ultimately move toward resolution in state court.

In California, a class action may be certified only if the moving party satisfies its burden to affirmatively establish (a) a sufficiently numerous, ascertainable class, (b) a well-defined community of interest, and (c) that certification will provide substantial benefits to litigants and the courts. *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007); see also Civil Code of Procedure § 382. In turn, the 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1106-10 (2003).

Requirements For Class Certification



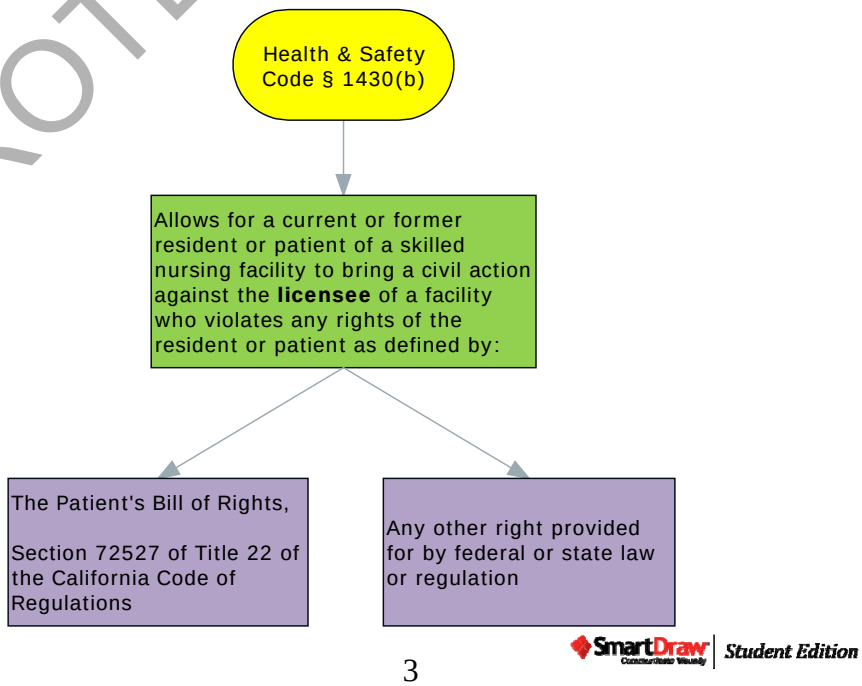
II. Popular Class Action Themes Against Long Term Care Providers

California long term care providers can expect to face class actions based on the following claims which Plaintiffs, and sometimes the courts, view as amenable to class certification.

Class Action Claims Based On Regulatory Violations

California claims based on regulatory violations brought against skilled nursing facilities are generally filed under Health & Safety Code § 1430(b):

Resident Rights-Creating Statute



Health & Safety Code § 1430(b), commonly referred to as the Patient's Bill of Rights, is applicable to California skilled nursing facilities and provides:

> A current or former resident or patient of a skilled nursing facility, as defined in subdivision (c) of Section 1250, or intermediate care facility, as defined in subdivision (d) of Section 1250, may bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patients Bill of Rights in Section 72527 of Title 22 of the California Code of Regulations, or any other right provided for by federal or state law or regulation. The suit shall be brought in a court of competent jurisdiction. The licensee shall be liable for the acts of the licensee's employees. The licensee shall be liable for up to five hundred dollars ($500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue.

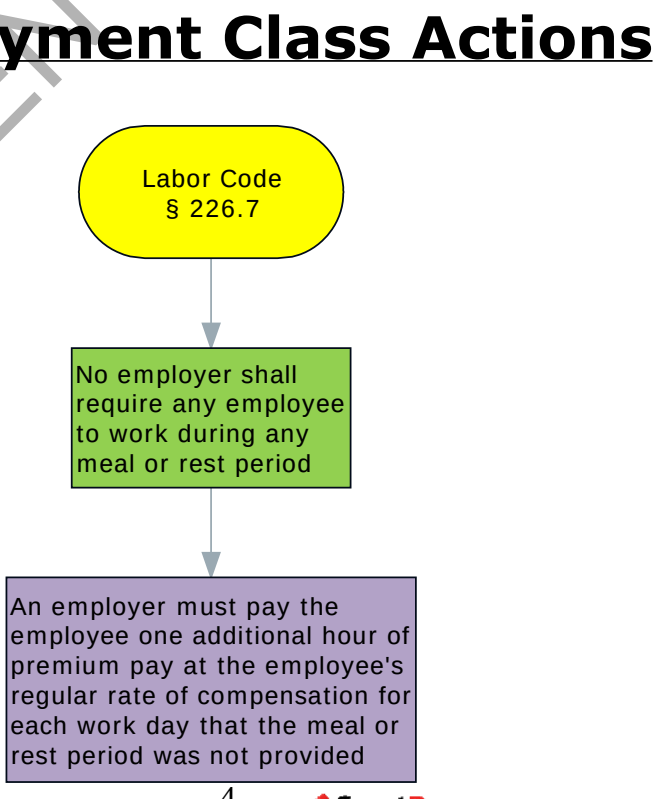
Under Code of Regulations Title 22 § 72061, "licensee means the person, persons, firm, partnership, association, organization, company, corporation, business trust, political subdivision of the state, or other governmental agency to whom a license has been issued."

Plaintiffs view the reach of 1430(b) as expansive given the language which provides for civil actions for violations of any right "provided for by federal or state law or regulation."

See Appendix A for State by State Nurse Staffing Requirements.

Class Action Claims Based On Labor Code Violations

While there are a number of employment related laws under which class action claims are viable, by far the most prevalent are claims filed under Labor Code § 226.7:



California labor laws require that an employer provide non-exempt employees with a thirty minute uninterrupted meal break after five hours of work (unless the employee's workday is completed within six hours) and a ten minute break time after each three and one-half hours of work. Break times must be paid by the employer. Cal. Code Regs., tit. 8, § 11070, subds. 11,.12.

Violation Of Labor Code § 226.7

Labor Code § 226.7 provides that "no employer shall require any employee to work during any meal or rest period." If an employer fails to provide an employee a meal or rest period, the employer must pay the employee one additional hour of premium pay at the employee's regular rate of compensation for each work day that the meal or rest period was not provided.

Long term care providers are targets for allegations of missed or interrupted breaks and meals because of the nature of the business. Current and former employees often allege they were forced to work through breaks and meals to provide for the immediate needs of their residents. Plaintiffs point to facility budgets and tight labor management to allege uniform pressures to violate wage laws.

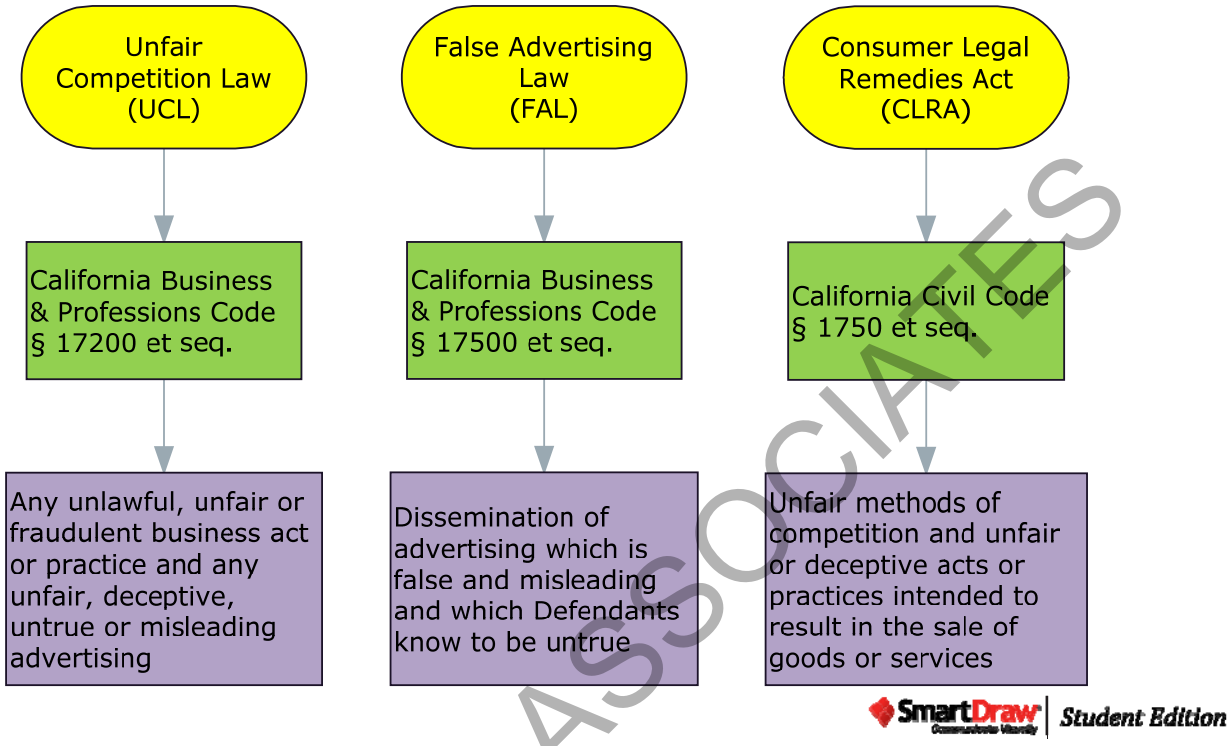
Violation Of Labor Code §§ 201, 203 And 226

Allegations of the failure to provide meal and rest periods lead to a myriad of additional Labor Code violations. Labor Code § 226 requires employees be given an accurate itemized statements in writing at the time wages are paid showing the total hours worked by the employee. Additionally, Labor Code §§ 201 and 203 require timely payment of all wages due at the time of termination or resignation. The code provides up to thirty days of waiting time penalties for violations of §§ 201 and 203. Plaintiffs argue wage statements must be inaccurate and employees cannot have been provided all wages due at the time of termination or resignation if throughout their employment their employer has continually failed to provide break and meal periods or forced employees to continue to perform some work during those periods. These claims are easy to make and can be challenging to defend.

California Consumer Protection Class Action Claims

California based consumer protection class actions brought against both skilled nursing facilities and residential care facilities for the elderly are generally filed under the following California statutes:

TYPICAL CALIFORNIA CONSUMER CLASS ACTIONS



Violation Of The Unfair Competition Law

Business & Professions Code §17200 et seq. is commonly known as the **Unfair Competition Law** (**UCL**). Under § 17200, unfair competition is defined as any unlawful, unfair or fraudulent business act or practice and any unfair, deceptive, untrue or misleading advertising. It is apparent from the language of the code that covered acts or practices are virtually limitless. Plaintiffs need simply allege Defendants violated any of a number of Health & Safety Code provisions and/or violations of California Code of Regulations, Title 22 (Title 22) that govern long term care facilities to show a pattern of misconduct and violations that constitute unfair business practices. The theory follows that Defendants' Health & Safety Code or Title 22 violations give them an unfair advantage over other facilities who abide by the rules. Deficiencies and citations issued by the Department of Social Services or Department of Public Health frequently provide important supporting evidence for such class action complaints.

Recently, the California Supreme Court issued its opinion in *Kwikset Corporation v. Superior Court (Benson)*, 51 Cal. 4th 310 (2011), which clarified the standing requirements for economic injury under the UCL. The Court found that the Plaintiffs' allegation that they paid for products they would not have otherwise purchased if the products had been properly labeled constituted "economic harm," and therefore "loss of money or property." The Court concluded that a consumer can satisfy the standing requirement of the UCL simply by alleging "that he or she

would not have bought the product but for the misrepresentation." The Court referred to and quoted the recent *In re Tobacco II Cases'* discussion of reliance, reiterating that "plaintiff is not required to allege that [the challenged] misrepresentations were the sole or even the decisive cause of the injury-producing conduct." *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009).

Plaintiffs make similar claims of unfair business advantage related to wage and hour claims.

Violation Of The False Advertising Act

Business & Professions Code §17500 et seq. is commonly known as the **False Advertising Law (FAL)**. Under these claims, Plaintiffs generally allege Defendants advertise they are able to provide necessary care and services to their residents even when Defendants know they do not have adequate staff in numbers or training to do so. In essence, Defendants systematically disseminate advertising which is false and misleading and which defendants know to be untrue. The alleged false advertising identified by Plaintiffs is found on facility web sites, in brochures and through statements made by marketing and admissions personnel. Plaintiffs' examples of false and misleading statements are often as simple as "We can take care of your needs."

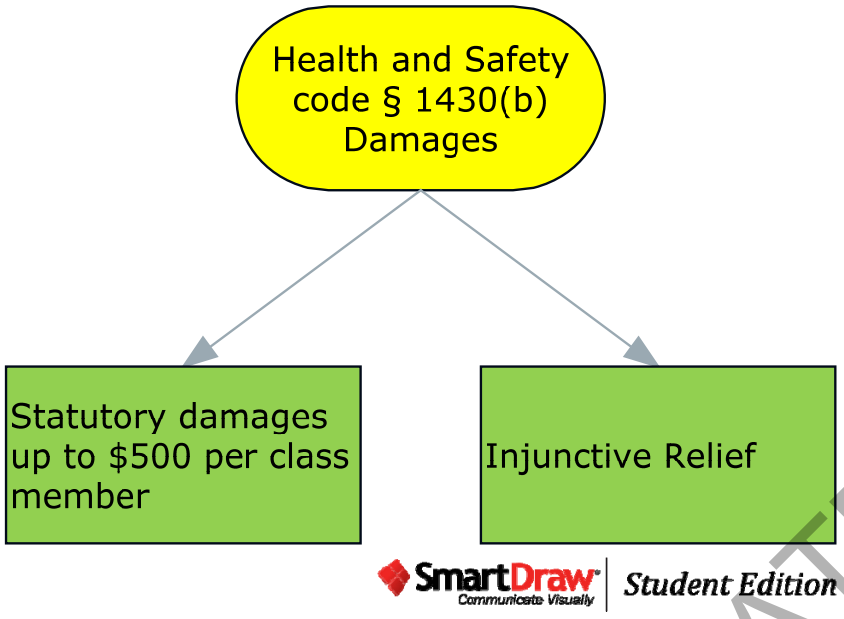
Violations Of Consumer Legal Remedies Act

Civil Code §1750 et. seq. is known as the **Consumer Legal Remedies Act (CLRA)**. This act targets unfair methods of competition and unfair or deceptive acts or practices intended to result in the sale of goods or services. Here, a typical allegation states Defendants represent to the public that they provide sufficient and lawful care and supervision to their residents. Plaintiffs argue these representations are made through such vehicles as admissions agreements, Department of Social Service and Department of Health Services licensing, and representations to the public through Defendant web-sites, brochures, advertising materials and facility personnel. Plaintiffs allege dissemination of the Patient's Bill of Rights by skilled nursing facilities in the admission agreement, as required by regulation, is an agreement to meet each requirement of the Bill of Rights which then becomes a misrepresentation any time a violation of the Bill of Rights occurs. Plaintiffs allege Defendants' actions are intended to entice the elderly to reside or receive care in their facilities, however, due to inadequate funding and staffing those facilities cannot provide the necessary services.

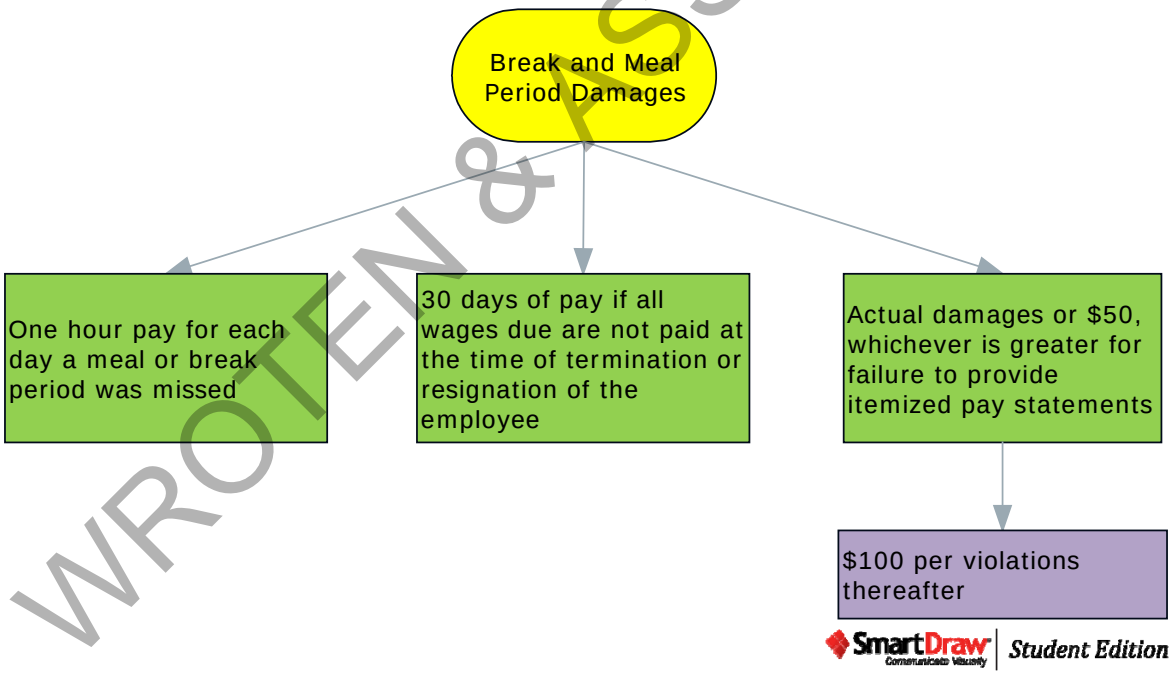
III. Damages And Other Relief Provided

Plaintiffs' goal is to stack as many available remedies against as many defendants as possible to create the super award.

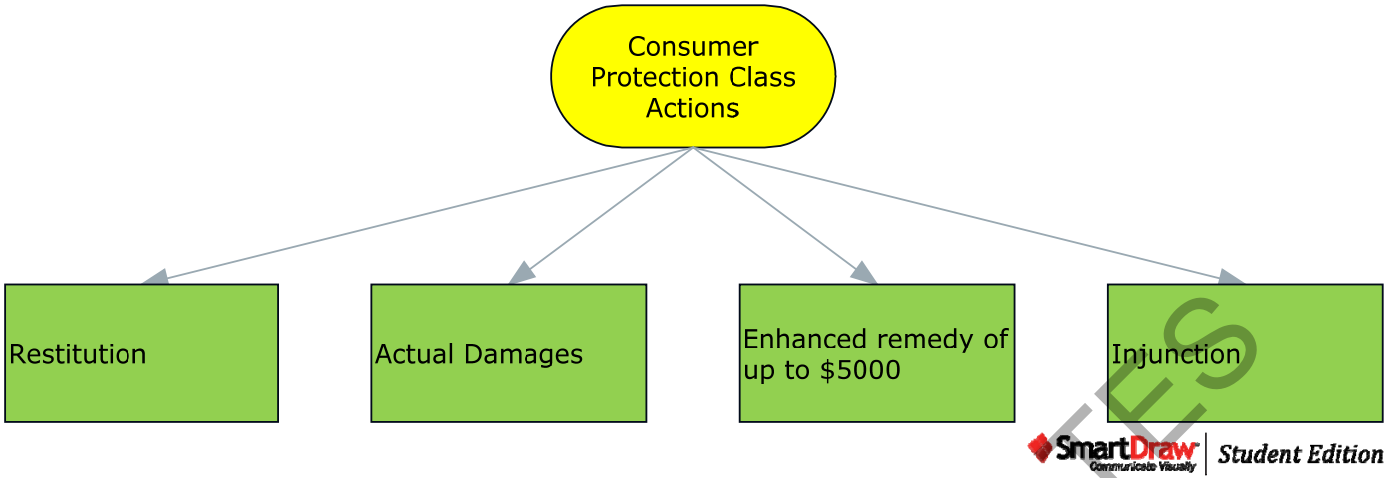
Health & Safety Code § 1430(b) provides for statutory damages up to five hundred dollars ($500) per individual whose right has been violated. The legislative history of § 1430(b) supports the conclusion that each class member may seek a single maximum $500.00 award, however, Plaintiffs will argue each class member is entitled to up to $500.00 times the number of violations of a single right. Plaintiffs will also seek an injunction under §1430(b).



Violations of break and meal period requirements entitle the aggrieved employee to one hour of pay for each day a meal or break period is missed. Failure to pay all wages due at the time of termination or resignation entitles the employee to an additional 30 days of pay. Failure to provide itemized pay statements results in the greater of actual damages or fifty dollars ($50.00), whichever is greater, for the first violation and one-hundred dollars ($100.00) per violation thereafter.

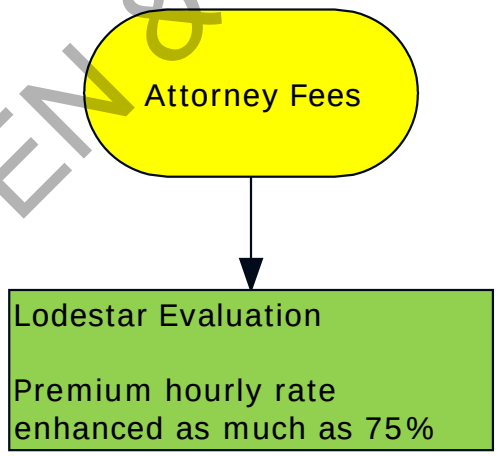


Consumer protection class actions based on "traditional" allegations of regulatory violation generally seek restitution of payments made by residents for those services which were allegedly never provided. The Consumer Legal Remedies Act also authorizes actual damages, as well as an enhanced remedy of up to $5,000 for each consumer who is a senior citizen or a disabled person. Plaintiffs will posture their complaint to seek punitive damages. Consumer protection class actions generally seek injunctions requiring Defendants to immediately cease those acts that constitute unlawful, unfair and fraudulent business practices and false advertising.



Plaintiffs will seek punitive or exemplary damages which are money damages over and above compensation for property damages. Punitive damages are allowed under circumstances aggravated by oppression, fraud or malice.

Finally, under each of the outlined causes of action Plaintiffs will demand that Defendants pay all Plaintiffs' attorneys fees based on a lodestar evaluation which inevitably demands a premium hourly rate which is then enhanced as much as seventy-five percent.



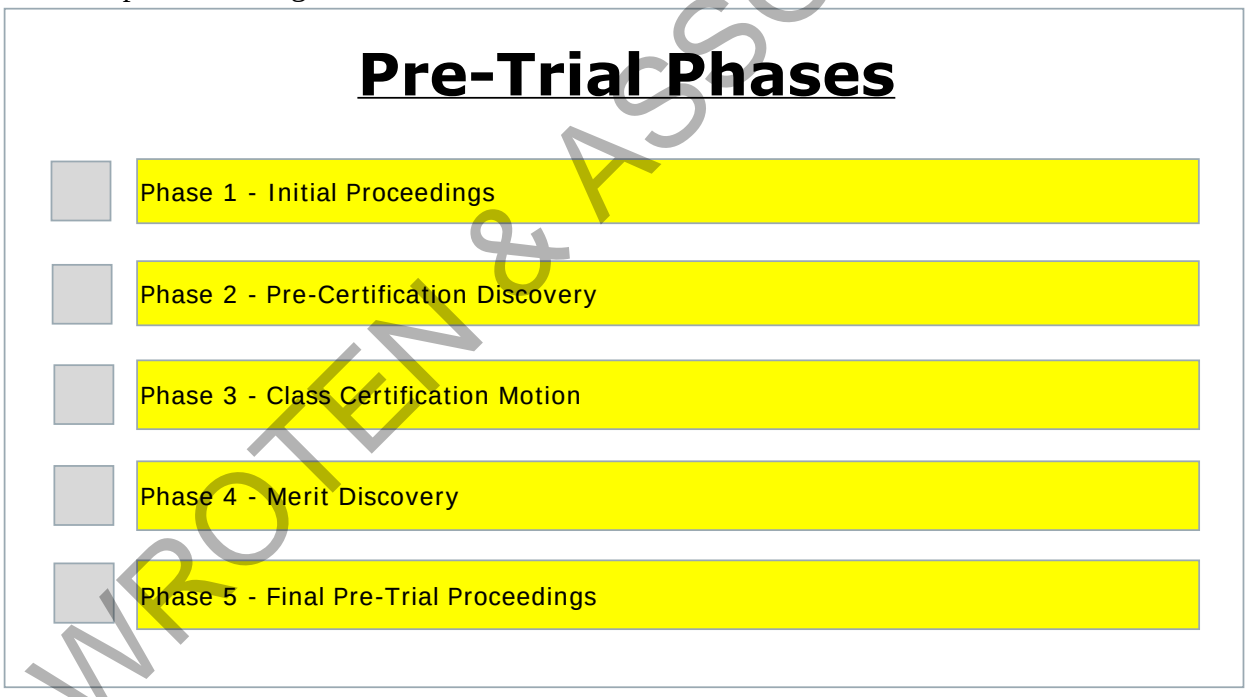
It should be abundantly clear, class action litigation enables Plaintiffs to create lawsuits with astronomical sums of money in damages, penalties and attorneys fees at stake.

CHAPTER 2

LITIGATION MANAGEMENT PLAN

A global litigation management plan will involve a multi-faceted evaluation that considers a review of the legal elements and underlying proof needed to establish each party's claims and/or defenses, the volume of information to be collected, the timing required for information procurement and preservation, a targeted and tiered time table for analysis, and the appropriate use of paralegal and non-attorney support. Each of these will assist in the creation of a workable litigation management plan and attendant budget.

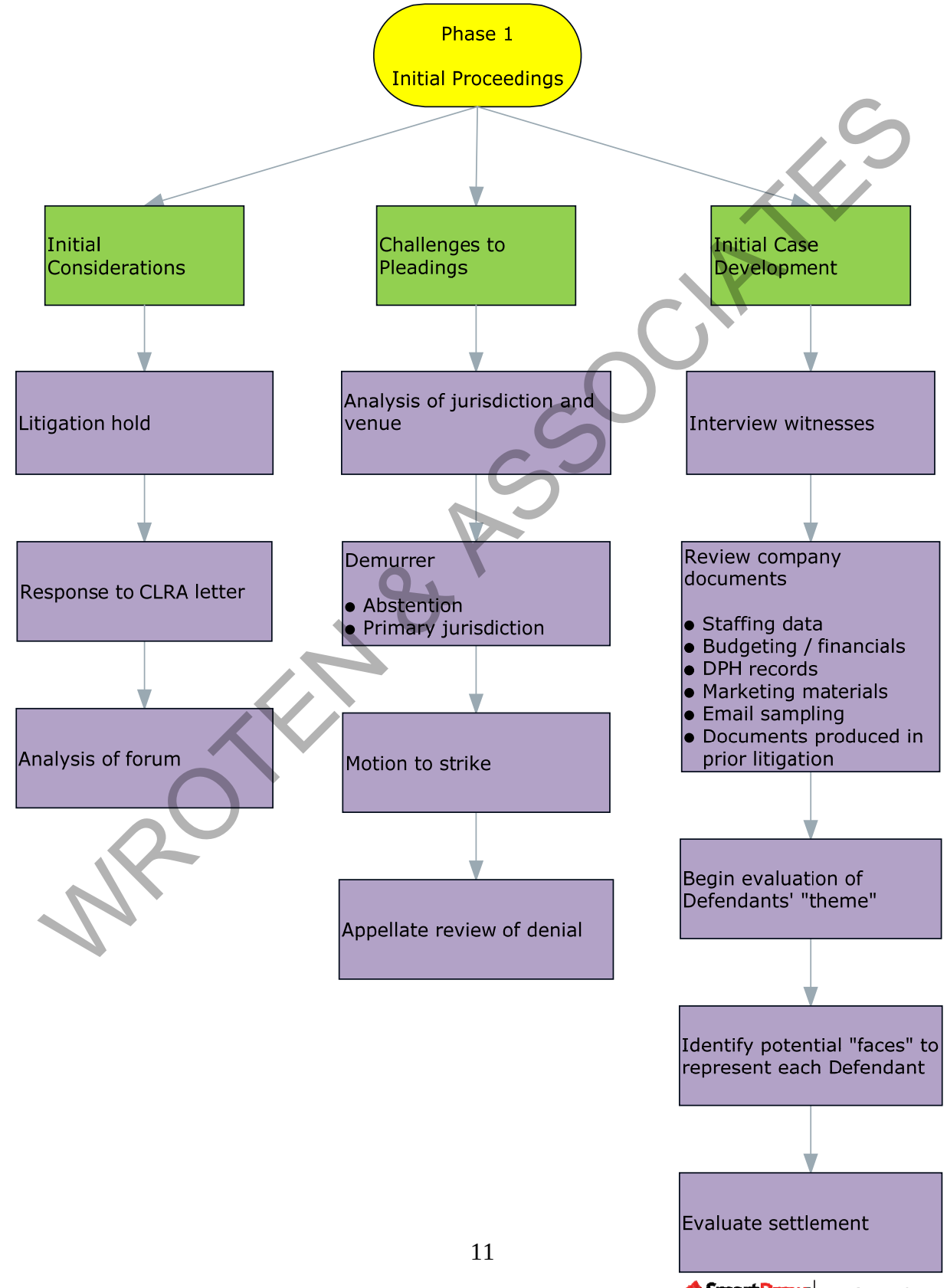
As a first step, your team will identify the key benchmarks anticipated to occur during the pre-trial period. For demonstrative purposes we have included a 5 phase pre-trial exemplar. Each of these phases are triggered by the course of anticipated legal proceedings. By creating a phased timeline the defense team can better manage the collection of information based on the timing of its anticipated exchange.



In the following pages we will break down each of these pre-trial phases into working projects which can be used to develop your litigation management plan. It is important to understand that the earlier your defense team begins integrating an organized action plan designed to capture your defense, the less expensive and more effective your long term results will be. Two points of caution should be noted. First, do not segregate these phases as if they are mutually exclusive snapshots of legal projects. They should instead be viewed as a running story line with each segment creating the building blocks for the next. Second, don't underestimate the importance of an organized action plan. The sheer volume of work involved in managing a class action defense

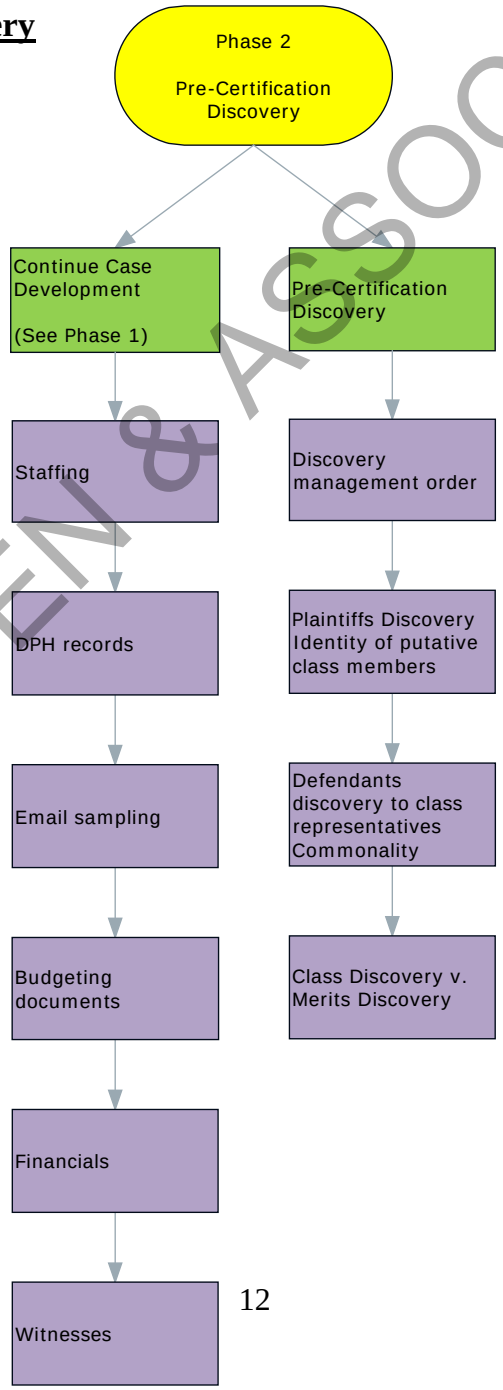
can give rise to ineffective legal scattershot. It is therefore imperative that the executive litigation manager has confidence in the oversight capabilities of the defense team leaders.

Initial Proceedings



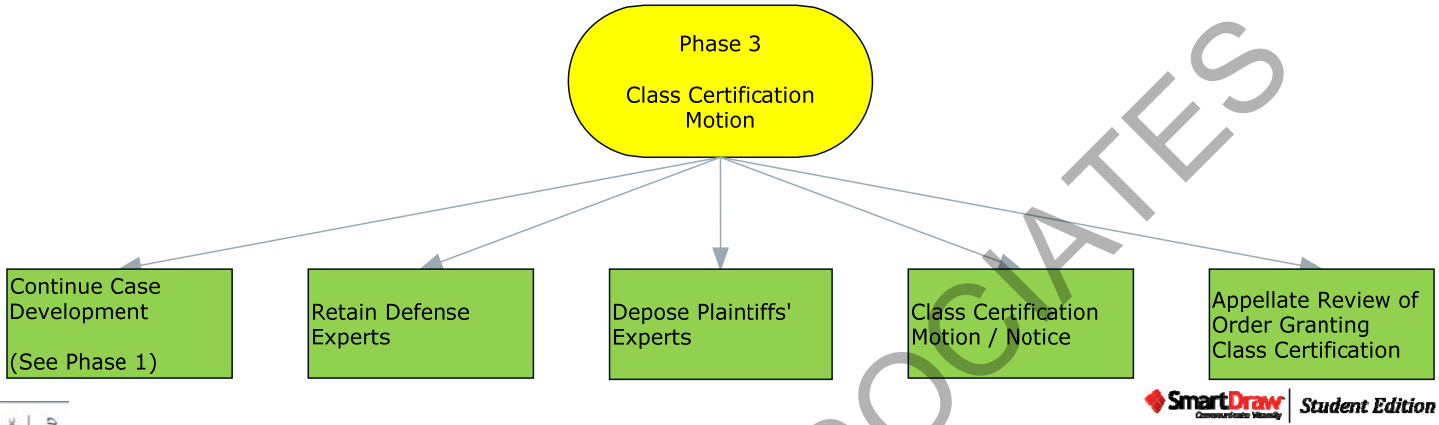
It is important to understand that data needed to respond to discovery and support your defense is voluminous. Consider a tiered approach to your investigation and preparation that allows for the early identification of potential problems and provides time to identify solutions before discovery is turned over to your opposition. In this approach the defense team will identify early in the litigation (1) the universe of documents ultimately required and the manner to be utilized for their retention (consider electronic libraries); (2) documents which must be acquired early to assure their preservation; (3) the development of a global discovery plan to protect against Plaintiff's collection of information through non-class litigation (if not already in place); (4) the timing for conducting interviews of employees, vendors, and patient/families (consider your turnover rate and need to complete interviews before class is certified); (4) the use of paralegals and company personnel where appropriate to contain costs; (5) a system for targeted information analysis (sampling) that allows your team to evaluate potential risk early. Know that this plan will necessarily be revised many times.

Pre-Certification Discovery



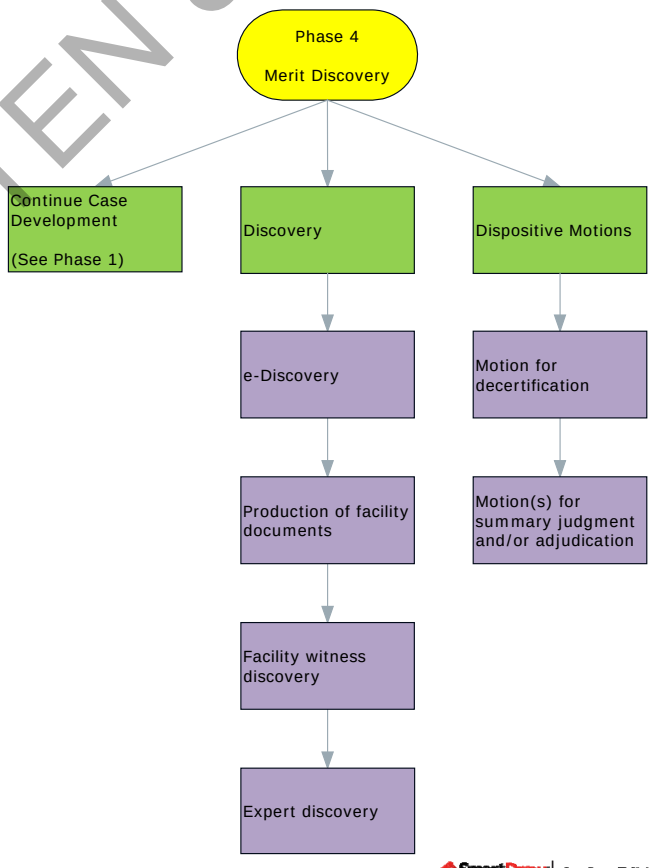
During the Pre-Certification phase it can be helpful to obtain a stipulation or if needed a Court Order that limits the exchange of discovery to information required to support or challenge class certification. Continue to utilize this time to conduct targeted sampling of data that allows the defense to identify and respond to potential concerns.

Class Certification Motion



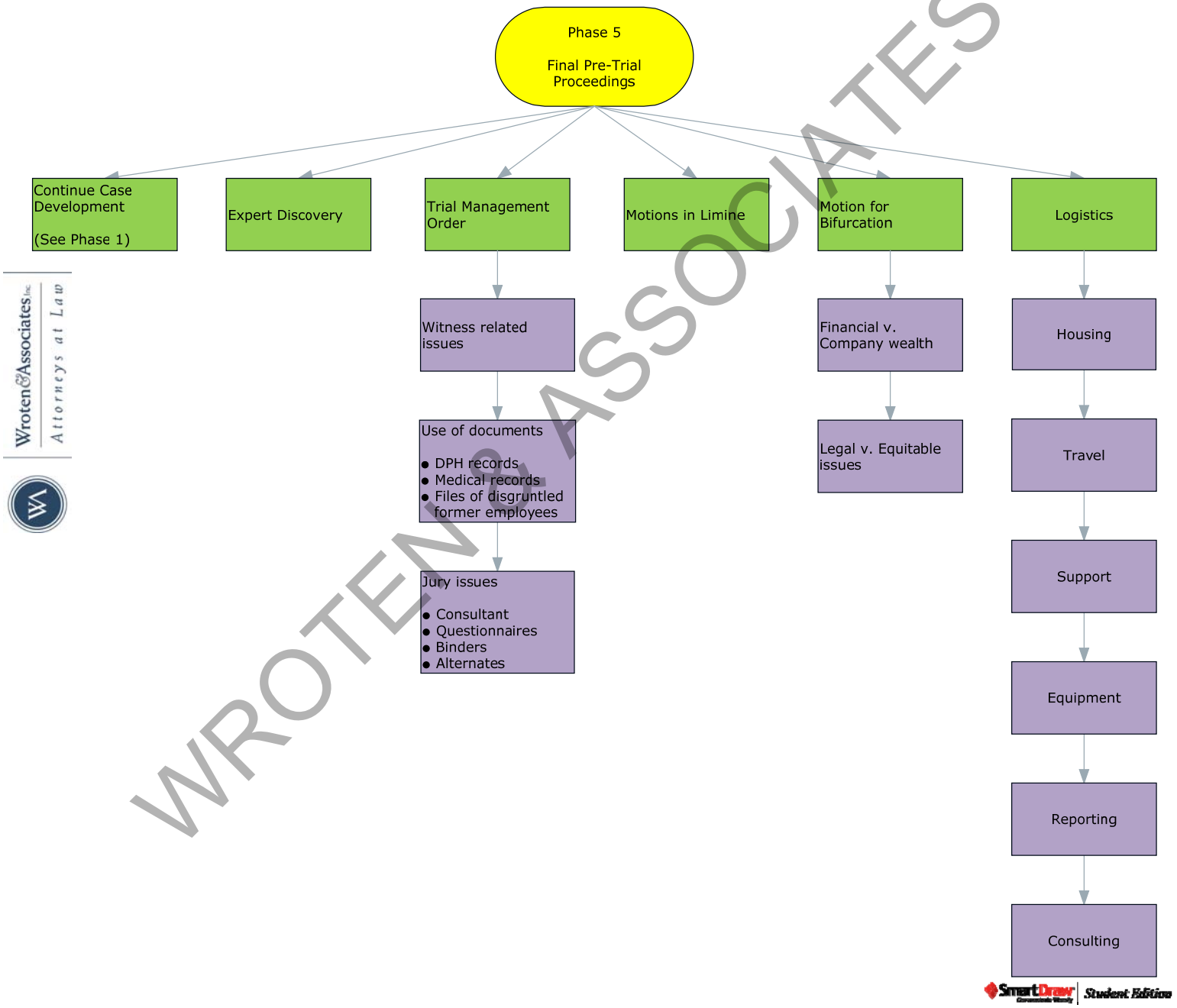
The Motion for Class Certification is a bright line in the class litigation continuum. Every Defendant will focus on defeating the legal standing of the proposed putative class. Unfortunately, there is too little settled law on which to rely that favors the long term care Defendant. Continued attention to maintaining forward momentum in accord with the global litigation plan may prove advantageous, regardless of the Defendants' belief their case will be dismissed.

Merit Discovery



Information gathered at each phase should by design build on prior information. Once your case is ripe for service of discovery based on the merits of Plaintiffs' claims the defense should be prepared to move forward expeditiously. This is where your prior organization will start to pay off.

Final Pre-Trial Proceedings



Focus during the pre-trial preparations should include evaluating methods to carve out portions of Plaintiffs' case and potentially limit liability exposure. Developing a trial notebook containing essential legal arguments and strategy can be very helpful. It is likely that settlement negotiations will proceed with new vigor. Identify a team that can maintain discussions throughout trial. Your best opportunity to settle may be in front of you.

CHAPTER 3

INITIAL PROCEEDINGS AND PLEADINGS

I. Preservation/Legal Holds

Litigation Holds

The seminal case concerning legal hold principles is *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). Judge Shira Scheindlin articulated several steps that must be taken to comply with preservation obligations:

1. Issue a Litigation Hold: Counsel must issue a litigation hold at the outset of the litigation, or prior to litigation, whenever litigation is reasonably anticipated. The litigation hold must be periodically re-issued so new employees are aware and so that it remains fresh in the minds of employees.

2. Talk to Key Players: Counsel should communicate with all key players (who are most likely to have relevant information) in the litigation. Key players should be clearly instructed on their preservation obligations and should also be periodically reminded.

Counsel should also instruct employees to produce electronic copies of their relevant files and make sure that back-up tapes are identified and stored in a safe place. Counsel is responsible for coordination of their client's discovery efforts.

The continuing duty to supplement disclosures also suggests the parties have a duty to make sure that discoverable information is not lost. Counsel must check and recheck all interrogatories and canvass all available information. Once a party and their counsel have identified all potential sources of relevant information, they are under a duty to retain that information and produce information responsive to the opposing party's requests.

In 2007, The Sedona Conference issued eleven guidelines on Legal Holds:

Guideline 1: Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.

Guideline 2: The adoption and consistent implementation of a policy defining a document retention decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 3: The use of established procedures to report information relating to a potential threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 4: The determination of whether litigation is reasonably anticipated should be based on good faith, reasonableness, a reasonable investigation, and an evaluation of the relevant facts and circumstances.

Guideline 5: Judicial evaluation of the decision to issue a legal hold should be based on the reasonableness and good faith of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made.

Guideline 6: When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as is practicable. Depending on the circumstances, a written legal hold (including a preservation notice to persons likely to have relevant information) should be issued.

Guideline 7: In determining the scope of the information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that may be considered.

Guideline 8: A legal hold is most effective when it: 1) Identifies the persons likely to have relevant information and communicates a preservation notice to those persons; 2) Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information; 3) Is in written format; 4) Clearly defines what information is to be preserved and how the preservation is to be undertaken; and 5) Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

Guideline 9: The legal hold policy and process of implementing the legal hold in a specific case should be documented taking into consideration that both the policy and the process may be subject to scrutiny by the opposing party and review by the court.

Guideline 10: The implementation of a legal hold should be regularly monitored to ensure compliance.

Guideline 11: The legal hold process should include provisions for the release of the hold upon the termination of the matter at issue. (See The Sedona Conference Commentary on Legal Holds, 2007, www.thesedonaconference.org.)

Preservation

The duty to preserve is triggered whenever litigation is reasonably anticipated, threatened or pending. Once the duty to preserve is triggered, the entity has a duty to undertake reasonable and good faith efforts to preserve those documents which are reasonably calculated to lead to the discovery of admissible evidence. An employee's knowledge will be inputted to the entity when

the agent is acting within the scope of his/her authority and the knowledge relates to matters within the scope of that authority. *In re Hellenic, Inc.* 252 F.3d 391, 395 (5th Cir. 2001).

Spoliation is the **destruction** of or significant **alteration** of evidence, **or the failure to preserve** property for another's use as evidence in pending or reasonably foreseeable litigation.

Practitioner Tips

- [ ] Duty to preserve extends only to *relevant* information. Per Code of Civil Procedure § 2017.010- Parties are entitled to discovery into any matter not privileged that is relevant to the subject matter or to the determination of a motion, if the matter either is itself admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence
- [ ] The implementation of a legal hold should be regularly monitored to ensure compliance
- [ ] The policy and process of implementing a legal hold should be documented considering that both the policy and the process may be subject to scrutiny by the opposing party and review by the court
- [ ] The legal hold process should include provisions for release of the hold upon the termination of the matter at issue
- [ ] Once a litigation hold is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold". To do this, Counsel must become familiar with her client's document retention policies and data retention architecture. It is not enough to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information
- [ ] Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and located
- [ ] Reasonable anticipation of litigation means when the entity is on notice of a credible probability that it will become involved in litigation as determined based on a good faith and reasonable evaluation of the relevant facts and circumstances known at the time
- [ ] Be aware of preservation duties stemming from requests for medical records, demand letters or notices of intent to sue, as well as those duties arising from litigation
- [ ] A duty to preserve may be triggered before litigation has commenced, when a party knows or reasonably should know what evidence may be relevant or subject to discovery in anticipated litigation
- [ ] Preservation duty is NOT triggered by vague rumors, indefinite threats, threats of litigation not made in good faith

II. Response To CLRA Letter

Before filing a class action complaint seeking damages under the CLRA Plaintiffs must satisfy mandatory pre-filing notice requirements. Civil Code § 1782. At least 30 days prior to filing a claim, Plaintiffs must provide Defendant with notice of the alleged violations and an opportunity to cure them. *Id*. If "a prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie." *Kagan v. Gibralter Sav. & Loan Ass'n*, 35 Cal. 3d 582, 509 (1984). A CLRA claim filed without proper notice to Defendant can be dismissed and the error cannot be cured by amendment. **If the notice is sent by fax, email or even standard mail it is defective.** The notice must be sent by certified or registered mail with return receipt requested. The notice must be sent to the place where the transaction occurred, or to the potential defendant's principal place of business within California. Civil Code § 1782. The CLRA's notice requirement is not jurisdictional, but compliance with this requirement is necessary to state a claim. Failure to give notice before seeking damages necessitates dismissal with prejudice, even if a Plaintiff later gives notice and amends. *Cattie v. Wal-Mart Stores Inc.*, 504 F. Supp. 2d 939, 949-50 (S.D. Cal. 2007). The 30 day notice requirement is limited to an action for damages; Plaintiffs may bring an action for injunctive relief without providing notice.

If Defendant complies with a pre-filing demands for remediation, Plaintiff no longer has a right to seek damages. An individual claim for damages has no merit if the alleged violator agrees to give the complaining consumer an appropriate correction, repair, replacement or other remedy within 30 days of receipt of the notice. Civil Code § 1782. A putative class action for damages has no merit if a Defendant has:

1. Identified or made "a reasonable effort to identify" all putative class members;
2. Notified the putative class members that he or she will correct the alleged CLRA violations at their request;
3. Made the corrections or will do so in a "reasonable time," and
4. Ceased from engaging in the alleged CLRA violations.

There is no bright line rule as to whether or not a Defendant has properly remedied alleged CLRA allegations.

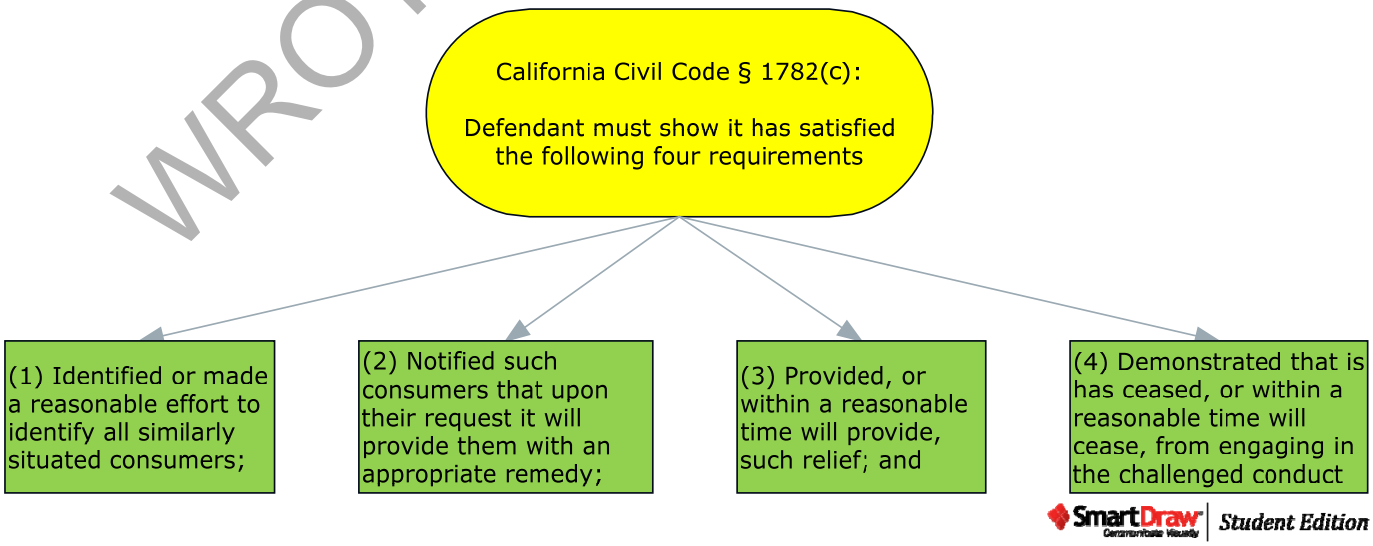
Defendants must be wary when responding to any pre-filing notice and always check to see if the notice complies with all requirements. If Plaintiffs send an untimely pre-filing notice, Defendants may waive the notice provisions in the CLRA by sending a responsive letter without raising the defect. *Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 40, 41 (1975).

Once In Receipt Of A Demand Letter, Defendant Should Analyze:

- [ ] Was the letter sent by a consumer?
- [ ] Was the consumer damaged?
- [ ] Was the violation intentional or the result of a bona fide error?
- [ ] Can your company cure the alleged violation effectively?

If Defendant decides to cure the alleged violation, under the CLRA, evidence of compliance or attempts to comply may be introduced by a Defendant for the purpose of establishing good faith or to show compliance. Any attempts to effect a cure cannot be used against Defendant at trial. Civil Code § 1782.

Requirements To "Cure" A Class Claim Based On A CLRA Demand Letter



Defendants have 30 days to send a response letter to the consumer. The response should be drafted in conformity with Civil Code § 1784 and articulate any areas where the violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error. Defendants should offer to make an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of subdivisions (b) and (c) of § 1782. If Defendants make this showing and provide a remedy no award of damages may be given.

III. Evaluation Of Forum

Arbitration agreements between Defendants and Class Members must be reviewed and evaluated early in the class action litigation process. While claims for **injunctive relief** or **violation of Resident Rights cannot be arbitrated**, other claims are amenable to arbitration. In some cases, courts have ordered select causes of action seeking monetary relief to be litigated in arbitration while retaining jurisdiction to hear those claims seeking injunctive relief.

Awards determined in binding arbitration are not appealable. Before deciding to pursue binding arbitration, Defendants must weigh the reception the "facts" will receive when presented to a jury as opposed to a panel of arbitrators.

IV. State v. Federal Court Jurisdiction

In some cases, the decision may need to be made whether to remain in state court or seek removal to federal court.

Federal question jurisdiction generally exists when either Congress or the Federal Courts decide there is some federal interest implicated by the suit which is worthy of Federal resources. 28 U.S.C. §1331 provides that, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." U.S.C. §1331 governs filing or removal to federal court in the absence of a specific statute which expressly provides for federal jurisdiction.

There are three types of Federal Questions: 1) Those based on Federal Statutes such as statutes which govern securities, bankruptcy, patent and maritime law; 2) 28 U.S.C. § 1331, and 3) Complete Preemption. Federal Questions arising under 28 U.S.C. §1331 are left to the discretion of the courts in their interpretation of congressional intent. Federal Courts are however, hesitant to find federal questions where there is no sign that congress intended federal jurisdiction.

Tests Under § 1331

1. The suit arises under the law that creates the cause of action. *American Well Works Co. v. Laynes & Bowler Co.*, 241 U.S. 257 (1916). See also *Jairath v. Dyer,* 154 F.3d 1280 (1998), holding that "A case may arise under federal law where the vindication of a right under state law necessarily turned on some construction of federal law. However, that statement must be read with caution. Determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. There is a need for prudence and restraint in the jurisdictional inquiry. The fact

that a federal issue is an element of a state law claim does not automatically confer federal-question jurisdiction, but rather, the analysis must entail careful judgments about the exercise of federal judicial power."

2. The right to relief depends upon the construction or application of federal law. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

3. The absence of a federal cause of action is tantamount to a congressional conclusion that the presence of a claimed violation "is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 814 (1986). This test finds federal jurisdiction only where there is a federally-created cause of action; however *Merrell Dow* did not expressly overrule *Smith*. "Substantiality" becomes the ad-hoc test. Unfortunately, the "ad-hoc substantiality test" is not uniformly applied.

4. Substantial federal question cases generally have two factors:

1) The federal question plays a significant role in the litigation, and

2) Implicates some larger federal interest. Without both, it is unlikely that the court will find federal jurisdiction. *D'Alessio v. N.Y. Stock Exchange*, 258 F.3d 93 (2001).

Removal

The Class Action Fairness Act of 2005 (CAFA) was passed with the clear intention of expanding federal court jurisdiction over class actions. 28 U.S.C. § 1332(d); *Brooks v GAF Materials Corp*., 532 F Supp 2d 779 (2008, DC SC). Congress has stated that one of CAFA's specifically identified purposes is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA, Pub. L. 109-2, § 2(b)(3), 119 Stat. 4-5.

Class Action Fairness Act Hurdles For Removal

A Defendant may remove if:

1. The class consists of at least 100 class members:

2. The combined claims of class members exceeds $5M, exclusive of costs and interest 28 U.S.C. §§1332(d)(2), and:

3. Any class member is a citizen of a different state than any defendant. 28 U.S.C. §1332(d)(5)(B).

Local Controversy Exception

Under the "local controversy" exception of the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(4)(A), a District Court shall decline to exercise jurisdiction over a class action in which:

1. Greater than two thirds of the members of the class are citizens of the state where the action was originally filed;

2. At least one Defendant is a citizen of the state where the action was originally filed; and

3. Injuries resulting from the alleged conduct of each Defendant were incurred in the state where the action was originally filed.

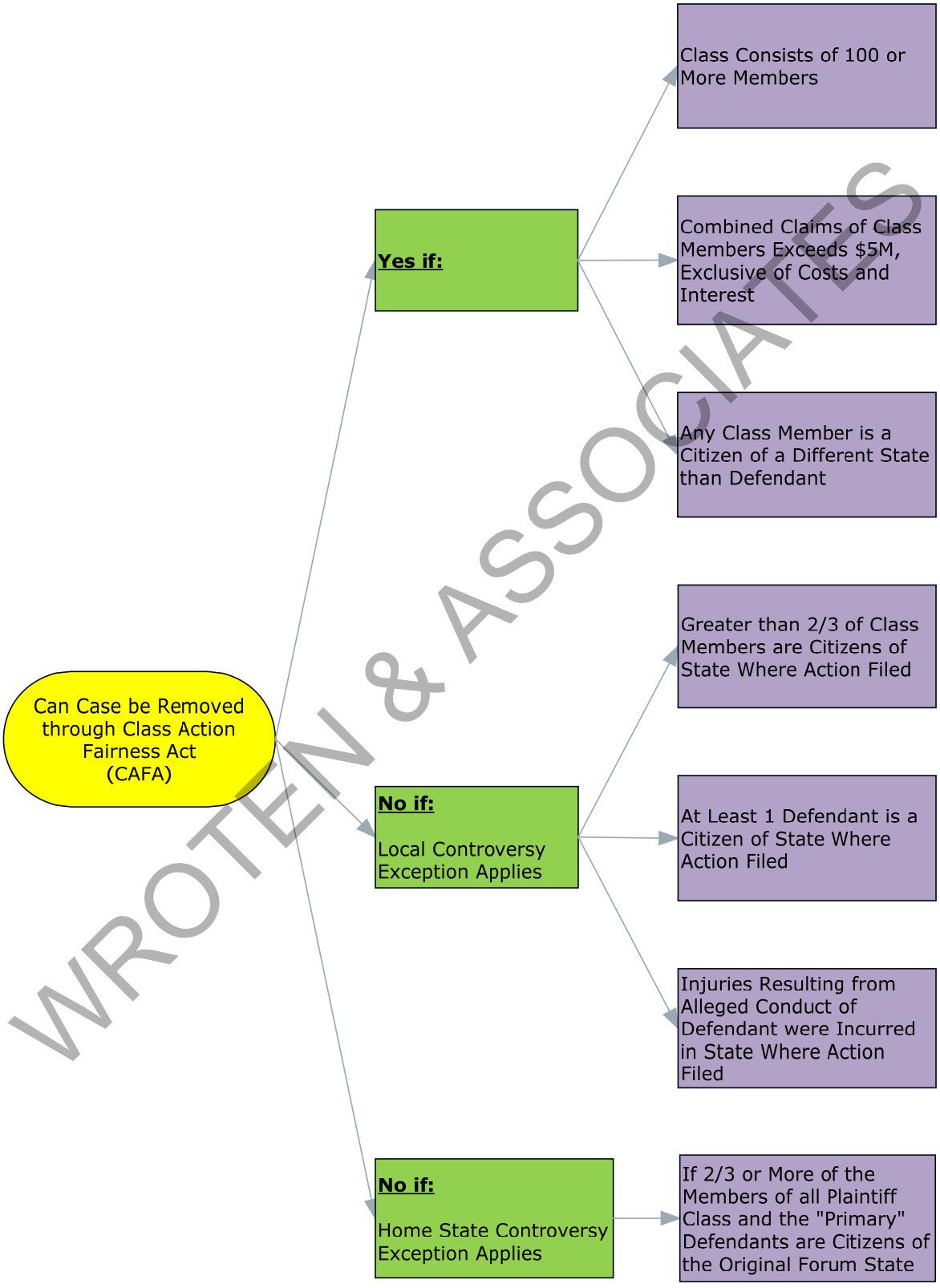
Home State Controversy Exception

CAFA requires courts to decline jurisdiction if two-thirds or more of the members of the plaintiff class and the "primary" defendants are citizens of the original forum state. 28 U.S.C. §1332(d)(4)(B). Both plaintiffs and defendants are predominately local and local interests presumably dominate in this "home state controversy" exception.

Determining the "primary" defendant has varied among courts. *Kearns v. Ford Motor Co*. 2005 WL 3967998 at 8 (CD Cal. Nov. 21, 2005), finding primary defendants as being those that are "potentially directly liable" as opposed to being only "indirectly," "vicariously," or "secondarily" liable.

The court's unanimous decision in *Hertz Corp. vs. Melinda Friend et al 297* Fed. Appx. 690 (2010), made it easier for class action parties that are citizens of different states to move the action to federal court from state court. CAFA allows such a move under most circumstances. The U.S. Supreme Court ruled that a company's "nerve center," where company officers "direct, control and coordinate" the company's activities, should be the principal place of business. Typically that would be the company's headquarters the high court said. But if a court finds that a company's alleged "nerve center" is nothing more than a mailbox or an empty office, the courts should determine the location of its actual principal place of business.

Removal Based On Class Action Fairness Act



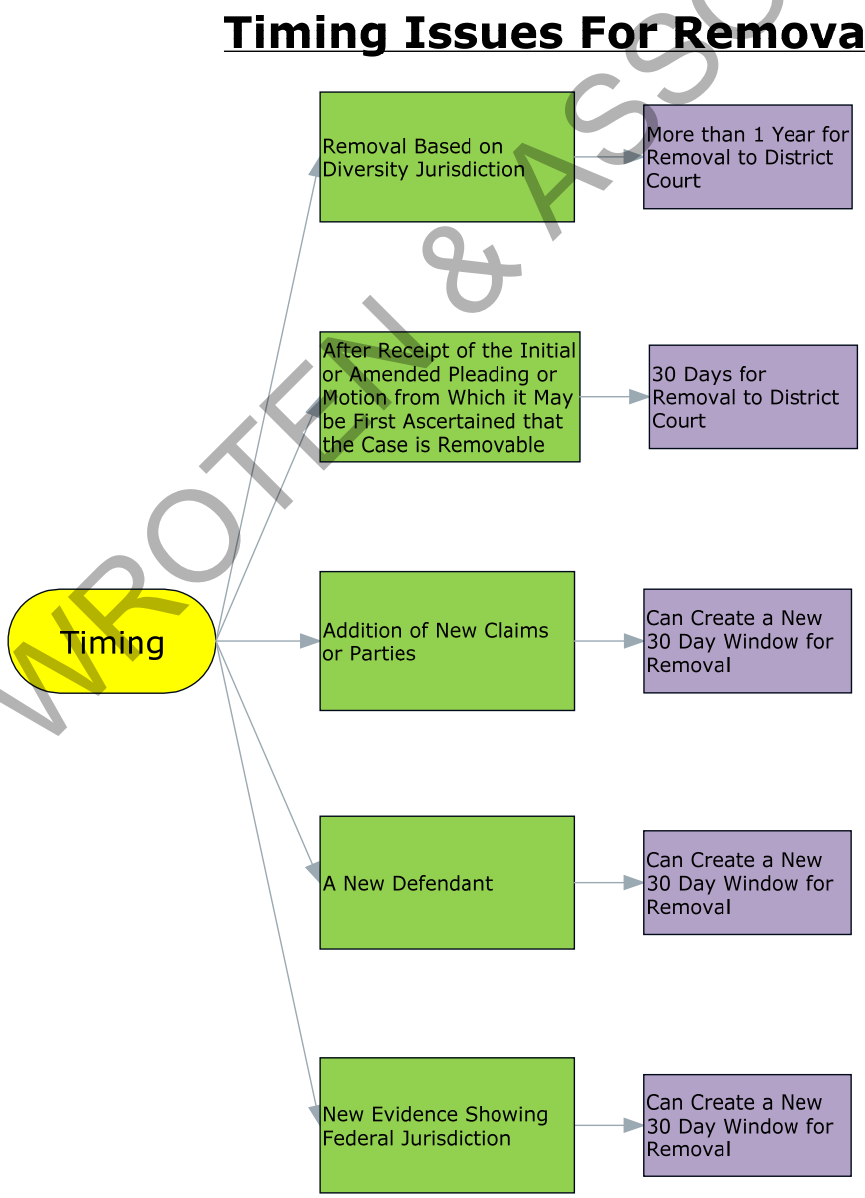
Timing:

30 Days For Removal To District Court

28 U.S.C. § 1453 provides the procedures applicable to removal of a class actions to Federal Court. Section 1453 provides that a class action may be removed to the United States District Court in accord with § 1446 timing rules.

28 U.S.C. § 1446 provides the procedures applicable to removal of cases to Federal Court. A case may be removed by notice of removal filed 30 days after receipt of the initial pleading or 30 days after receipt by the defendant of an amended pleading, motion or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of diversity jurisdiction per § 1332 more than one year after commencement of the action.

Note: non-class action diversity suits will not be removed more than one year after commencement of the action. Class action suits according to the Class Action Fairness Act of 2005 are not subject to this limitation. In a class action the matter may be removed by any Defendant without the consent of all Defendants.



Situations That Can Create A New 30-Day Window

1. Addition of New Claims and/or Parties:

Amendments of new claims and/or parties has no effect on timing *unless* the amendment creates federal jurisdiction. Only in cases where the action could not have initially been removed but became removable because the complaint had been amended will allow a new 30-day window. *Bush v. Cheaptickets, Inc*., 425 F.3d 683, 688 (9th Cir. 2005).

2. A New Defendant:

Jurisdictions are split as to whether a plaintiff's amendment to a complaint to add a new defendant allows that defendant to remove the case within thirty days of being joined in the litigation. California appears to follow the rule that *any* amendment, whether to add parties or claims, will not affect the timing, unless the amendment creates federal jurisdiction that otherwise did not exist. *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 688 (9th Cir. 2005).

3. New Evidence Showing Federal Jurisdiction:

28 U.S.C. § 1446(b) provides *two* thirty-day windows during which a case may be removed: 1) during the first thirty days after the defendant receives the initial pleading; or 2) during the first thirty days after the defendant receives a paper "from which it may first be ascertained that the case is one which is or has become removable" if "the case stated by the initial pleading is not removable." Thus, the 30 day period starts only after the defendant receives information sufficient to determine that federal jurisdiction exists. *Akin v. Big Three Indus., Inc.* 851 F.Supp. 819, 825 (ED TX 1994).

Ambiguity in Pleading: In situations where it is unclear from the complaint whether the case is removable (such as when the citizenship of the parties is unstated or ambiguous), the thirty day time period starts to run from Defendant's receipt of the initial pleading "only when that pleading affirmatively reveals on its face the facts necessary for federal court jurisdiction." *Durham v. Lockheed Martin Corp*., 445 F.3d 1247, 1250 (9th Cir. 2006); citing *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689, 690-91 (9th Cir. 2005). Otherwise, the thirty days do not begin to run until a defendant receives "a copy of an amended pleading, motion, order or other paper" from which it can determine that the case is removable. 28 U.S.C. § 1446(b).

Amendment Creates Federal Jurisdiction: If the initial complaint does not reveal a basis for federal jurisdiction, a notice of removal may be filed within thirty days after receipt by the defendant of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable… Section 1446 therefore provides two thirty-day windows during which a defendant may remove an action. *Lopez v. Wal-Mart Stores, Inc*., 2008 U.S. Dist. LEXIS 4831 (D. Nev. 2008). The removal statute, however, is strictly construed and the court must reject federal jurisdiction if there is any doubt as to whether removal was proper. See also *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *Brazina v. Paul Revere Life Ins. Co*., 271 F. Supp. 2d 1163, 1166 (N.D. Cal. 2003).

Federal Jurisdiction: The "well-pleaded complaint rule" provides that federal jurisdiction only exists when a federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on the resolution of a "substantial question" of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). For removal, it is not enough that a federal question *may* arise during the course of the litigation in connection with some defense or counter-claim. A federal defense, even if anticipated, is not part of a plaintiff's cause of action.

A Defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case arises under federal law. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). Removal additionally cannot be based simply on the fact that federal law *may be referred to* in some context in the case. Simply put, if the claim does not arise under federal law, it is not removable on federal question grounds. Incidental federal issues are not enough. *Berg v. Leason*, 32 F.3d 422, 425-426 (9th Cir. 1994).

Finally, removal on federal question grounds is not allowed unless the state law claim necessarily raises a disputed and substantial issue that a federal court may entertain without disturbing federal/state comity principles. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

The Ninth Circuit has stated, "(w)hen a claim can be supported by alternate and independent theories – one of which is a state law theory and one of which is a federal law theory — federal question jurisdiction **does not attach** because federal law is not a necessary element of the claim." *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir. 1996); *Littel v. Bridgestone/Firestone, Inc.*, 259 F. Supp. 2d 1016, 1027 (C.D. Cal. 2003); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986), holding that "arising under" jurisdiction exists only "where the vindication of a right under state law necessarily turn[s] on some construction of federal law". Thus, plaintiffs will likely argue that federal law is not a "necessary" component of their complaint and that there is no federal question jurisdiction.

Practitioner Tips

- Federal courts apply underlying state case law, however, they apply federal procedural rules which are often viewed as more restrictive on Plaintiffs. On the other hand, Federal courts are generally perceived as being more liberal regarding expanded discovery.
- One consideration faced in California when deciding whether to remove a class action to Federal court is the make-up of the Ninth Circuit which would hear a likely appeal. The Ninth Circuit has been recognized by experts as a "class action friendly" circuit. Overall, the Ninth Circuit has far outpaced every other circuit in allowing class actions to proceed since CAFA was enacted in 2005.
- Plaintiffs will certainly contend that there are no federal claims and that removal is inappropriate. Moreover, Plaintiffs will likely argue that the removal is late and probably contend that this is yet another effort to delay the action and forum shop.

Practitioner Tips (cont.)

- Defendants should watch for any arguments from Plaintiffs in their class certification motions including declarations in support of their motion by experts that reveal federal claims (for example, the requirements of 42 CFR 483.30 and OBRA independently and as the standard for Health & Safety Code 1599.1). Be aware if your change of venue motion argued similar premises as Plaintiffs will point to this to show that removal is late.

- A Plaintiff's Complaint will likely only assert state causes of action on its face. Accordingly, a case can only "arise under" federal law if federal statutes implicated by Plaintiff's complaint raise "substantial" federal law questions. See Rains v. Criterion Systems, Inc., 80 F.3d 339, 343 (9th Cir. 1996), holding removal was improper because although a federal statute was referred to in complaint, the claim of wrongful termination did not arise under the federal statute, it arose under state law.

Staffing Regulations

In cases involving staffing regulations, Plaintiffs may argue case law suggests that there is no private right of action to enforce administrative regulations in federal court. See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 938 – 940 (9th Cir. 2003), holding that ". . . agency regulations cannot create independent rights enforceable through § 1983." Accordingly, even if Plaintiffs' references to federal regulatory violations that are considered independently of their state causes of action, it arguably does not change the fact that Plaintiffs could not have originally sought enforcement of those regulations in federal court.

Defendants certainly can argue that *Grable & Sons Metal Products, Inc*, 545 U.S. 308 (2005) stands for the proposition that federal jurisdiction in staffing regulation cases is proper notwithstanding the fact there may not be a private right of action allowing Plaintiffs to enforce any of the federal regulations arguably embodied in this action. In *Grable & Sons*, the Court purported to clarify its earlier ruling in *Merrell Dow* by stating that, for the purposes of removal to federal court, *Merrell Dow* should be read as "treating the absence of a [private right of action] as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' required by § 1331." See *Id*. 2369-2370. However, the Court made clear that it was not overruling *Merrell Dow* in any way. See *Id*. at 2370. *Grable & Sons* went on to consider several factors that the Court deemed relevant to determining whether the case properly was removed to federal court, in addition to the private right of action issue, including the strength of the state interest in the case, and whether or not extending federal jurisdiction would likely alter the division of labor between federal and state courts. See *Id*. at 2369-2371.

Be prepared, however, as recent case law from the Ninth Circuit establishes that, even after *Grable & Sons*, the absence of a federal private right of action is a critical part of the analysis in determining whether a case was properly removed to federal court. In *Martinez v. Del Taco*,

Inc., 252 Fed. App'x. 148 (9th Cir. 2007), the court clarified that *Merrell Dow* remains good law even after *Grable & Sons*. *Martinez*, 252 Fed. App'x. at 149. The *Martinez* Court affirmed the District Court's decision that there was no significant federal question in the case because the federal law at issue did not give rise to a private right of action. See *Id*.

Practitioner Tip

Be aware that a court may allow for limited discovery regarding patient's identities to determine whether the federal court had subject matter jurisdiction under CAFA or whether the case should be remanded back to state court under CAFA's local controversy exception. Martin v. Lafon Nursing Facility of Holy Family, Inc. 244 F.R.D. 352 (2007, ED La)

Procedural Requirements For Notice Of Removal

Pursuant to 28 U.S.C. § 1446(a), Defendant must file a Notice of Removal in the District Court, signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. This Notice must contain a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon the defendant in the action.

28 U.S.C. § 1446(d) requires that promptly after the filing of the notice of removal, Defendant must:

1. Give written notice to adverse parties, and

2. Must also file a copy of the notice with the clerk of the State court, which shall effect removal, and the State court shall proceed no further unless and until the case is remanded.

Practitioner Tip

Where multiple Defendants are involved, your case may be removed if only one Co-Defendant seeks timely removal. A Defendant's removal of an entire action with multiple defendants is improperly remanded when removal was timely. US Steel, Paper and Forestry et al v. Shell Oil Company et al. 2008 DJDAR 18007.

Burden:

Defendants, as the moving party, bear the burden of proving the elements of removal outlined in 28 U.S.C. § 1332(d)(4). *Duncan v. Stvetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *Brazina*, 271 F.Supp.2d at 1166, *Lao v Wickes Furniture Co*. 455 F.Supp.2d 1045 (2006, C.D. Cal.). If at any time before final judgment the court determines that it is without subject matter jurisdiction, the action shall be remanded to state court. 28 U.S.C. § 1447(c); *Brazina v. The Paul Revere Life*

Ins. Co.,, 271 F. Supp. 2d 1163, 1166 (N.D. Cal. 2003). *Serrano v. 180 Connect, Inc*., 478 F.3d 1018, 1021 (9th Cir. 2007).

For example, the court denied Plaintiffs' motion to remand because Defendants met their burden of showing that removal under "mass action" provision of Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, was appropriate as it was evident from their complaint that Plaintiffs' anticipated single jury trial of all their claims was inherent from their filing of single joint complaint under 735 ILCS 5/2-404. *Bullard v Burlington Northern Santa Fe Ry*., 556 F.Supp.2d 858 (2008 N.D. Ill.).

Remand

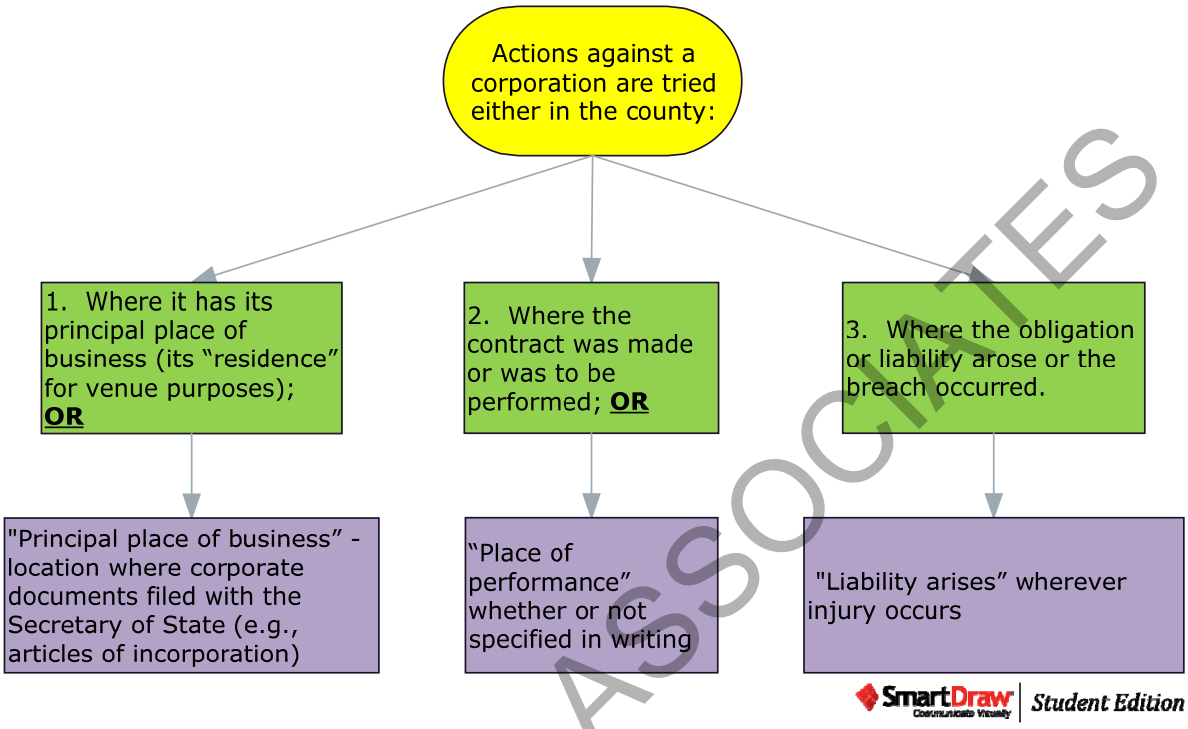
The party seeking remand bears the burden of proving that an exception to removal applies. *Serrano v. 180 Connect, Inc*., 478 F.3d 1018, 1021-24 (9th Cir. 2007).

The burden shifts to the moving party to prove that removal was improper when seeking to remand a class action to state court. In *Waitt v. Merck & Co.* 2005 US Dist LEXIS 38748 (2005 W.D. Wash.) (criticized in *Ongstad v. Piper Jaffray & Co*., 407 F. Supp 2d 1085 (2006 D. N.D.)), the court declined to remand putative class action lawsuit to state court, holding that the Class Action Fairness Act, which amended 28 U.S.C. § 1332, shifted the burden to Plaintiff to prove that removal was improper, rather than placing burden on manufacturer to prove removal was proper.

V. Analysis Of Venue

Code of Civil Procedure § 395.5 states that "A corporation or association may be sued in the county where…the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Therefore, when Plaintiffs file an action against several properly-joined Defendants residing in different counties, Plaintiffs may pick whichever county they prefer. *Monogram Co. v. Kingsley*, 38 Cal. 2d 28, 34 (1951); *K.R.L. Partnership v. Super. Ct. (Pemberton)*, 120 Cal. App. 4th 490, 504 (2004).

VENUE
California Code of Civil Procedure § 395.5



Venue in class action litigation will generally be in the county of the class representatives' choice. Plaintiffs, however, must consider factors such as the convenience to witnesses when choosing an appropriate venue. A court may permit a trial "to be had as near as possible to the residences of the greatest number of witnesses." *Harden v. Skinner and Hammond,* 130 Cal. App. 2d 750, 754 (1955). For example, a showing that ninety witnesses' residences were close to the requested new venue demonstrated that transfer of venue would be more convenient for witnesses. *Id*. at 754-55.

Even when Plaintiffs file in a proper venue, pursuant to Code of Civil Procedure § 397(c), a court has the authority to transfer a case to any other county "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." The grounds for change of venue, however, may be deemed waived if Defendants do not raise transfer in a timely motion. Where there are multiple facility defendants spread over a state or multiple counties, Defendants must argue that long term care residents often lack sufficient mental capacity to testify and responsible parties and public guardians are called to testify in the residents' place, making travel to a less central venue inconvenient.

Furthermore, Defendants can argue that forcing employees to travel a great distance will make the venue inconvenient. The Court in *Wood v. Silvers*, 35 Cal. App. 2d 604, 607 (1939) stated, "[T]he time required of some witnesses in attending court at a remote place may be more

valuable than that of others on account of the nature of their employment or the emergency of enterprises in which they are engaged." The convenience to medical professionals like Registered Nurses and Nursing Home Administrators is appropriately a factor to consider. *Baird v. Smith,* 21 Cal. App. 2d 221, 223 (1937). Ultimately, "a conclusion that the ends of justice are promoted can be drawn from the fact that by moving the trial closer to the residence of the witnesses, delay and expense in court proceedings are avoided and savings in the witnesses' time and expense are effected." *Pearson v. Super. Ct.,* 199 Cal. App. 2d 69, 77 (1962); *Harden, supra*¸ p. 754.

Timing:

Within thirty days of service of the complaint the court must order a transfer of an action "[w]hen the court designated in the complaint is not the proper court." Code of Civil Procedure §§ 396b, 397(a).

Motion For Transfer/Change Of Venue

Since the grounds upon which a court may order transfer are entirely statutory, the notice of motion must be based on one or more of these grounds. Code of Civil Procedure § 397. The burden is on the moving party to establish whatever facts are needed to justify transfer. The court may refuse to consider grounds not specified in the notice of motion. See *McDonald v. California Timber Co*., 151 Cal. 159, 161 (1907). The notice should follow the statutory language. For example, a notice based solely on the ground of "convenience of witnesses" may be held defective ... because the statutory ground is "convenience of witnesses and the ends of justice, etc." Code of Civil Procedure § 397(c). See *Willingham v. Pecora,* 44 Cal. App. 2d 289 (1941); Code of Civil Procedure § 1010

VI. Evaluation Of Courtroom Assignment

Once in an appropriate venue, one courthouse or even courtroom may be more amenable than another to class action litigation. Some judges have experience with complex class litigation and understand the extensive time and document management required. When a judge is assigned to a class action and counsel has researched him/her finding that judge has known biases or inexperience with class litigation, a peremptory challenge should be utilized.

Challenge To The Judge

Code of Civil Procedure § 170.6 theoretically does not entitle a litigant to select the judge before whom he or she wishes to appear, but only to disqualify a judge whom he genuinely believes to be biased. Any party may move to disqualify a judge under section 170.6 and is not required to provide the court with a factual basis for its belief that the judge is biased. An important element, however, is the limitation of each party to a single motion, or each side to a single motion, should there be more than one Plaintiff or Defendant. Code of Civil Procedure § 170.6(a)(3). The phrase "only one motion for each side" contemplates that one side may consist of several parties, and a peremptory challenge by any party disqualifies the judge on behalf of all

parties on that side. This limitation also reflects the general aim of the legislature to strike a balance between the needs of litigants and the operating efficiency of the courts.

The provisions of Code of Civil Procedure § 170.6(a)(4) providing that "where there may be more than one plaintiff or similar party's or more than one defendant or similar party's appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding" does not mean that, where several parties are joined, they are necessarily confined to one motion regardless of how conflicting their interests may be. Where Co-Plaintiffs or co-Defendants have **substantially adverse interests**, there are more than two sides in the case. *Avital v. Super. Ct.*, 114 Cal. App. 3d 297, 301 (1981). See also *Johnson v. Superior Court of Los Angeles County*, 50 Cal. 2d 693, 700 (1958). Often in class litigation in the long term care setting, multiple corporate and facility Co-Defendants are named. Generally, related entities will be viewed as one side thereby receiving a single preemptory challenge.

When a party among several on the same side has disqualified a trial judge pursuant to Code of Civil Procedure § 170.6, the remaining parties on the same side are not entitled to a new peremptory challenge. Similarly, when a party on the same side has exercised its right to disqualify a judge, a late-appearing party has no right to challenge the then-current judge, because that side has used its one challenge. Conversely, when parties on the same side have waived or have not exercised their right to a peremptory challenge of the judge, a late-appearing party on that side may exercise such a challenge. *The Home Ins .Co v. Super. Ct.*, 34 Cal. 4th 1025, 1022 (2005).

However, courts have long recognized that, in certain circumstances, section 170.6 authorizes the exercise of a peremptory challenge by more than a single Plaintiff or Defendant. A party, although joined with other parties, may be considered to be on a different side within the meaning of the statute when the joined parties have interests that are “substantially adverse.” Although differences of opinion between Co-Defendants as to procedural matters such as the desirability of a change of venue or a separate trial might, under some circumstances, show the existence of substantially adverse interests under Civil Code of Procedure § 170.6(3), it should not be assumed that this is true in the absence of a showing of what the circumstances are and how they affect each of the parties and the relationship between them. Representation by separate counsel is not enough. *Pappa v. Superior Court of Los Angeles County*, 54 Cal 2d 350, 355 (1960).

Timing:

Code Civil Procedure § 170.6 provides that a peremptory challenge must be made within 10 days after notice of all purpose assignment or if the party has not yet appeared in the action, then within 10 days after the appearance. This means that Defendant must quickly conduct research regarding a judge’s experience.

VII. Designating Case As Complex

The Judicial Counsil of California defines complex civil cases as those that "require[] exceptional judicial management to avoid placing unnecessary burdens on the courts or the litigants and to expedite the case, keep costs reasonable, and promote efficient decision making

by the court, the parties and counsel." California Rules of Court, Rule 3.400(a). Class actions filed against long term care providers under Health & Safety Code § 1430(b) and California consumer protection statutes very quickly meet that definition, especially when brought against multiple facilities.

If Plaintiffs have not designated the case as complex, Defendants should do so no later than the first appearance by filing a *Civil Case Cover Sheet* (Form CM-010) designating the action as a complex case. **Class action cases receive provisional approval as complex under Rule 3.400(c)(6).** A number of counties across the state have courtrooms designated to hear complex cases. Judges are trained to handle complex legal issues and manage complex cases.

VIII. Demurrer

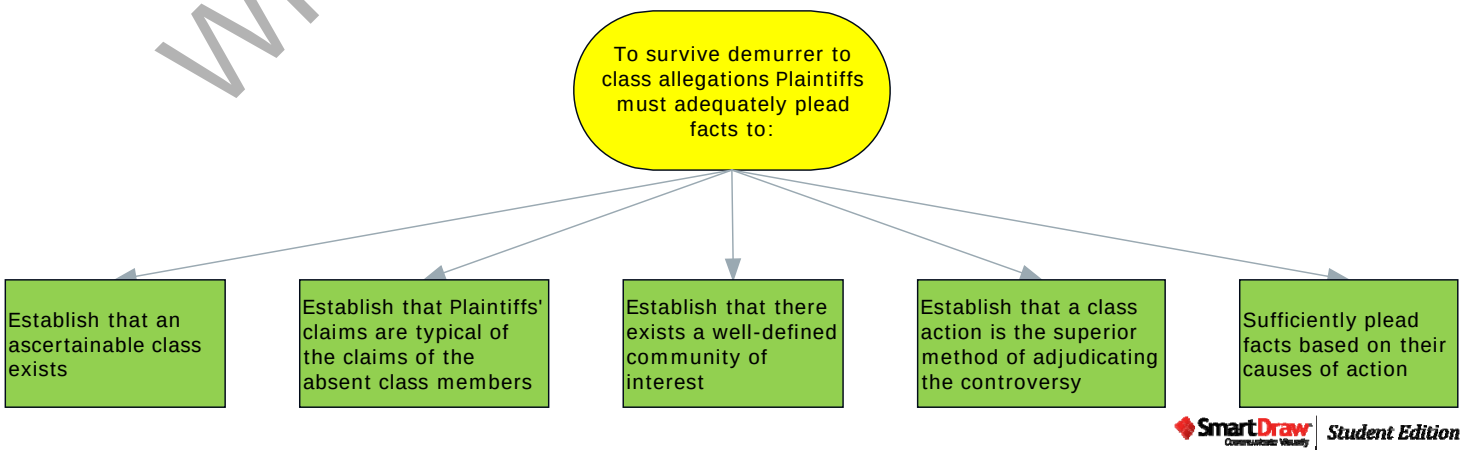
California case law is settled that class action allegations may be dismissed on demurrer. *Silva v. Block*, 49 Cal. App. 4th 345, 349 (1996). Trial courts "properly and routinely" determine class allegations on demurrer, and can sustain the demurrer, without leave to amend on class action allegations. *Clausing v. San Francisco Unified School Dist.*, 221 Cal. App. 3d 1224, 1234 (1990). The standard on demurrer is whether there is a "reasonable possibility" that class action treatment is warranted. *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 813 (1971); *Prince v. CLS Transportation, Inc*., 118 Cal. App. 4th 1320, 1325 (2004).

To survive demurrer on class allegations, Plaintiffs must adequately plead facts establishing all of the following: (1) an ascertainable class exists; (2) Plaintiffs' claims are typical of the claims of the absent class members; (3) there exists a well-defined community of interest; and (4) a class action is the superior method of adjudicating the controversy. *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981). In addition, Defendants can attack Plaintiffs' complaint for inadequately pleaded causes of action as in routine long term care cases.

Timing:

California Rules of Court govern the procedural aspects of class actions. Therefore, the timing for filing demurrers remains the same, 30 days after being served.

Pleading Requirements To Withstand Demurrer



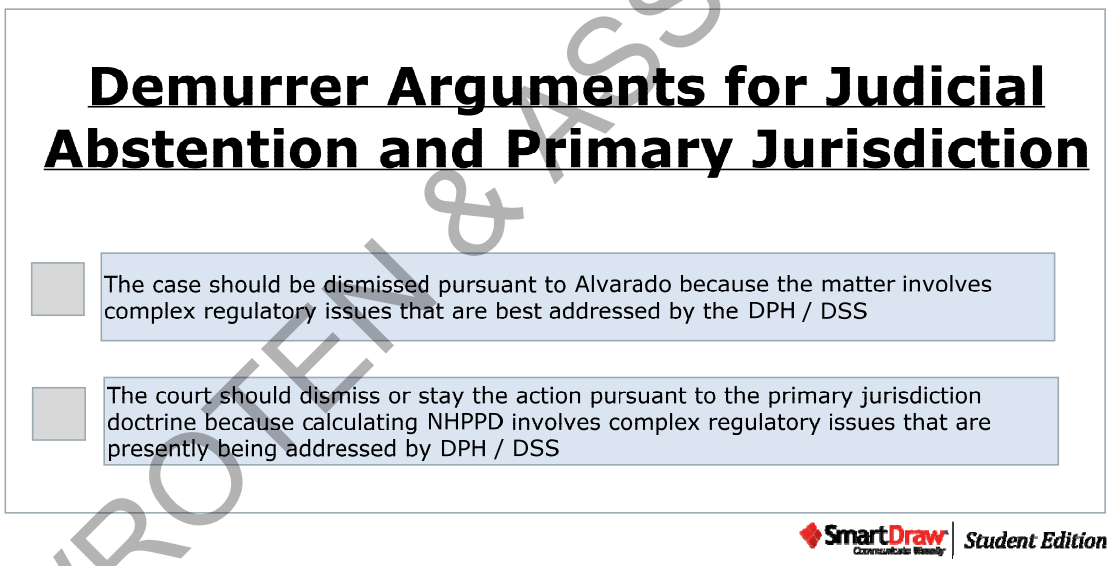
Considerations

As all facts pleaded in a complaint are assumed to be true, it is uncommon for a judge to sustain a demurrer without leave to amend. That said, demurrers remain a strong weapon for the defense.

Many judges are not familiar with complexities of law in class action cases stemming from the long term care arena. A demurrer allows Defendants to provide an introductory education to the judge regarding issues that are unique to this area of law that will drive the way the case will be defended. Regardless of the outcome of the demurrer, it is an opportunity to plant seeds with the judge that could be invaluable as the case evolves as it gives the judge a glimpse into the complex and highly regulated field of long term care, including the Department of Social Services and Department of Public Health's strong presence, the complex interplay between state and federal regulations, as well as the immense volume of regulations affecting the industry.

Abstention

Ultimately, the court should defer to the DPH's regulations of nursing home staffing levels. Arguments should be raised through demurrer based on the theory of abstention.



In *Alvarado v. Selma*

Convalescent Hospital, 153 Cal. App. 4th 1292, 1304 (2007), the Court of Appeal held that Health & Safety Code Section 1276.5(a) "is a regulatory statute, which the Legislature intended the [DPH] to enforce." The court reached its conclusion "based upon the wording of section 1276.5, subdivision (a), and its surrounding statutory framework." *Id.* (noting that subsection (a) provides "[t]he department shall adopt regulations setting forth the minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities.") The *Alvarado* opinion observed that determining compliance with Section 1276.5 with respect to Plaintiffs' class-wide claims would require the trial court to assume regulatory functions of the DPH and adjudicate complex health care matters concerning staffing levels at skilled nursing facilities. *Id.* at 1306.

Among other things, resolving a Section 1276.5 claim would require the court to first determine "whether a particular skilled nursing or intermediate care facility is governed by section 1276.5." *Id.* at 1305. The court then would need to "calculate nursing hours for each facility involved," which would require classifying which health care professionals' hours may be counted toward the 3.2 nursing hours per patient day requirement, and then calculate the hours each such employee worked. *Id.* Because Section 1276.5 provides different formulas for calculating nursing hours in different skilled nursing facilities, the *Alvarado* Court noted that "the court would have to determine on a class-wide basis the size, configuration and licensing status of skilled nursing and intermediate care facilities." *Id.*

Attacking Punitive Damages

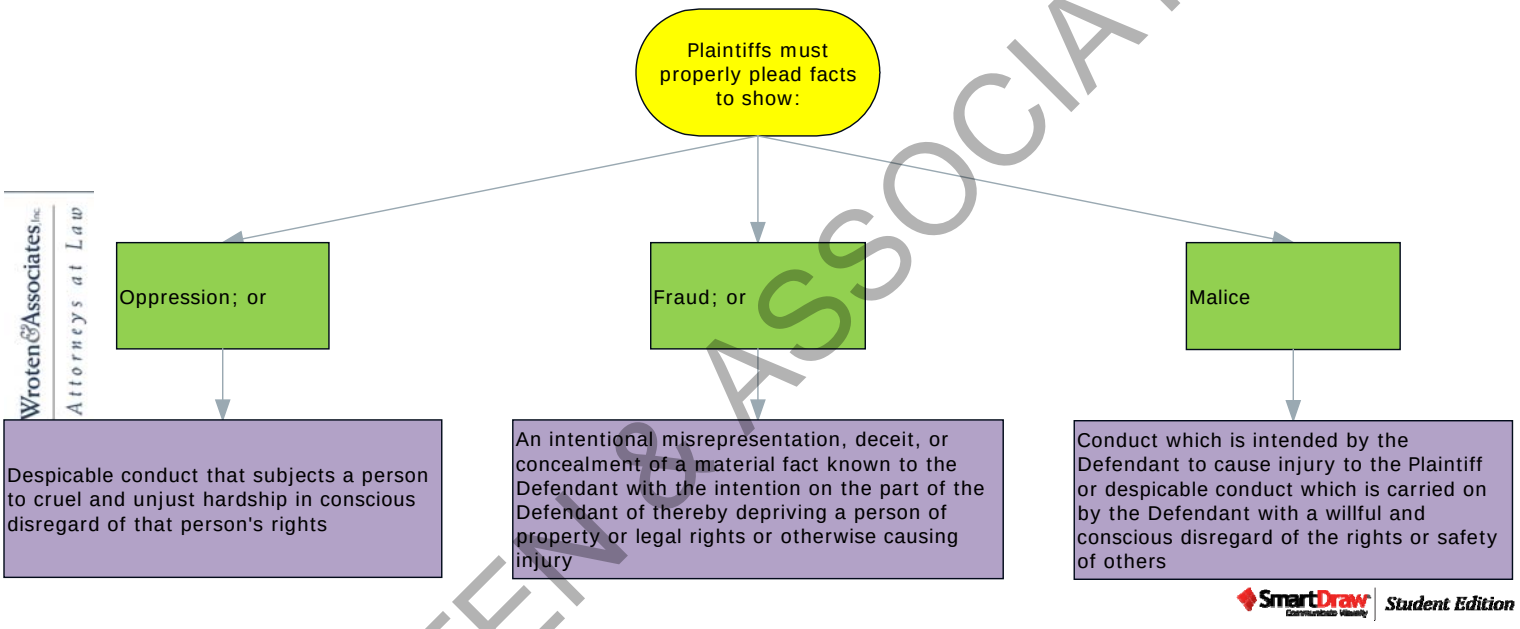
As punitive damages can vastly exceed a verdict for damages, Defendants should exhaust every opportunity to remove the possibility of punitive damages being levied. Supreme Court Justice Sandra Day O'Connor wisely stated in a dissenting opinion "Punitive damages are a powerful weapon. Imposed wisely and with restraint they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than do what you think best." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). As Justice O'Connor alludes, when a jury awards punitive damages against a corporate defendant or a long term care facility it can have an annihilating effect.

The "law does not favor the imposition of punitive damages." *Woolstrum v. Mailloux*, 141 Cal. App. 3d Supp 1 (1983). "They should only be allowed in the 'clearest of cases.' The *Woolstrum* court further noted that "conduct which may be characterized as unreasonable, negligent, grossly negligent or reckless does not satisfy the highly culpable state of mind warranting punitive damages." *Id*. See also *Ebaugh v. Rabkin*, 22 Cal. App. 3d 891, 894-895 (1972).

"There is no constitutional right to plead punitive damages upon an insufficient showing." *Aquino v. Superior Court of San Diego County*, 21 Cal. App. 4th 847 (1993). Where a complaint seeks exemplary or punitive damages, Civil Code, § 3294 requires the Plaintiff to establish "oppression, fraud, or malice," a high benchmark for Plaintiffs which is rarely properly pleaded. *Brousseau v. Jarrett*, 73 Cal. App. 3d 864, 872 (1977). Civil Code § 3294 defines "oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard

of that person's rights." Civil Code § 3294 also states that "fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Section 3294 defines malice as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety or others." Courts have further indicated that in order to state facts sufficient to recover punitive damages, a complaint must contain facts that would indicate evil motive and intent to injure on the part of the defendant. See *Ebaugh v. Rabkin* supra; *Cyrus v. Haveson*, 65 Cal. App. 3d 306, 316-317 (1976), holding that facts demonstrating Defendant's oppression, fraud, or malice must be alleged.

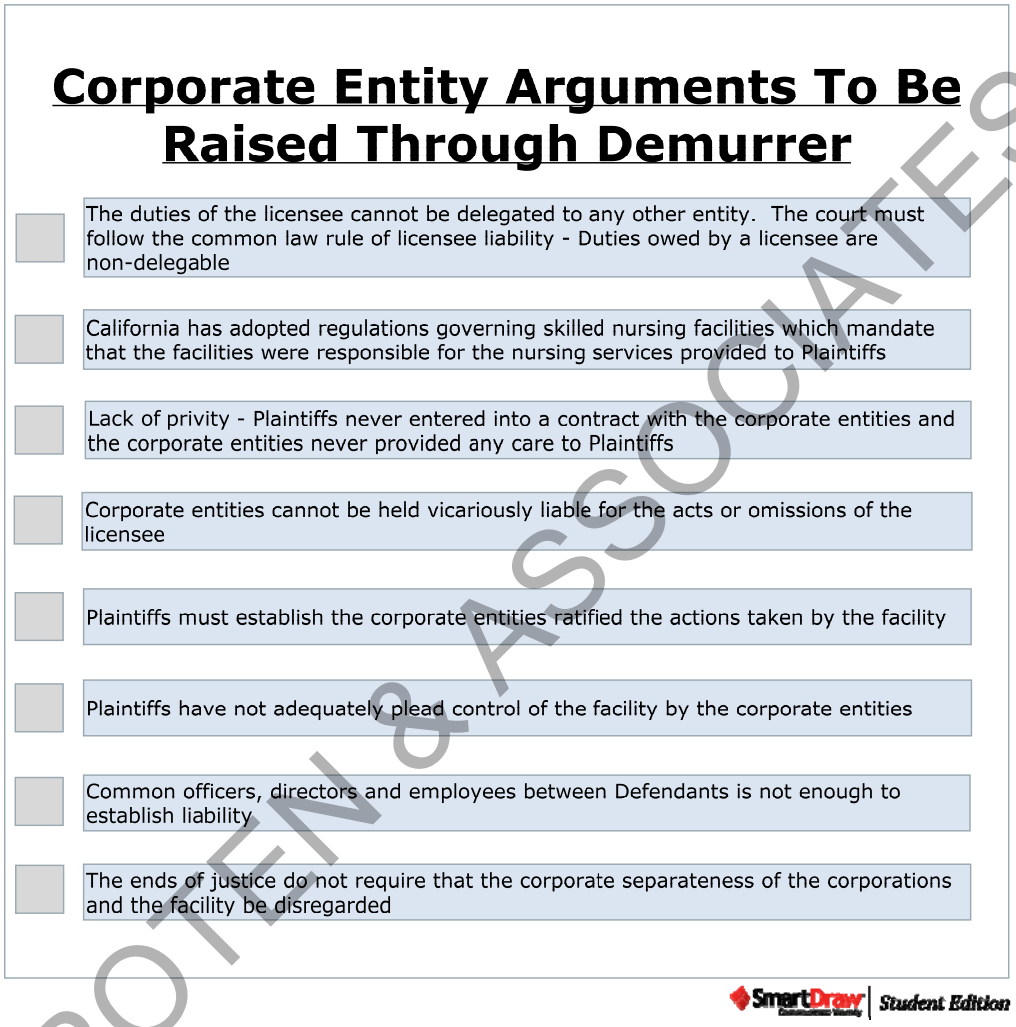
Benchmark For Punitive Damages



Ultimately, it is not enough for Plaintiffs to simply plead in a conclusory fashion that the Defendant acted with oppression, fraud, or malice. *Cyrus v. Haveson*, supra (holding that conclusory averments of oppression, fraud, and malice are insufficient to support an award of punitive damages.) Rather, Plaintiff must specifically state facts illustrating malice on the part of Defendant. *G.D. Searle & Co.*, supra; *Brousseau v. Jarrett*, supra. "The terms willful, fraudulent, malicious and oppressive are the statutory description of the type of conduct which can sustain a cause of action for punitive damages. Pleading in the language of the statute is acceptable provided that sufficient facts are plead to support the allegations. The terms themselves are conclusory, however." *Blegen v. Super. Ct.*, 125 Cal. App. 3d 959 at 963 (1981). (emphasis added).

Corporate Law

Demurrers may be an effective tool for elimination of corporate Defendants early in class litigation. Often, Plaintiffs will assert allegations of vicarious liability and alter ego against separate corporate entities within the same investment portfolio as the facility in hopes of scouring deeper pockets. There are many arguments that can be presented through demurrer to attack Plaintiffs' allegations against corporate Defendants. **See Appendix B for more information on corporate entity considerations.**



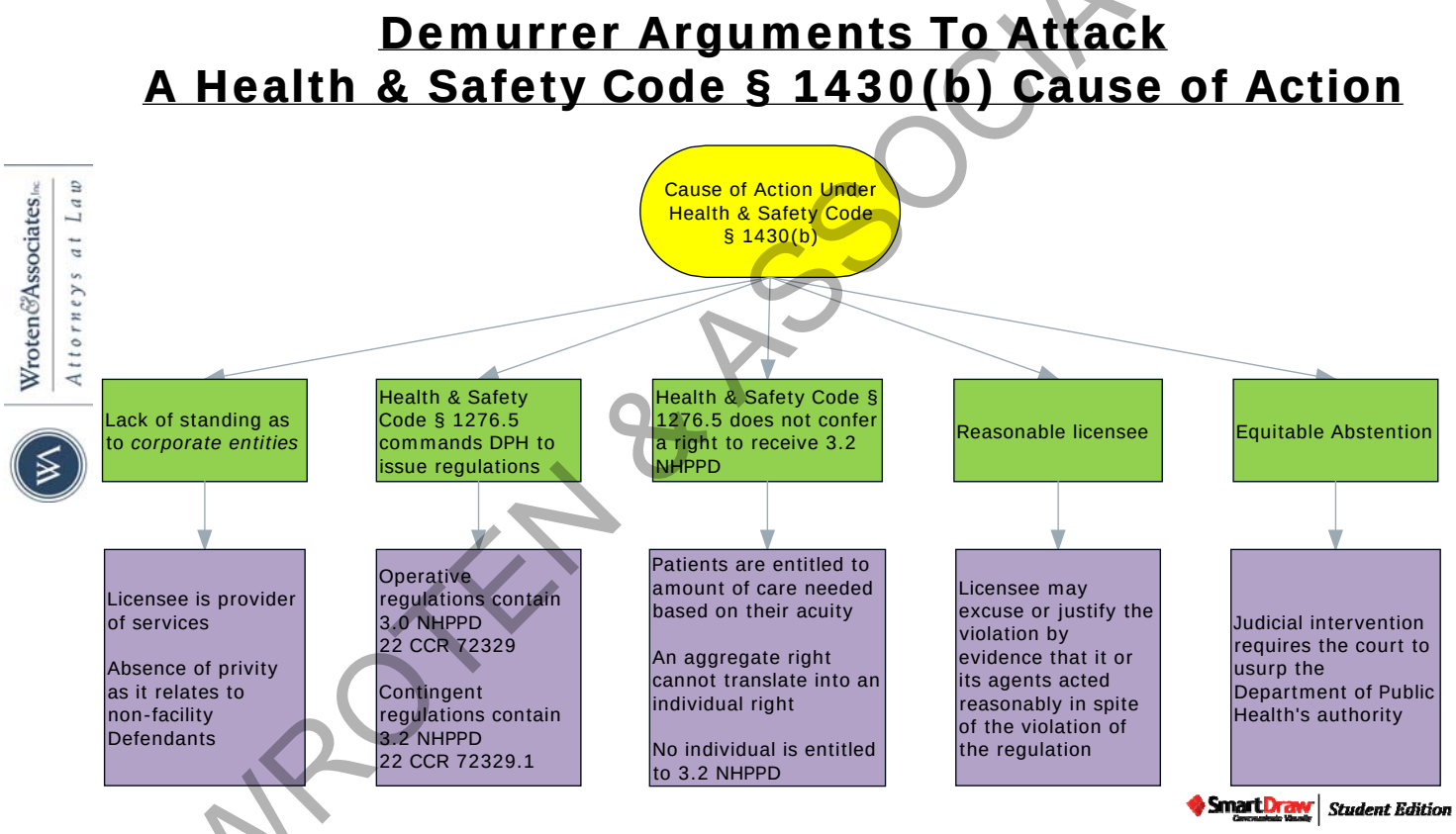
Because society recognizes the benefits of individual limitation of business liability through incorporation, the corporate form will be disregarded in narrowly defined circumstances and only when justice so requires. *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 19 Cal. App. 4th 615, 628 (1993). Proof of inequity requires more than a showing that a creditor will remain unsatisfied if the corporate veil is not pierced. *Assoc.'d Vendors v. Oakland Meat Company, Inc.*, 210 Cal. App. 2d 825, 842 (1962). Plaintiffs must allege or show that fraud or injustice would actually result if the corporate entity is not found liable. A legally recognized corporate structure should never be disregarded without a proper showing that fraud or injustice will result.

The operation of a skilled nursing facility has been expressly held by the California Supreme Court to be a non-delegable duty held solely by the licensed entity. *Cal. Ass'n of Health*

Facilities v. the Dep't of Health Servs., 16 Cal. 4th 282; Title 22 California Code of Regulations § 72501. Mere control of a subsidiary's budget is not sufficient to impose liability upon the parent, even if it causes the subsidiary to suffer financial hardship. *Waste Management, Inc. v. Superior Court* 119 Cal. App. 4th 105, 110 (2004).

Plaintiffs are not entitled to stack recovery for their damages. The concepts of respondeat superior and agency/principle do not exist to enrich Plaintiff. (See *Zabaglione v. Billings*, 4 Cal. 4th 1150, 1158-1159 (1993)). "Regardless of the nature or number of legal theories advanced by a plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited.")

Health & Safety Code § 1430(b)



Lacks A Private Right Of Action

Defendant may also argue that if the legislature did not intend to create a private right of action under the statute a demurrer should be sustained. In ascertaining legislative intent, a court may look to the statute's legislative history. *Dyna-Med, Inc. v. Fair Employment and Housing Comm.*, 43 Cal. 3d 1379, 1387 (1987). It is proper for a court to consult a statute's legislative history if there is any ambiguity in the statute. *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th

543, 554 (1992). This argument should be made in any 1430(b) class action where Plaintiffs allege regulatory violations as "patient right" violations.

Enforceability Of 3.2 NHPPD

The enforcement of staffing levels of a skilled nursing facility is a regulatory function of the Department of Health Services. *Alvarado v. Selma Convalescent,* 153 Cal. App. 4th 1292 (2007).

Health & Safety Code § 1276.5 is a regulatory enabling statute which does not by itself establish a duty to particular residents to provide them with individual care at a level of 3.2 nursing hours per patient day. Health & Safety Code § 1276.5 mandates that the Department of Public Health implement regulations requiring sufficient nursing staff at skilled nursing facilities, with a floor of 3.2 nursing hours per patient day. Following a Department of Public Health recommendation that a different metric of patient care—a staff-to-patient ratio—might be superior, the Legislature adopted a new statute (Health & Safety Code § 1276.65), which is elaborated in a supplemental Department regulation. (California Code of Regulations, Title 22 § 72329.1.) However, both provisions are ***expressly contingent*** upon legislative funding, ***which has not occurred***. (See § 1276.65(i); § 72329.1(l).) Therefore the only viable regulation, California Code of Regulations, Title 22 § 72329, does not mandate 3.2. Further, no individual patient has a right to receive staffing at a 3.2 nursing hours per patient day level because 3.2 nursing hours per patient day is, by definition, an average or aggregate measure; some patients may need more, some may require less.

An argument can be also made that Health & Safety Code §1276.5 was directed at the Department of Public Health to promulgate regulations and was not a directive to skilled nursing facilities. In the absence of an enforceable regulation, Plaintiffs may not be capable of demonstrating an injury in fact or a loss of money or property. Even if they are able to demonstrate an injury in fact or a loss of money or property they may no longer be able to maintain class certification based on typicality of their claims.

IX. Motion To Strike

Pursuant to Code of Civil Procedure § 435(b)(1), "any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof…" Code of Civil Procedure § 436 allows a court to strike out "any irrelevant, false or improper matter inserted in any pleading" or "strike out all or any part of a pleading not drawn or filed in conformity with the laws." A motion to strike can be utilized to attack an entire pleading or even single words and phrases. *Warren v. Atchison, Topeka & Santa Fe Ry. Co.*, 19 Cal. App. 3d 24, 40 (1971).

A motion to strike can be used to reach defects or objections to pleadings that are not challengeable by demurrer. A complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for Plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts. *Careau & Co. v. Security Pac. Business Credit, Inc.* 222 Cal. App. 3d 1371, 1390 (1990). The pleader should also avoid evidentiary and argumentative facts, and allege only ultimate facts. *Citizens for Parental Rights v. San Mateo County Board of Education,* 51 Cal. App. 3d 1, 35 (1975).

Timing:

A motion to strike must be filed "within the time allowed to respond to a pleading" Code of Civil Procedure § 435 (b)(1). This leaves Defendant 30 days after being served to file. Motions to strike should always be served concurrently with demurrers.

Punitive Damages

Under controlling authority, fairness to Defendants requires that claims for punitive damages be specifically pled. *G.D. Searle & Co. v. Super. Ct.* 49 Cal. App. 3d 22, 29 (1975). Where a prayer for punitive damages is based on unsupported conclusions, any such conclusions are properly stricken. *Smithson v. Sparber,* 123 Cal. App. 225, 232 (1932); See also *Faulkner v. California Toll Bridge Authority,* 40 Cal. 2d 317, 329 (1952).

References To Actions By The Department Of Public Health Services

Reference to the actions of California Department of Public Health is irrelevant to any cause of action. Reference to deficiencies does not support a cause of action as Plans of Correction prepared in response to a deficiency cannot be utilized as an "admission" of the underlying truth of the Deficiency. Health & Safety Code § 1280(f).

It is well established that DPH deficiencies and citations are not penal in nature and may not serve as a vehicle by which private parties may seek civil liability or punitive damages. *California Association of Healthcare Facilities v. Department of Health Services* (1997) 16 Cal. 4th 282, 294-295 noted that the civil penalties imposed by Health & Safety Code § 1424 are not "penal in nature, but remedial . . . their primary purpose is to 'secure obedience to statutes and regulations' imposed to assure important public policy objectives." *Myers v. Eastwood Care Center, Inc.* (1982) 31 Cal.3d 628, 632 noted that the Legislature intended that the statutory scheme for issuing citations to do nothing more than "provide prompt and effective discovery of violations and enforcement of the applicable statutes and regulations through administrative action." In addition, the California Supreme Court in *Kizer v. County of San Mateo,* 53 Cal. 3d 139, 146, 147, fn. 6 (1991), specifically noted that citations could be imposed without a showing of any injury at all.

The Use Of "Buzz Words"

The mere recitation or use of buzz words such as "malice" "oppression" and "fraud" does not satisfy the pleading requirements for a showing of despicable conduct. Rather specific facts must be alleged. *Grieves v. Superior Court (*1984) 157 Cal. App. 3d 159, 166. As the Court in *Blegen v. Superior Court* (1981) 125 Cal. App. 3d 959, 963 stated: "The terms willful, fraudulent, malicious and oppressive are the statutory description of the type of conduct which can sustain a cause of action for punitive damages. Pleading in the language of the statute is acceptable provided that sufficient facts are plead to support the allegations. The terms themselves are conclusory, however."

X. Preparing For Discovery & Initiating Your Defense

It is recommended that your defense team initiate an action plan for the collection, preservation, and evaluation of documents and witness statements as soon after notice of your class action has been received as is practicable. Although the details of your action plan will be driven by the structure of your operations, preliminary checklists designed to aid in outlining the first steps of your litigation management plan are attached. (See Appendix' B, C, and D.)

CHAPTER 4

PRE-CERTIFICATION DISCOVERY

I. Pre-Certification Discovery v. Merit Discovery

There is not always a bright line between pre-certification and merits discovery. In fact, courts have recognized that information about the nature of the claims on the merits and the proof that they require is also important to deciding class certification. (Federal Judicial Center, Manual for Complex Litigation, 4th Edition 2004, §21.14) Bifurcating class discovery from merits discovery can be efficient when merits discovery would not be used if certification was denied. Even limited discovery relating to class issues may overlap with merits discovery. (California Judicial Council, Deskbook on Management of Complex Litigation – Lexis Nexis, 2003.) "[W]e view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2000). "Nothing we say today is intended to preclude a court from scrutinizing a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a classwide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Id.* at 443.

For Plaintiffs, class certification hinges on proving typicality and a community of interest. This is a factual assertion, thus discovery issues should be expected to occupy considerable time prior to the class certification hearing. Further, with broad and uncertain allegations almost certainly predominating the complaint, and disagreements over which facts are and are not relevant, class action discovery quickly becomes a combat arena.

Pre-certification discovery is permitted to establish community of interest as a "matter of fact" at the class certification. The judge then applies legal theories to the facts. Early discovery usually focuses on the existence of the class and the suitability for class action, however, there is no clear distinction between what constitutes class discovery and what constitutes merits discovery.

For Defendants, the goal revolves around clarification and narrowing of the issues so that discovery is manageable. For Plaintiffs the goal is very different, and focuses on gathering the proof needed to establish a community of interest among the class.

Preliminary Discovery Issues

- The right to conduct pre-certification discovery
- The distinction between class discovery and merits discovery
- Discovery of contact information for class members
- Discovery from unnamed class members
- E-Discovery

Considerations

- Discovery Referee - Complex actions call for special masters capable of devoting the time needed to grasp complexities of the legal and factual issues
- Document Repositories - Consider use of a common repository for documents which can be accessed by both Plaintiffs and Defendants
- Consider allowing class and merits discovery to proceed concurrently if bifurcation would result in significant duplication of efforts and expense to the parties

II. Pre-Certification

Generally, California law permits discovery in order to obtain information necessary to plead a cause of action, and doubts as to whether or not the information will aide the requesting party or not are usually resolved in favor of permitting discovery. In the class action context, the right to conduct pre-certification discovery is well established and uncertainty as to whether or not the information would actually support a class action is not a reason to deny discovery. *Union Mut. Life Ins. Co. v. Super. Ct.*, 80 Cal. App. 3d 1, 11 (Cal. App. 5th Dist. 1978).

Pre-certification discovery is usually conducted in order to:

1. Gather evidence to prove elements of class certification
2. Gather proof of Defendant's liability; and
3. Identify a new class representative in the event one is disqualified or withdraws.

In *Colonial Life & Accident Ins. Co. v. Super. Ct.*, 31 Cal. 3d 785 (Cal. 1982), the Supreme Court held that the discovery of the names, addresses and records of other insureds whose claims were negotiated by the same claims adjuster who handled Plaintiff's claim was relevant to the subject matter of the class action. However, the court also ordered that disclosure could only take place after each individual authorized same by signing and dating a form, now known as a "Colonial Life Letter."

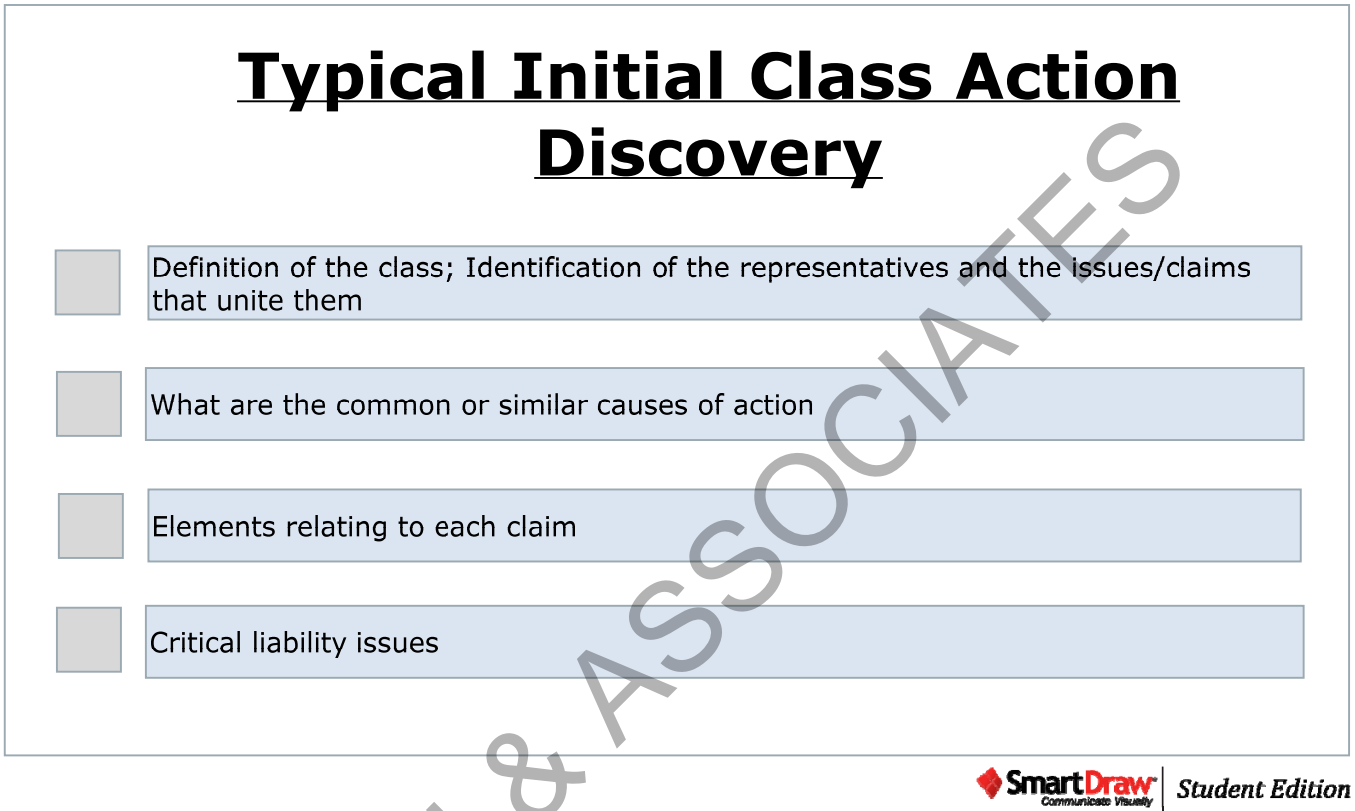
Discovery of similarly situated persons was allowed in *Budget Finance Plan v. Super. Ct.*, 34 Cal. App. 3d 794, 799 (Cal. App. 1st Dist. 1973), where Plaintiffs sought to learn the names of other proper Plaintiffs who may be of assistance in the presentation of the case, and who may share the burdens of its prosecution. This discovery was allowed even after a demurrer to the complaint was sustained.

There is a right to pre-certification discovery. In *Bartold v. Glendale Federal Bank*, 81 Cal. App. 4th 816, 827 (2000), the court allowed discovery that focused on class action issues before documents in support of or in opposition to the motion are filed, and a full opportunity to brief the issues and present evidence. Typically, pre-certification discovery will focus on common questions of fact, composition of the class and potentially the location of absent class members.

Plaintiff is entitled to conduct discovery as to class certification issues, and it is an abuse of discretion for the court to determine class certification issues before the parties have had an opportunity to conduct discovery. *In Stern v. Super. Ct.*, 105 Cal. App. 4th 223, (2003), the court held that each party must have an opportunity to conduct discovery on class action issues before filing documents to support or oppose a class certification motion so the trial court can realistically determine if common questions are sufficiently pervasive to permit adjudication in a class action.

Usually discovery relating to the scope and extent of the class is to be expected initially. See *Union Mut. Life Ins. Co. v. Super. Ct.*, 80 Cal. App. 3d 1 (1978), holding that interrogatories which sought information which would allow the Plaintiff to amend the complaint to state a class action against another potential group of people was held to be appropriate by the court because

Plaintiffs should have the opportunity to discover further information and should not be denied based on uncertainty.



Damages are an example of discovery which can be delayed until after the initial phases.

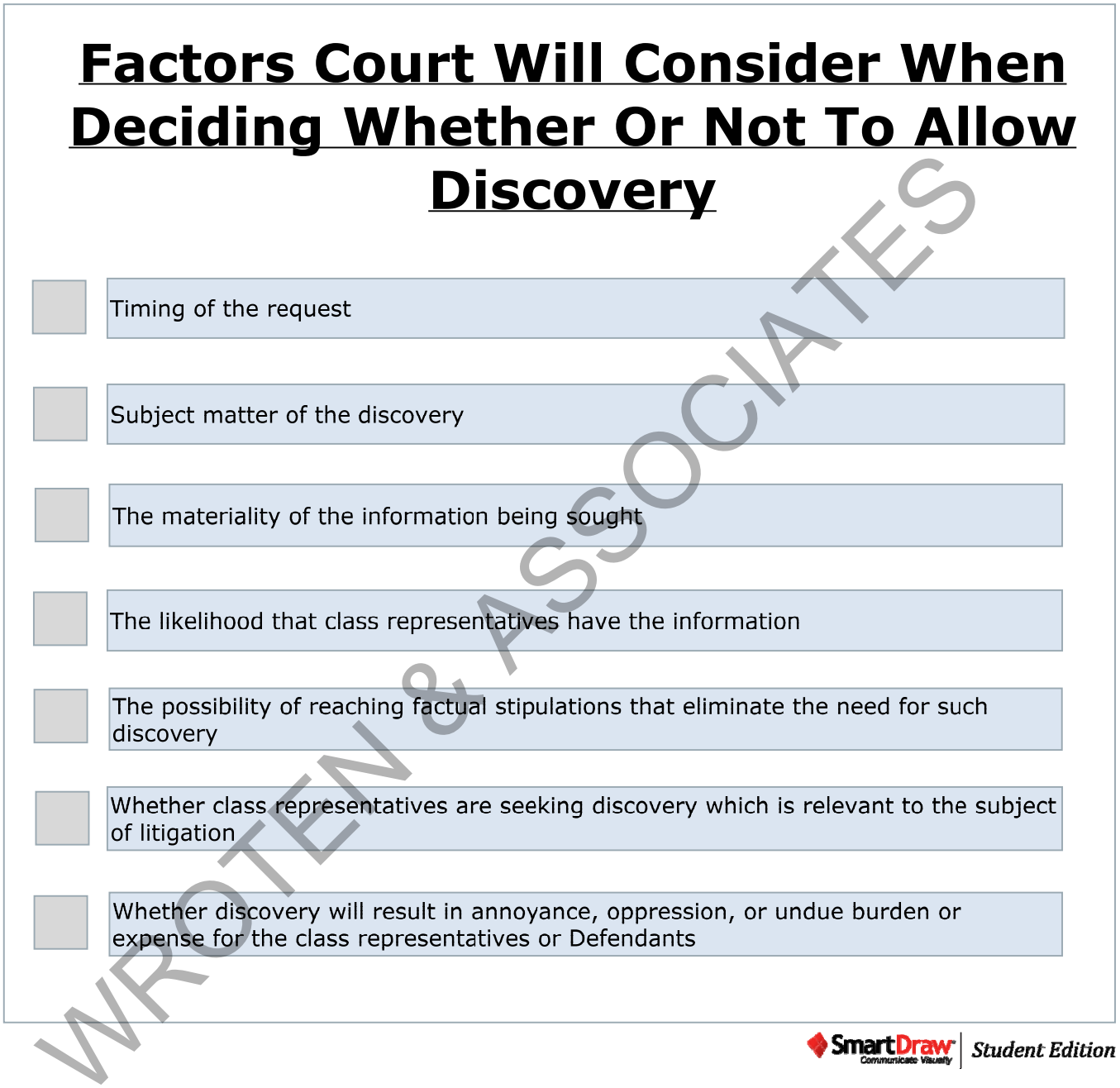
III. Pre-Certification Discovery-Plaintiff's Burden

Because Plaintiff bears the burden of meeting the requirements for class certification, initial discovery should be focused on these elements. Specifically, pre-certification discovery should address the composition of the class, geographic location of class members as well as nature and extent of the class.

Plaintiffs may seek discovery relating to the uniformity of Defendants' conduct. If conspiracy among multiple Defendants is alleged, discovery will also focus on the relationships or conduct which bind the Defendants together. Discovery will also likely focus on Defendants' underlying motivation as it effects the issues raised by the alleged wrongdoing.

In *McGhee v. Bank of America*, 60 Cal. App. 3d 442 (Cal. App. 1st Dist. 1976), where Plaintiffs brought action against certain Defendant banks alleging deeds of trust contained impound provisions on pre-printed forms, the court determined that the fact that separate transactions were involved did not preclude a finding of the requisite community of interest necessary for a class action so long as every member of the alleged class would not be required to litigate numerous

and substantial questions to determine his individual right to recover. *McGhee v. Bank of America*, 60 Cal. App. 3d 442 (Cal. App. 1st Dist. 1976).



IV. Class Action Discovery And Privacy

Privacy limitations and the balance with Plaintiffs' discovery interests in pre-certification discovery were discussed in *Pioneer Electronics (USA), Inc. v. Super. Ct.*, 40 Cal. 4th 360 (2007), where the Supreme Court ultimately held that disclosure of names and addresses of complaining customers to Plaintiff involved no serious breach of privacy. The *Pioneer* trial court held that contact information of other customers who complained to Pioneer about the

same defective DVD player as Plaintiff might assist in prosecuting the case. The court further stated, "such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches. *Id.* at 373. The trial court reasoned that there was no serious invasion of privacy when contact information voluntarily disclosed to Pioneer by complaining customers was disclosed to Plaintiff, **following written notice and an opportunity to object**. The Court of Appeal issued a writ of mandate vacating the trial court's order. The Supreme Court reversed the Court of Appeal and remanded.

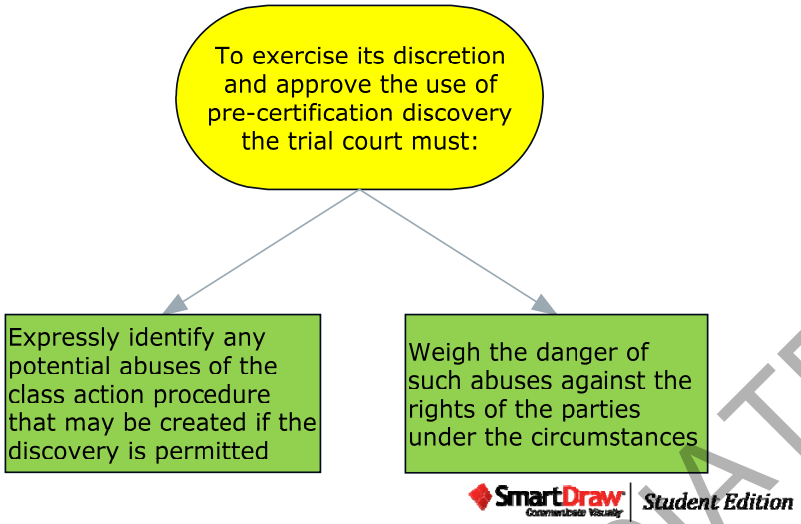
The court in *Best Buy Stores, L.P. v. Super. Ct.*, 137 Cal. App. 4th 772 (2006), approved the use of pre-certification discovery to identify a new class representative, as long as the manner of conducting the discovery was consistent with putative class members privacy rights.

To exercise its discretion, "the trial court must … expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances." *Parris v. Super. Ct.* 109 Cal. App. 4th 285, 300–301 (2003). Here the court engaged in such a weighing process in formulating its order for discovery. *Best Buy Stores, L.P.*, 137 Cal. App. 4th at 779.

The *Best Buy* court also held, "[d]iscovery to ascertain a suitable class representative is proper. Should the trial court conclude that a plaintiff cannot suitably represent the class, it should afford him the opportunity to amend his complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative." *Id.* at 779.

In the context of class notice, privacy considerations were also considered in *Belaire-West Landscape, Inc. v. Super. Ct.*, 149 Cal. App. 4th 554, 562 (2007). In *Belaire-West*, an opt out notice following *Pioneer* was sufficient to protect the privacy rights of class members in a wage and hour class action. The *Belaire-West* court also articulated the general requirements for evaluation of claims of invasion of privacy under the California Constitution. First, the claimant must possess a legally protected privacy interest. Next, the claimant must have a reasonable expectation of privacy under the particular circumstances, including the customs, practices, and physical settings surrounding particular activities. Third, the invasion of privacy must be serious in nature, scope, and actual or potential impact; trivial invasions do not create a cause of action. If a claimant meets these criteria, then the court must balance the privacy interest at stake against other competing or countervailing interests. *Id.* at 558.

Pre-Certification Discovery



The right to discovery however, is not unlimited. A Plaintiff who purports to bring a cause of action on behalf of a class of which the Plaintiff was never a member may not obtain precertification discovery to find a new class representative. "California law is clear that a representative plaintiff must be a member of the class he seeks to represent. Indeed, Proposition 64 was enacted to prevent abuses of the class action system by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact.' [Internal citations omitted.] We cannot permit attorneys to make an 'end-run' around Proposition 64 by filing class actions in the name of private individuals who are not members of the classes they seek to represent and then using precertification discovery to obtain more appropriate plaintiffs." *First American Title Ins. Co. v. Super. Ct.*, 146 Cal. App. 4th 1564, 1577 (2007).

In *Cryoport Systems v. CNA Ins. Cos.*, 149 Cal. App. 4th 627, 634 (2007), the plaintiff who lacked standing was granted leave to amend his complaint to identify a plaintiff with standing but was unable to do so. The *Cryoport* court stated, "*Best Buy Stores* does not stand for the proposition that a plaintiff with no interest in the action has a right to discovery to find a substitute plaintiff to keep the action alive…As in *First American*, the potential for abuse of such discovery in a case like this is great. Cryoport clearly has no interest of its own in this litigation, having been unable to amend its complaint to allege its own standing." *Id*. at 634.

Pre-certification discovery was allowed in a class action for the purpose of identifying class members who may become substitute Plaintiffs in place of named Plaintiffs who were not members of the class they purported to represent. "In deciding whether to order precertification discovery of the identities of potential class members, a trial court must expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances. In applying that balancing test to the circumstances in a particular case, a trial court exercises its discretion." *CashCall, Inc. v. Super. Ct.*, 159 Cal. App. 4th 273 (2008).

The *CashCall* court concluded that unlike the class members in *First American*, *CashCall* had knowledge of the names and contact information of the class members because of the secret

nature of *CashCall's* monitoring of calls between its collection employees. "[U]nlike the rights of the class members in *First American*, the rights of the class members in this case are quite significant and, absent precertification discovery and potential continuation of this class action, those rights may go unasserted without their knowledge of *CashCall's* alleged privacy right violations. Accordingly, absent precertification discovery, *CashCall* may essentially receive a windfall by escaping any scrutiny…" *Id.* at 299. "Unlike in First American, we conclude the potential for abuse of the class action procedure is not significant in this case. In *First American*, the plaintiff essentially appointed himself enforcement officer for the California Department of Insurance settlement agreement…" *Id.* at 299.

V. Discovery From Unnamed Class Members

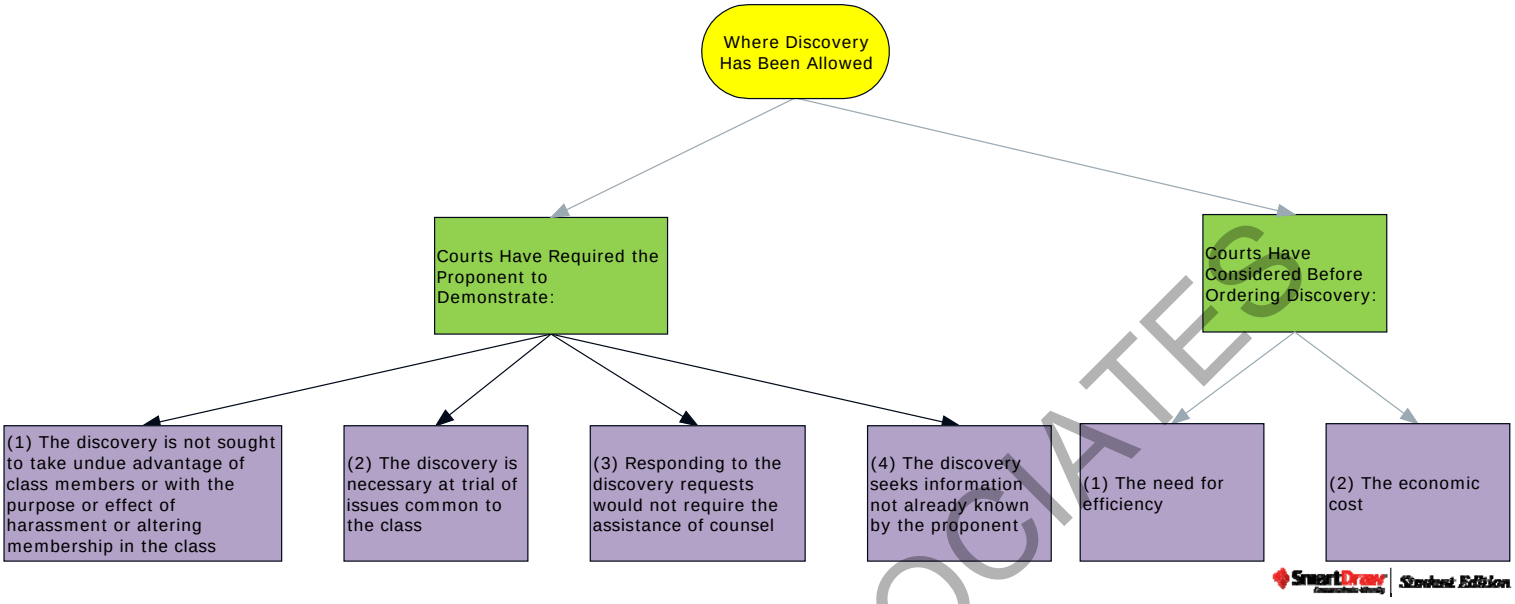
Unnamed class members who are not representatives may be deposed and may be required to produce documents. Rules of Court, Rule 3.768(a) provides that depositions (oral or written) as well as depositions for production of business records and things may be taken of an unnamed class member, via subpoena, without a court order. A party representative, deponent or affected person may move for a protective order to preclude or limit the discovery. Rules of Court, Rule 3.768(b). Therefore, named class representatives do have standing to seek a protective order limiting discovery on unnamed class members.

A court order is required before interrogatories may be served on a member of the class who is not a representative or who has not appeared. Rules of Court, Rule 3.768(c). The reason for this restriction is that to the extent unnamed class members are compelled to participate in trial, the more the class action device is destroyed. Interrogatories should be controlled by the court and should be modified as appropriate to reflect the circumstances and good cause. Other than contention interrogatories which should be served before trial, interrogatories should focus narrowly on the issues.

Interrogatories are not to be used to obtain information about the amount of each class members' claim, the identify of class members or to decrease the size of the class, as those issues are not germane to trial of class issues. *Danzig v. Superior Court*, 87 Cal. App. 3d 604, 612 (Cal. App. 1st Dist. 1978); see also *Daar v. Yellow Cab Co*., 67 Cal. 2d 695, 709 (1967), holding common recovery is not required to establish a community of interest. "As a practical matter, a requirement of common relief has no compelling importance and its absence presents no insuperable difficulties. A determination of the interest of each member of the class in any damages recovered does not seem to us dissimilar to a determination of each member's interest in a common trust fund, such determination sometimes being required after the common issues have been resolved in a class action. Only at such final stage do the individual interests become critical and does the community of interest requirement lose significance." *Id* at 734.

A representative Plaintiff cannot be compelled to supply information concerning members of his class or their interests in the action which is neither in his possession nor control, unless the interrogatory is directly related to his own standing to maintain the action, to the existence of an ascertainable class, or to the existence of that community of interest which is required to sustain a class action. *Alpine Mut. Water Co. v. Super. Ct. of Ventura County*, 259 Cal. App. 2d 45, 54-55 (Cal. App. 2d Dist. 1968).

Discovery From Unnamed Class Members



Unnamed class members are "parties" for purposes of discovery. However, the right to such discovery is not absolute. Named Plaintiffs may be able to assert little, if any, control over unnamed class members, and Defendants should not be allowed to effectively stifle a class action at the discovery stage, either by imposing impossibly expensive burdens on the named Plaintiffs or by chipping away at the size of the class through exclusion of the unnamed Plaintiffs. It is especially vital to prevent such "chilling" of class actions in light of their importance as a litigation tool. *Nat'l Solar Equip. Owners' Ass'n v. Grumman Corp.*, 235 Cal. App. 3d 1273 (Cal. App. 4th Dist. 1991).

Practitioner Tip

When unnamed class members sign declarations in support of class certification, the natural inclination for defense counsel is to take the depositions of the declarants. When deciding whether or not to notice these depositions consider that this will most likely be met by a motion for protective order limiting the number of depositions because the declarations are intended to represent a sample of the evidence

CHAPTER 5

CLASS CERTIFICATION

The Supreme Court of California has consistently admonished trial courts regarding the need to "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." *Bell v. Farmers Ins. Exch*. 115 Cal. App. 4th 715, 740-741 (Cal. App. 1st Dist. 2004), emphasis added; see also *City of San Jose v. Sup. Ct*. 12 Cal. 3d 447, 458 (1974).

Plaintiffs bear the burden of proof on every issue of class certification. *City of San Jose v. Superior Court,* 12 Cal. 3d 447, 459 (1974); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704 (1967). Plaintiffs "must establish the existence of an ascertainable class and a well-defined community of interest among the class members." *Richmond v. Dart Indus., Inc*., 29 Cal.3d 462, 470 (1981). This burden is not a lenient one. It is not enough that Plaintiffs rely on mere allegations or conclusions; each required element must be proven by a preponderance of competent, admissible, probative evidence. *Hamwi v. CitiNational-Buckeye Inv. Co*., 72 Cal. App. 3d 462, 470-73 (Cal. App. 2d Dist. 2007). To satisfy this burden, Plaintiffs must "establish more than 'a reasonable probability' that class treatment is appropriate." *Id*. at 471. Rather, the class certification requirements must be determined "on the merits" and Plaintiffs must establish the requirements of class certification "as a matter of fact." *Id*. at 472. In short, it is the Plaintiffs' burden to compile the factual record that will demonstrate that an appropriate predominant issue justifies certification.

Class certification should be decided at the earliest possible stage but filed when practicable under the California Rules of Court, rule 3.764(b). *Massey v. Bank of America*, 56 Cal.App.3d 29 (Cal. App. 1st Dist. 1976).

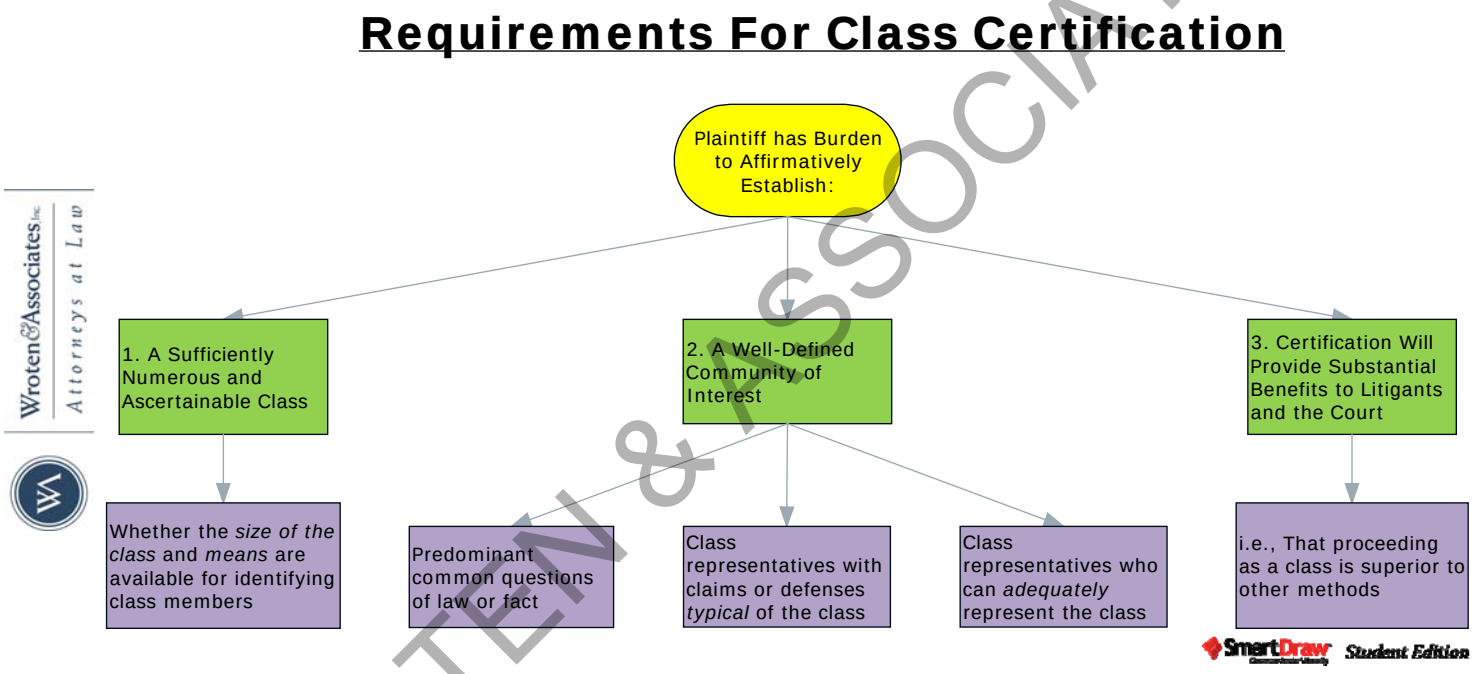
I. Requirements For Certification

In California, a class action may be certified only if the moving party satisfies its burden to affirmatively establish (a) "a sufficiently numerous, ascertainable class," (b) "a well-defined community of interest," and (c) "that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." *Fireside Bank v. Super. Ct*., 40 Cal. 4th 1069, 1089 (2007); see also Civil Code of Procedure § 382; *City of San Jose v. Super. Ct*., 12 Cal. 3d 447, 459 (1974). In turn, "[t]he 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 326 (2004) (citing *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1106-10 (2003)).

California courts have made clear that "[t]he party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest

among class members." *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 143 (Cal.App. 2d Dist. 2006) (quoting *Sav-On Drug Stores*, 34 Cal. 4th at 326) (citations omitted).

In a hearing on class certification, "when the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." *Bartold v. Glendale Federal Bank*, 81 Cal. App. 4th 816, 829 (2000); see also *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1092 (2007), stating that "in determining whether the criteria of Code of Civil Procedure §382 are met[,]" the court is not precluded from considerations "that may overlap the case's merits"; *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1345-46 (2009) (finding "declarations by purported class members went to issues relevant to class certification"); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 656 (1993).



A. Ascertainable Class

Under California law, a class must be defined in a manner that is ascertainable; in other words, whether the size of the class and means are available for identifying class members. *Reyes v. San Diego County Bd. Of Supervisors*, 196 Cal.App. 3d 1263 (Cal.App. 3d 4th Dist. 1987), quoting *Vasquez v. Superior Court*, 4 cal. 3d 800 (1971). See Also *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 835 (1948), holding that a class action could not be pursued because no class could be ascertained.

Class certification is not warranted where the class definition was vague and overbroad as to size and identification of purported class members. *Global Minerals & Metals Corp. v. Super. Ct.*, 113 Cal.App. 4th 836, 860 (Cal.App. 4th Dist. 2003); accord *Am. Suzuki Motor Corp. v. Super. Ct.*, 37 Cal.App. 4th 1291, 1294-95 (Cal.App. 2nd Dist. 1995) (prerequisite to maintenance of

class action is a class whose members have a plausible cause of action against defendant; deciding element of ascertainability).

B. Community Of Interest

To prove a community of interest, "[i]t is the burden of the proponent of class certification to show, with substantial evidence, that common questions of law and fact predominate over questions affecting individual members." *Capitol People First v. Dep't of Developmental Services*, 155 Cal.App. 4th 676, 689 (Cal.App. 1st Dist. 2007). In itself, "[t]he 'community of interest' requirement embodies three factors:

(1) Predominant common questions of law or fact

If a class will splinter into individual trials, common questions do not predominate and litigation of the action in the class format is inappropriate. *Hicks v. Kaufman and Broad Home Corp*., 89 Cal.App. 4th 908 (Cal.App. 2d Dist. 2001); see also *Akkerman v. Mecta Corp.*, 152 Cal.App. 4th 1094, 1102 (Cal.App. 2nd Dist. 2007).

The court in *Paxil Litigation* 212 F.R.D. 539, 551 (CD Cal. 2003) held that individual questions of fact regarding causation…subvert any benefits to be gained through a class action proceeding…not only do individual physiologies affect the causation issues, but so too do the underlying illnesses and medical history of each individual plaintiff. Likewise, in *Evans v. Lasco Bathware, Inc*. 2009 DJDAR 15846, class certification which was denied based on finding that individual damage issues predominate is not abuse of discretion despite offered formula estimating class wide damages. See, however, *Hicks v. Kaufman and Broad Home Corporation*, supra, (judgment denying class certification was reversed and remanded; a class will be certified even if the members must individually prove their damages. In order to determine whether common question of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged).

Common questions are predominant when they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 810 (1971. Despite the existence of some common questions of law or fact, a class action may not be maintained if individual issues predominate because inquiry into each member's right to recover depends on separate facts applicable only to that individual. *See Lockheed Martin Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1106-10 (2003; see also *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 460, 463 (1974); *Gerhard v. Stephens*, 68 Cal. 2d 864, 913 (1968).

(2) Class representatives with claims or defenses typical of the class ("Typicality")

If Plaintiff does not have an individual cause of action against each Defendant, he "fail[s] to satisfy the class action "typical' requirement. *Hart v. City of Alameda* 76 Cal.App. 4th 766, 775 (Cal.App. 4th Dist. 1999).

A class representative Plaintiff does not have claims "typical" of absent class members' claims if the class representative lacks standing to bring the asserted claims against the Defendants sued.

Baltimore Football Club, Inc. v. Super. Ct., 171 Cal.App. 3d 352, 359 (Cal.App. 3d Dist. 1985); accord *Hart v. County of Alameda*, 76 Cal.App. 4th 766, 775-76 (Cal.App. 4th Dist. 1999).

In *Sweet v. Pfizer*, 232 F.R.D. 360, 368 (CD Cal 2005), the court held that typicality fails where proof of causation depended on individual factors "such as the nature of each Plaintiff's exposure and personal susceptibility and plaintiffs had divergent medical histories."

Claims Against Multiple Providers: The plaintiff brought a class action against 25 counties, purportedly on behalf of all people who deposited jury fees with the counties, and alleged that the class was entitled to a refund of those deposits. The plaintiff alleged that he, or his assignors, had deposited jury fees in four of the 25 counties. The appellate court held that the plaintiff did not have standing to assert claims against the counties in which he or his assignors did not deposit jury fees. As the court explained,

> "When a class action is brought against multiple defendants, the 'action may only be maintained against defendants as to whom the class representative has a cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met. If the plaintiff class representative only has a personal cause of action against one defendant and never had any claim of any kind against the remaining defendants, his claim is not typical of the class.... Th[is] ... requirement is ... not fulfilled merely because the plaintiffs allege that they suffered injuries similar to those of other parties at the hands of other defendants." *Hart v. County of Alameda*, 76 Cal. App. 4th 766 (1999).

(3) Class representatives who can adequately represent the class. The court will examine the class representative's ability to pursue the class members' claims and specifically whether any conflict may develop regarding settlement with the class representative only. The Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997), stated that this "adequacy inquiry" is necessary to "uncover conflicts of interest between named parties and the class they seek to represent…" See also *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 326 (2004) (citing *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1106-10 (2003)); *Reyes v. San Diego County Bd. Of Supervisors*, 196 Cal.App.3d 1263 (1987).

C. Class Action Is Superior Method

When an action could proceed more efficiently as a non-class representative action, a class action will not be superior method for litigating a claim. The party seeking class certification bears the burden to prove this element. The Court in *Blue Chip Stamps v. Super. Ct.*, 18 Cal. 3d 381, 389 (1976), described that "the trial court must consider both the benefits which a class action would yield and any unfairness to either absent class members or to the defendant which might result from litigation of the underlying claims through aggregate procedures rather than through separate trials. This inquiry requires a court to judge the consequences not only of a common trial of questions of liability [citations omitted] but also of the use of techniques like fluid recovery which might be necessary if the benefits of class litigation are to be realized."

II. Issues In The Long Term Care Setting

Although it is often stated that the "merits" of Plaintiffs' claims will not be considered in the class certification decision, it is more accurate to state that while the merits will not be weighed or decided, courts must consider the elements of the substantive claims for relief and the nature of the proof of those claims in determining whether the certification criteria can be met. See *Washington Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 926-27 (2001), stating "a trial court cannot reach an informed decision on predominance and manageability" without first "determining the applicable law." See also *Quacchia v. DaimlerChrysler Corp*., 122 Cal. App. 4th 1442, 1455 (2004), holding that in denying class certification for lack of predominance, trial court properly considered the "nature of the evidence" required to prove Plaintiffs' claims and doing so did not improperly "weigh" the claims' merits; *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000), the California Supreme Court held that lower courts improperly considered and prejudged the legal merits of a cause of action and, even after assuming it was meritorious, made erroneous legal assumptions in weighing the potential benefits and burdens. The case was remanded to determine if class treatment was proper. Thus, the governing law defines the parameters of the certification or decertification inquiry. *Walsh*, 148 Cal. App. 4th at 1453-56. Class actions serve only as a means to enforce the substantive law; they do "not serve to enlarge substantive rights or remedies." *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1014, 1018 (2005).

Common questions predominate when they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 810 (1971). See Rules of Court, Rule 3.764(a)(3)-(4). *Grogan-Beall v. Ferdinand Roten Galleries, Inc.*, 133 Cal. App. 3d 969, 975-77 (1982). Despite the existence of some common questions of law or fact, a class action may not be maintained if individual issues predominate because inquiry into each member's right to recover depends on separate facts applicable only to that individual. See *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1106-10 (2003); *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 460, 463 (1974).

Defeating Typicality

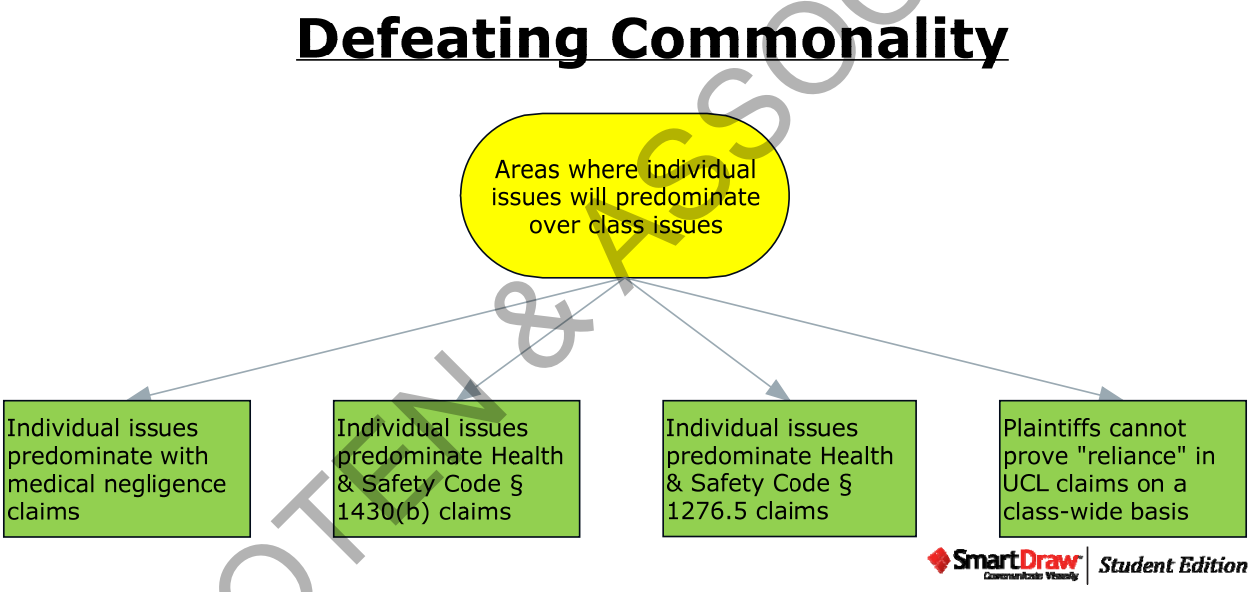
If the Plaintiff class representative only has a personal cause of action against one Defendant and never had any claim of any kind against the remaining Defendants, his claim is not typical of the class. See *Hart v. County of Alameda*, 76 Cal. App. 4th 766, 775-76 (1999). A class representative Plaintiff does not have claims "typical" of absent class members' claims if the class representative lacks standing to bring the asserted claims against the Defendants sued. *Baltimore Football Club, Inc. v. Super. Ct.*, 171 Cal. App. 3d 352, 359 (1985).

UCL Claims: *Tobacco II* (*infra*) holds that to assert a post-Prop. 64 UCL or FAL claim, the class representatives must have **standing** through loss of money or property, and a showing that the loss was "**as a result of**" the alleged unfair competition. See *In Re Tobacco Cases II*, 46 Cal. 4th 298, 325 (2009). To meet that causation requirement, the class representatives must show "actual reliance." *Id.* at 326-27. The same "actual reliance" showing is required to meet the CLRA's standing requirement. See *Meyer v. Sprint Spectrum, L.P.*, 45 Cal. 4th 634, 641 (2009).

Health & Safety Code § 1430(b): When one examines the language of Section 1430(b) and the statutory structure, as well as its legislative history, it is evident that Section 1430(b) provides a private right of action for violation of individual rights. The elements of proof include the standard elements applicable to any statutory tort or civil rights action: (1) duty (as defined by legal right); (2) breach of that duty; (3) damage to Plaintiff; and (4) causation. See *Fitzhugh v. Granada Healthcare and Rehab. Ctr., LLC*, 150 Cal. App. 4th 469, 475-76 (2007) (issues to be litigated under Section 1430(b) include whether violations of patients' bill of rights *caused* decedent's injuries); *Trujillo v. First American Registry, Inc.*, 157 Cal. App. 4th 628, 637-38 (2007), finding that to sue under UCL, Plaintiff must show injury-in-fact rejecting the argument that conduct violating the law was "inherently harmful," instead, actual damages are required to state a cause of action.

Defeating Commonality

When individual issues predominate over common class issues, grounds do not exist to certify the class. *Edythe Keller v. Tuesday Morning* 2009 DJDAR 17056.



Individual Issues Predominate Within Medical Negligence Claims

The court in *Rose v. Medtronics*, 107 Cal. App. 3d 150 (1980) dismissed the class action allegations, holding that each member of the class would have to litigate numerous substantial issues affecting his or her individual right to recover because each pacemaker patient had different damages and because their claims were governed by different state laws, therefore there was no community of interest as to common questions of law and fact.

Likewise, in *Brown v. The Regents of the University of California*, 151 Cal.App.3d 982 (1984), the court affirmed an order that sustained the demurrer by Defendants, University Regents and hospital, because Plaintiffs failed to establish a sufficient community of interest as to their causes of action to establish a class action and because individual issues substantially predominated

over common questions. The court held that the class members' ability to recover damages resulting from treatment at a University hospital depended on facts specific to each individual.

However, see *Bomersheim v. LA Gay & Lesbian Center,* 184 Cal. App. 4th 1471 (2010), holding that causation issues in personal injury suits do not defeat class certification where circumstances raise a class wide presumption of causation. The Court of Appeal presumed causation as to entire class because all class members came to Defendants seeking treatment for syphilis and were all given the same medication, and all sought re-treatment. The Court reasoned that the initial mis-treatment caused members to seek re-treatment and this inference could be made on a class-wide basis.

Furthermore, it is clear that certain types of damages, such as emotional distress and mental anguish, require individual determinations and thus, no community of interest can exist. *Altman v. Manhattan Savings Bank*, 83 Cal. App. 3d 761 (2d Dist. 1978).

Individual Issues Predominate § 1430(b) Claims

When the elements of a Section 1430(b) claim are properly considered, Plaintiffs' claims fail to meet the requirement that common issues of law and fact predominate. First, Section 1430(b)'s statutory scheme establishes the individualized inquiry necessary to establish a licensee's legal responsibility and any Plaintiff's right to recovery. Second, a claim alleging failure to satisfy Health & Safety Code § 1276.5's requirements for staffing hours per patient day raises predominantly individual issues to establish a facility's liability and a class member's right to relief. Third, a claim alleging failure to employ an adequate number of personnel under Health & Safety Code § 1599.1(a) requires facility-specific, patient-specific and time-specific analysis. Finally, when Plaintiffs seek damages and injunctive relief commonality maybe defeated.

For example, in *Walsh v. IKON Office Solutions, Inc*. (*supra*), the First Appellate District affirmed an order decertifying a class where common issues did not predominate because the evidence showed that adjudication of Plaintiffs' claims and Defendant's affirmative defenses would require "each individual subclass member . . . to establish entitlement to damages (liability) as well as the amount of damages." *Walsh v. IKON Office Solutions, Inc*., 148 Cal. App. 4th 1440, 1456; see also *Grogan-Beall*, 133 Cal. App. 3d 969, 975-77 (1982), affirming decertification order based on lack of commonality where each class member "must litigate a number of substantial fact questions peculiar to his right of recovery" on claim for violation of consumer protection statute; *In re Wells Fargo Home Mortg*., --- F.3d --- , 2009 WL 1927711, at *1 (9th Cir. July 7, 2009), reversing district court's class order certifying California wage and hour claims which relied on employer's internal policy regarding employees' exempt status "to the near exclusion of other relevant factors touching on predominance".

However, see *Medrazo v. Honda of North Hollywood* 2008 166 Cal. App. 4th 89 (2008) where the court reversed an order denying class certification and directing the class be certified. The court allowed certification of a class based on allegations of non-compliance with a state regulatory statute under the Vehicle Code.

A Section 1430(b) Claim Vindicates Individual Residents' Rights And Turns On Individual Issues

The statutory structure of Section 1430 confirms that Section 1430(b) claims are reserved for litigation to vindicate individual residents' rights and require individualized proof, as contrasted with § 1430(a), which provides for the Attorney General or a private Plaintiff to sue on behalf of the general public to enforce compliance with the law generally. See *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 143 & n.3 (1991) discussing two alternative forms of remedy in Section 1430(a) versus 1430(b). The distinction between these two sections is critical, and it directly impacts the suitability of the case for class treatment: with Section 1430(a), a Plaintiff may sue on behalf of the general public to enforce violations of the law; under Section 1430(b), a Plaintiff sues to enforce his or her own individual rights. Proof of a Section 1430(b) claim necessarily requires proof of an individual's right to relief, which requires individualized proof of harm to the "rights of the resident or patient" resulting from alleged understaffing.

Other parts of the legislation confirm the fact-specific, facility-specific, patient-specific, time-specific nature of a Section 1430(b) inquiry. For example, the statutory scheme of regulatory enforcement for violations of these laws makes clear the precise inquiry needed as to each particular alleged violation. Under Health & Safety Code § 1424(a):

"In determining the amount of the civil penalty, all relevant facts shall be considered, including, but not limited to the following:

1. The probability and severity of the risk that the violation presents to the patient's or resident's mental and physical condition.
2. The patient's or resident's medical condition.
3. The patient's or resident's mental condition and his or her history of mental disability or disorder.
4. The good faith efforts exercised by the facility to prevent the violation from occurring.
5. The licensee's history of compliance with regulations."

Health & Safety Code § 1424(a) under § 1430(b)

Thus, each resident's or patient's claim will require a fact-specific inquiry of the adequacy of staffing as to that individual, and a fact-specific inquiry as to any defenses that the particular facility might have as to that particular claim. See *Walsh*, 148 Cal. App. 4th at 1450, stating "The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues."

As § 1424(a) makes clear, the statutory scheme envisions not only detailed proof of violations, but it also permits facilities to obtain relief from non-compliance based on "good faith," and other statute defenses to licensees. Section 1424(d) & (e), setting forth "reasonable licensee defense" as so termed in *California Association of Healthcare Facilities v. Department of Health Services*, 16 Cal. 4th 282, 288. See also *CAHF*, 16 Cal. 4th at 302, holding that the licensee has

the "opportunity to excuse or justify the violation by evidence that it or its agents acted reasonably in spite of the violation of the regulation."

Thus, the very statutory scheme upon which class plaintiffs often rely in asserting a Section 1430(b) class action claim establishes the individualized inquiry necessary to establish the licensee's legal responsibility. See also Health & Safety Code § 1424.1(a)(2), stating no citation shall issue from a violation of the regulations if violation was not willful and resulted in no actual harm to patient or guest, if other conditions met; *Id*. Section 1424(b), either the Department or the facility can also introduce facts not listed on the citation to support or challenge the amount of the penalty; *Id*. (See § 1290, considering good faith, Title 22 § 72711(2), considering mitigating factors.)

Health & Safety Code § 1276.5 Raises Predominantly Individual Issues

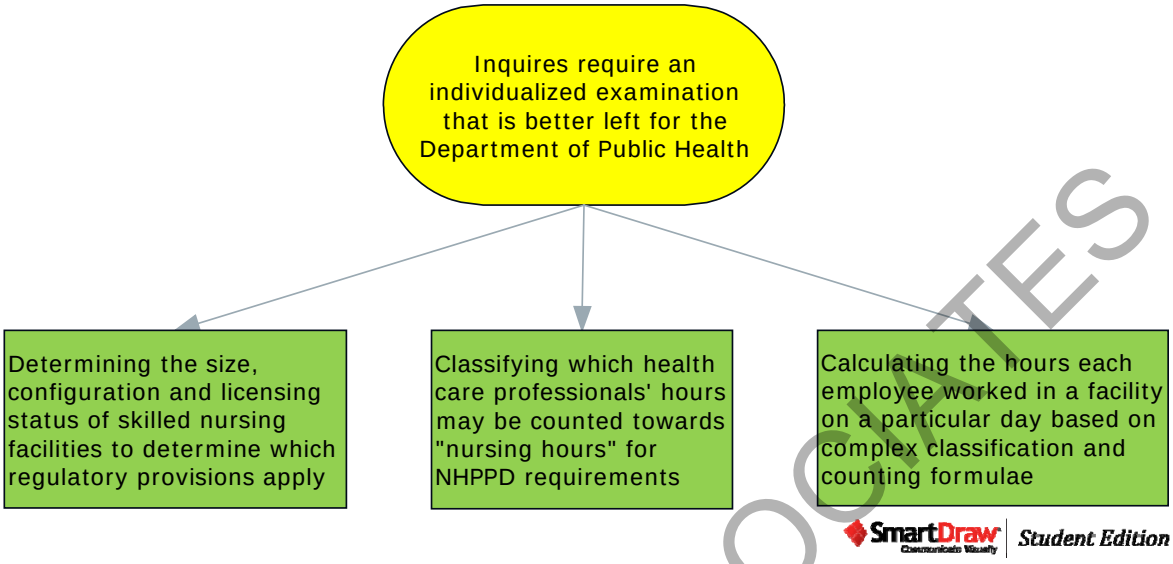
A section 1430(b) claim alleged on the theory that Health & Safety Code § 1276.5 imposes a 3.2 PPD staffing requirement on SNFs. Because of the intricate and complex regulatory requirements set forth in § 1276.5 (and the regulations promulgated thereunder), litigation of such claims requires adjudication of numerous and individualized issues. Each class Plaintiff will need to allege that a Defendant facility's staffing fell below 3.2 NHPPD on certain days during their admission, thus necessarily requiring individual proof of admission dates and NHPPD's.

The court in *Alvarado v. Selma Convalescent Hospital*, 153 Cal. App. 4th 1292 and 1304-06 made clear that determining compliance with § 1276.5 with respect to residents' class claims would require the trial court adjudicate complex health care matters concerning staffing levels at SNFs such as determining the size, configuration and licensing status of SNFs to determine which regulatory provisions apply, classifying which health care professionals' hours may be counted toward "nursing hours" for NHPPD requirements, calculating the hours each such employee worked in a facility on a particular day based on complex classification and counting formulae. Each of these inquiries would require an individualized examination, an examination that was better left to the Department of Public Health than the courts.

In addition, the relief sought by plaintiffs on a Section 1430(b) claim would impose an onerous, if not impossible burden on the trial court. When plaintiffs seek an injunction ordering defendants to cease alleged unlawful activity and to comply with California law going forward, including staffing and other regulatory requirements. As the *Alvarado* court aptly observed "[T]here are numerous variables for determining whether a particular skilled nursing or intermediate care facility is providing 3.2 nursing hours per patient day. Thus, granting the requested injunctive relief would place a tremendous burden on the trial court to undertake a class-wide regulatory function and manage the long-term monitoring process to ensure compliance with [§ 1276.5(a)]."

Alvarado, 153 Cal. App. 4th at 1306. Enforcing compliance would require the trial court to monitor injunctions, and micro-manage compliance with a staggering array of regulatory requirements.

Determination Of Compliance With Health & Safety Code § 1276.5



A Section 1599.1(a) Claim Requires Individualized Analysis

Section 1599.1(a), which is a component of the Skilled Nursing and Intermediate Care Facility Patients' Bill of Rights (Health & Safety Code § 1599, et seq.), provides policies and procedures to "ensure that each patient admitted to the facility has the following rights" including:

> (a) The facility shall employ an adequate number of qualified personnel to carry out all of the functions of the facility.

Thus, the right to "adequate personnel," and not just nursing staff, is guaranteed to each individual patient. Although no published California case has adjudicated what is required to establish an "adequate number of qualified personnel," the nature of the evidence required to prove "adequacy" shows that establishing such a claim turns almost exclusively on individualized issues of proof.

In short, aside from the question of damages, to establish their right to recovery and a defendant's liability, each Plaintiff and putative class member must prove that they were deprived of "adequate" care. That determination can only be made by looking at the precise circumstances existing at an individual facility at the time of each plaintiffs' residence.

"Adequacy" of staffing is a complicated, multi-factor analysis—looking at acuity, staff mix, facility size, timing and multiple other factors. And, even proof of non-compliance with California law (*e.g.*, the 3.2 NHPPD purportedly required under Section 1276.5, which would have to be shown as to a particular facility while Plaintiff was a resident) would be insufficient to establish inadequate staffing because compliance with law does not equate with adequate staffing.

While no California case has addressed commonality as to claims under Sections 1276.5 or 1599.1, several analogous California cases suggest that certification of a class action is improper where the claim at issue requires individualized proof of a right to recovery. See, *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1426-28 (2006), class certification properly denied where particularized individual liability determinations required; *Bennett v. Regents of University of Cal.*, 133 Cal. App. 4th 347, 358 (2005), holding class certification is generally inappropriate when each member of the proposed class must individually litigate substantial questions to establish their right to recovery; *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 756 (2003), holding individual issues predominate where each individual class member must prove right to recovery; *Frieman v. San Rafael Rock Quarry, Inc.*, 116 Cal. App. 4th 29, 40-41 (2004), holding that no class can exist where individual proof was required.

Moreover, the complex interaction between the alleged understaffing and residents' particular medical circumstances requires individualized analysis of causation and damages. See *Kohn v. Am. Hous. Found., Inc.*, 178 F.R.D. 536, 542-44 (D. Colo. 1998) rejecting certification of class of nursing home patients on their claim of alleged inadequate nursing hours. The *Kohn* court held that "Certification on the sole issue of liability may well have merit in certain cases, particularly where a single event such as a plane crash is involved. Where the issue is one of [the] standard of long-term care of patients who are concededly in differing circumstances, such an approach is problematic and inconsistent with established authorities." *Id.* at 543. Because, as to a plaintiffs' Sections 1276.5 and 1599.1 theories of understaffing, each class member is a "distinguishable being," with their own care needs and circumstances, commonality in proof of alleged violation of their individual rights cannot possibly predominate.

Plaintiffs Cannot Prove "Reliance" In UCL Claims On A Class-Wide Basis

In an attempt to surmount the obstacle posed by the individual nature of providing reliance as to all of their claims, Plaintiffs contend that Defendants' misrepresentations occurred through statutorily-required admission forms, marketing materials, website publications, reports made to the State of California, posted staffing requirements, or other representations made about staffing levels. Plaintiffs often claim that these misrepresentations and reliance may be established by common proof. However, this argument fails both as a matter of fact and as a matter of law.

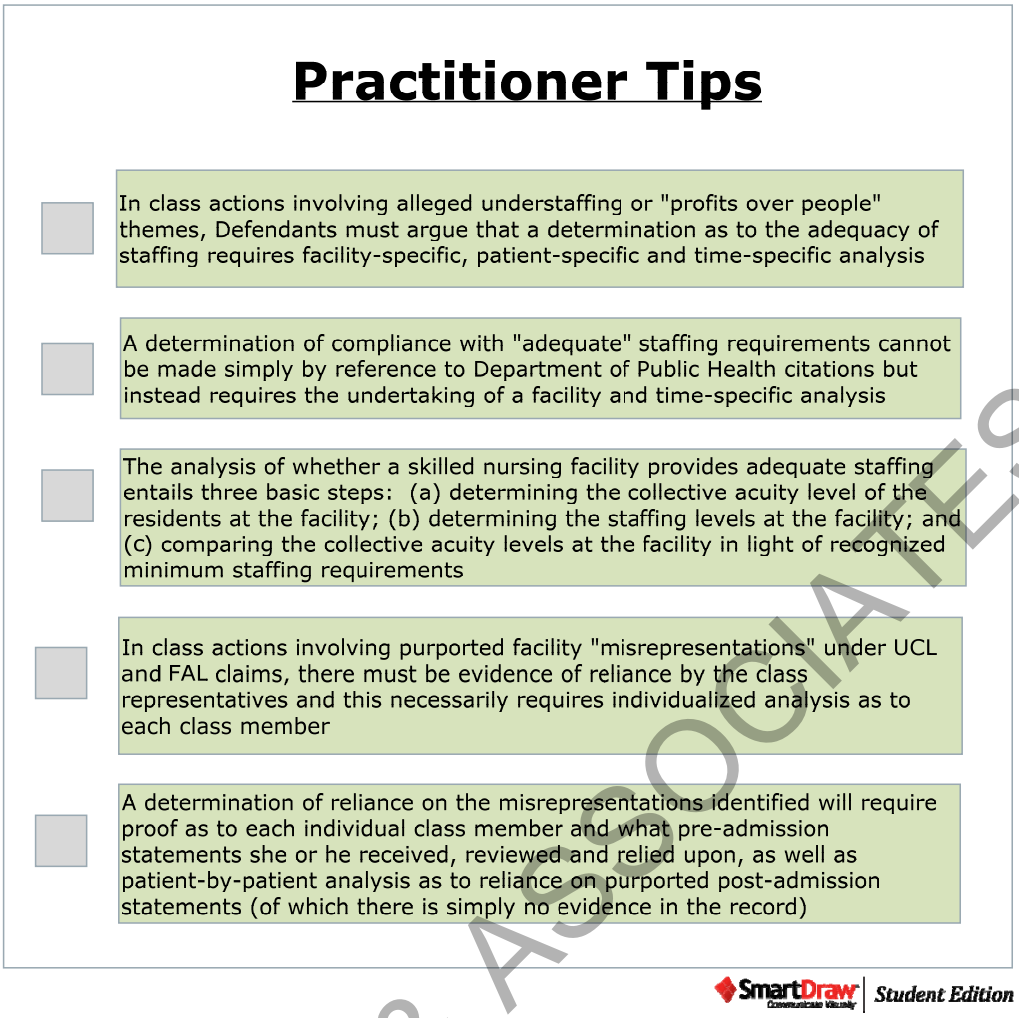
The heart of the reliance element is that it serves as the causal connection between the alleged misrepresentation (Defendants' alleged bad conduct) and Plaintiffs' injury (participating in a transaction). See, e.g., *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 n.2 (2008); see also *Desai v. Deutsche Bank Securities Ltd*, 573 F.3d 931 (9th Cir. 2009), finding reliance establishes the causal connection between alleged conduct and injury, and in a class action, it must either be shown on class-wide basis by presumption or shown individually, which defeats class certification. When disparate facts surrounding alleged misrepresentations and reliance require individual proof of reliance as to each lass member, commonality is precluded. E.g., *Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 651, 660-61, (1988) declining to apply a class-wide presumption of reliance based on Defendants' advertising campaign because Plaintiffs failed to show the same representation was made to each class member, and nine representative Plaintiffs' experiences varied significantly; *Kavruck v. Blue Cross of Cal.*, 108 Cal. App. 4th 773, 786-87 (2003), no inference of reliance when evidence shows that every class member was not provided with same alleged misrepresentation.

Nor can the "materiality" of misrepresentations of adequate staffing be considered a common fact question. The essence of the claim of misrepresentation is a false or untrue statement of material fact (or failure to disclose a material fact when under a duty to do so). E.g., *Caro v. Proctor & Gamble Co.,* 18 Cal. App. 4th 644 and 668; Business & Professions Code § 17500. The nature of the evidence required to establish whether a particular facility violated an individual resident's rights by providing him or her with inadequate staffing and to establish injury-in-fact (as now required), is highly fact-specific; such claims and their elements simply are not subject to common proof.

When the elements of the claim are properly considered, alleged misrepresentations of adequate staffing cannot possibly be considered common fact questions. See *Brown v. Regents of Univ. of Cal*., 151 Cal. App. 3d 982, 989-91 (1984), cause of action for failure to disclose morbidity and mortality statistics from a medical facility was not suitable for class treatment because individual fact issues would predominate over common questions; see also *Quacchia*, 122 Cal. App. 4th at 1449-50, holding claims under UCL and CLRA are not appropriate for class certification where individual fact issues involving 17 different vehicles over 10 model years, predominated.

Plaintiffs cannot overcome the individual nature of the reliance proof in a UCL case by invoking the presumption of reliance sometimes applied in class action. To establish a class-wide presumption of reliance, the representatives must have actually relied on the alleged misrepresentation. See *Tobacco II*, 46 Cal. 4th at 326, and the alleged misrepresentation must be material. *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993). Moreover, an identical alleged misrepresentation must have been made to all class members. *Id*. Plaintiffs generally cannot establish that all class members even read the alleged misrepresentations. Thus, a presumption is not warranted. "[W]hen the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class." *Id*. at 1095. However, such presumption does not extend to "persons who never read or heard the alleged misrepresentations, . . . " *Id*. at 1094. Stated differently, while "actual reliance can be proved on a class-wide basis when each class member has read or heard the same misrepresentations, nothing in [*Vasquez* or *Occidental Land*] so much as hints that a plaintiff may plead a cause of action for deceit without alleging actual reliance." *Id*. at 1095 (citations omitted).

Even if all class members read the informational material, what they thought "adequate" meant, how much weight (if any) they gave to that statement in their decision process, and what level of care they actually received, cannot be determined with class-wide proof. Where "individual issues involving the existence and nature of any material misrepresentation would predominate over common issues," no presumption of reliance may arise. *Caro*, 18 Cal. App. 4th at 668. Because individual proof as to the alleged misrepresentations, actual reliance per *Tobacco II*, causation, and damages is required, common issues simply do not predominate.



III. Appellate Review Of Decision Granting Class Certification

Granting of a Motion for Class Certification is reviewed by way of a Writ of Mandate. *Blue Chip Stamps v. Superior Court* 18 Cal. 3d 381 (1976) . *Danzig v. Jack Grynberg & Assoc*., 161 Cal. App. 3d 1128, 1135 (1985), holding "The proper time to challenge the procedural propriety of a class action is before proceedings have been undertaken on the merits; judicial review, if necessary, is available by extraordinary writ.". The standard of review is abuse of discretion. See Also *Washington Mut. Bank v. Super. Ct*., 24 Cal. 4th 906, 929 (2001); *Blue Chip Stamps v. Super. Ct*., 18 Cal. 3d 381, 387 n.4 (1976); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal. App. 3d 758 (1989).

Abuse Of Discretion Standard

The term judicial discretion implies the absence of arbitrary determination, capricious disposition, or whimsical thinking. *People v. Giminez*, 14 Cal.3d 68, 72 (1975). Judicial discretion requires the exercise of discriminating judgment within the bounds of reason. To exercise judicial discretion, a trial court must know and consider all material facts, and all legal principles essential to an informed, intelligent, and just decision. *In re Cortez*, 6 Cal.3d 78, 85-86 (1971) .

Timing:

Courts of Appeal usually expect the petition within 60 calendar days after the lower court's ruling. *Planned Parenthood Golden Gate v. Superior Court,* 83 CA 4th 347 (2000). If no statutory date exists, the time starts when the lower court's order is entered. *Popelka, Allard, McCowan & Jones v. Super. Ct.,* 107 Cal. App. 3d 496 (1980) .

However, once a class is certified, the class action must continue to meet the class certification requirements. See *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007); see also Code of Civil Procedures § 382; Code of Civil Procedures § 1781. Where "changed circumstances" make continued class action treatment improper, a motion to decertify the class is appropriate. *Green v. Obledo,* 29 Cal. 3d. 126, 148 (1981), Rules of Court, Rule 3.764(a)(3)-(4).

Rehearing

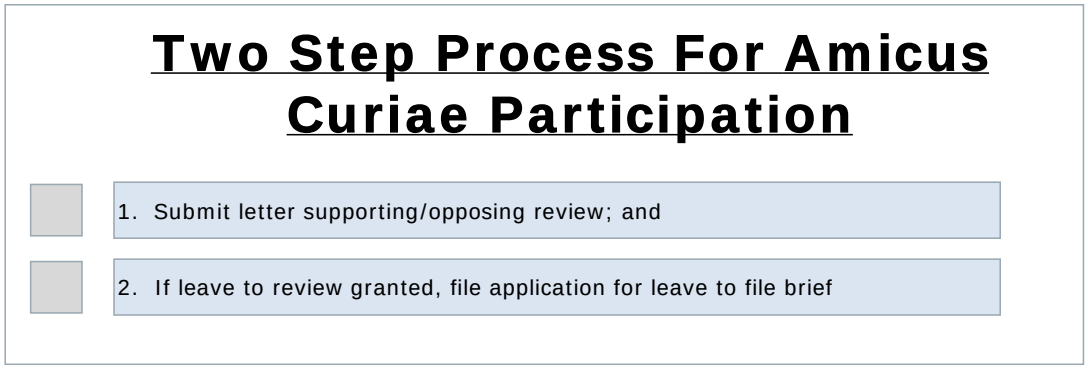
If the Court of Appeal's opinion certifying the class misstates the issues or omits facts, Counsel should seek rehearing in the Court of Appeal. There is no rehearing in the event of a summary denial. Rule of Court, Rule 8.268. Counsel may file a petition for review in the Supreme Court without first seeking rehearing. A Petition for rehearing, however, must be filed within 15 days after the filing of the Court of Appeal's decision. Rules of Court, Rule 8.268(b)(1).

Review By California Supreme Court

After the Court of Appeal's decision becomes final, a party may petition the California Supreme Court for review. The petition for review may be filed after a writ opinion is issued, the petition for rehearing is denied or on summary denial of the writ. Rules of Court, Rule 8.500. The Petition for Review must be filed with the Supreme Court within 10 days after the Court of Appeal's decision becomes final. Rules of Court, Rule 8.500(e)(1). Once the Petition is on file, the Supreme Court has 60 calendar days to decide whether it will grant review. This deadline can be extended by 30 days. If no order is made within this timeframe, the petition is considered denied. Rules of Court, Rule 8.512(b)(1) and (2).

Amicus Curiae

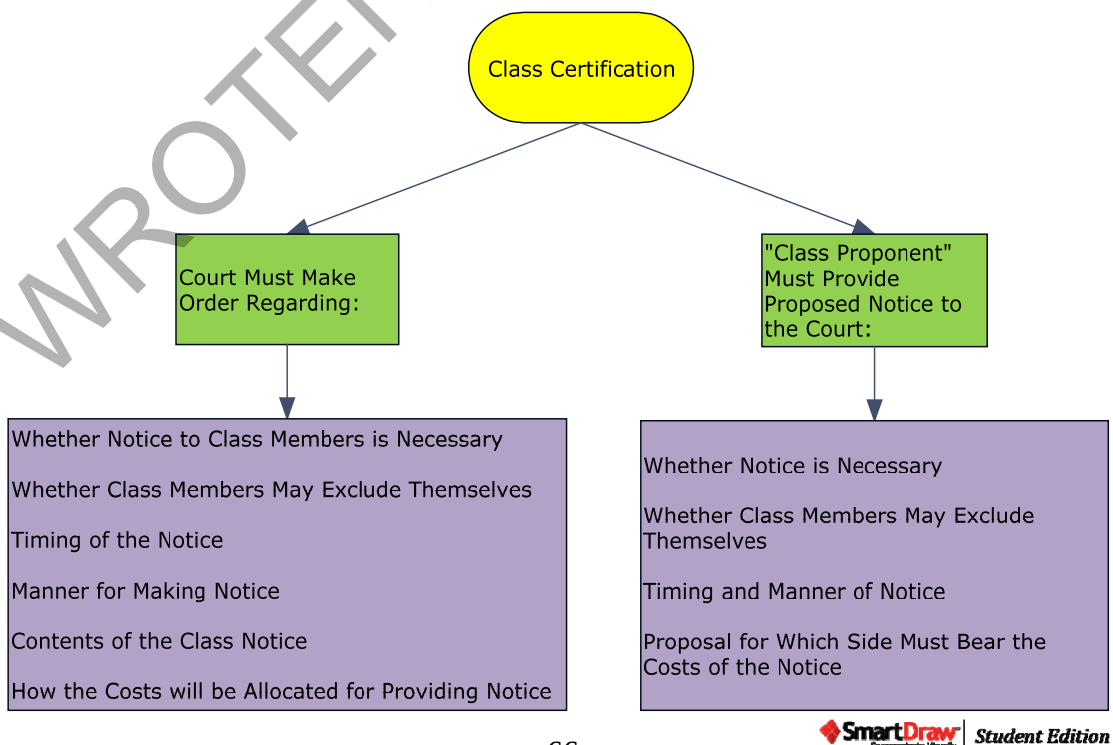
An amicus curiae, literally meaning "friend of the court," is a non-party who volunteers to offer information to encourage the court to hear a writ and assist a court in deciding a matter. These discretionary letters and/or briefs may be solicited from other healthcare providers or those who would benefit from issues being heard. An amicus brief may be filed after obtaining the chief justice's permission. The applicant must file a request and a proposed brief no later than 30 days after all briefs that the parties are entitled to file have been or can no longer be filed. Rules of Court, Rules 8.200 and 8.500(g). Amicus may file a letter with the Supreme Court instead of a brief if desired.



IV. Providing Post-Certification Notice To Class Members

Class actions seeking substantial monetary relief require that putative class members be afforded reasonable notice and an opportunity to request exclusion, or opt-out from participating in the class. *Home Sav. & Loan Assn. v. Super. Ct,*. 42 Cal. App. 3d 1006, 1010 (1974). Rules of Court, Rule 3.766, "Notice to Class Members," provides the parameters for parties to provide this class notice. Either party, according to the Rule, may provide class notice pursuant to a court order if the class has been certified. Rules of Court, Rule 3.766(a). See also Civil Code §1781(d) for CLRA class actions.

Once the class has been certified, the court must make an order regarding whether notice to class members is necessary, whether class members may exclude themselves, timing of the notice, the manner that notice will be made, the contents of the class notice, and how costs will be allocated for providing notice. Rules of Court, Rule 3.766(c). The "class proponent" must then submit a proposed notice to the court and a statement regarding the notice that states whether notice is necessary, whether class members may exclude themselves, the timing and manner of notice, and



a proposal for which side must bear the costs of the notice. Rules of Court, Rule 3.766(b).

Contents

The court maintains a critical supervisory role in the notification of class members regarding the pendency of a class action and is given discretion in determining whether a party proposes a reasonable notice. That role is to assure that the notice given is "objective in tone, neither promoting nor discouraging the assertion of claims." *Gainey, Jr. v. Occidental Land Research,* 186 Cal. App. 3d 1051, 1057-1058 (1986), citing *Zarate v. Younglove*, 86 F.D.R. 80, 101 (C.D. Cal. 1980). Class notice is designed to present the relevant facts of the case in an unbiased communication to allow class members to independently decide whether to remain in the class. *Gainey*, 186 Cal. App. 3d at 1058.

"The contents of the class notice is subject to court approval." Rules of Court, Rule 3.776(d). In "opt-out" cases, where a class member is given the option to exclude themselves from class litigation, the notice must include:

1. A brief explanation of the case, including the basic contentions or denials of the parties;
2. Statement that the court will exclude the member if they fail to respond by a specified date;
3. Procedures for the member to opt out;
4. Statement that if a member does not exclude themselves, they will be bound by the judgment; and
5. Statement that a member may enter an appearance through counsel.

Further, "it is essential that the class members' decision to participate or to withdraw be made on the basis of independent analysis of its own self-interest. It is the responsibility of the Court as a neutral arbiter, and of the attorneys in their adversary capacity, to insure this type of free and unfettered decision. The mechanism selected for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format." *Gainey*, 186 Cal. App. 3d at 1058.

A "fully descriptive notice sent first-class mail to each class member, with an explanation of the right to 'opt-out,' satisfies due process." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Conversely, "communications that misrepresent the status or effect of the pending action, or which may cause confusion, adversely affect the administration of justice." *Howard Gunty Profit Sharing Plan v. Super. Ct*, 88 Cal. App. 4th 572, 581-582 (Cal. App. 2d Dist. 2001) "The court should take care that any communication approved by it be completely neutral in language, merely notifying of the status of the lawsuit, the need for a lead plaintiff, and the consequences of dismissal if no qualified plaintiff steps forward." *Id.* at 582.

Practitioner Tip

Be sure that Plaintiffs' proposed notices include a statement of defendants' denials of any liability of wrongdoing as required by California Rule of Court, rule 3.766(d)(1). The rule specifically provides that the class notice include "the basic contentions or denials of the parties". Plaintiffs' notice may intentionally omit such statement

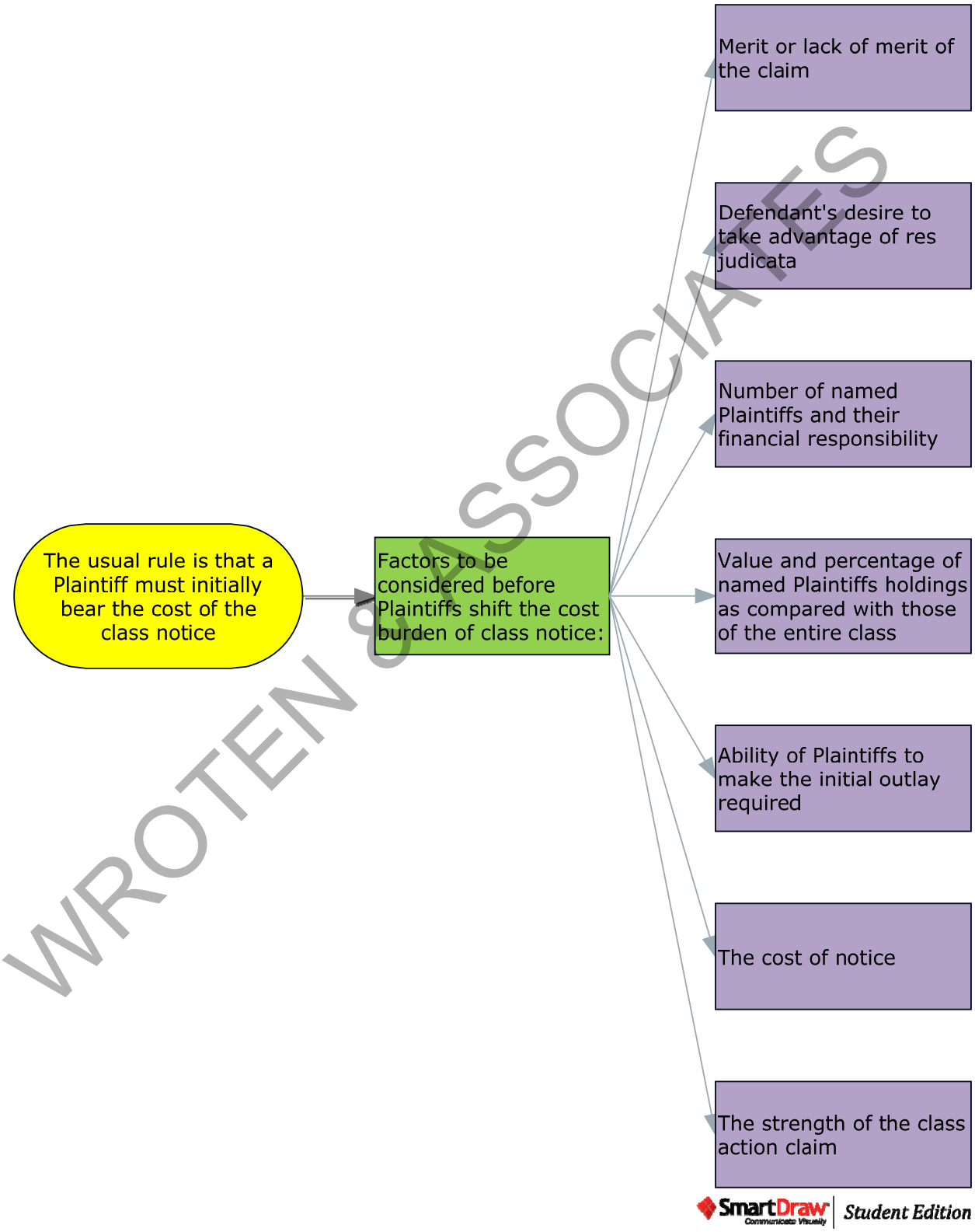
In determining the manner in which the parties give class notice, the court must consider the interests of the class, the type of relief being requested, individual class members stake in the litigation, the cost associated with notifying the class, resources of the parties, any possible prejudice to class members who do not receive notice and "the res judicata effect" on class members. Rules of Court, Rule 3.766(e).

When personal notice of a class action is "unreasonably expensive" or "the stake of individual class members is insubstantial" or "if it appears that all members of the class" cannot be notified personally, the court may order notice by a means "reasonably calculated to apprise the class members" including publication of class notice in newspapers or magazines, through public media such as television, radio, or now more commonly, through websites. Rules of Court, Rule 3.766(f). Where the membership of a class is large and individual damages are minimal, notice by publication alone may be adequate. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 251 (2001). *Cooper v. American Sav. & Loan Assn.*, 55 Cal. App. 3d 274, 285 (1976). The standard is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court, supra*, 50 Cal. App. 3d at 974.

Cost Of Class Notice

As stated above, the court must consider the cost of notifying class members of the litigation when ruling on the manner of giving class notice. Rules of Court, Rule 3.766(e)(4). Class representatives must be prepared, at the outset of a suit, to accept the responsibility of identifying absentee class members and paying for their individual notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-79 (1974). "The usual rule is that a plaintiff must initially bear the cost of notice to the class….the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." Id. at 178-179. Thus, before Plaintiffs shift the cost burden to Defendants, Plaintiffs must make a showing to support such cost shifting. See Id.; see also Rules of Court, Rule 3.766(e)(4)&(5). The determination of cost shifting entails consideration of several relevant factors. The court in *Berland v. Mack*, 48 F.R.D. 121, 131-132 (1969) stated "[We] believe that no rigid rule as to allocation of expense of notice is advisable and that the better course is to decide the issue in each case on the basis of the relevant factors, including the apparent merit or lack of merit in the claim, the Defendant's desire to take advantage of the broader res judicata effect of a class action, the number of named Plaintiffs and their financial responsibility, the value and percentage of their holdings as compared with those of the entire class, the ability of the Plaintiffs to make the initial outlay required, and, of course, the cost of notice." See also *Civil Service Employees Ins. Co. v. Super. Ct,*. 22 Cal. 3d 362, 380, fn. 10 (1978); *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975).

Cost Burden Of Class Notice



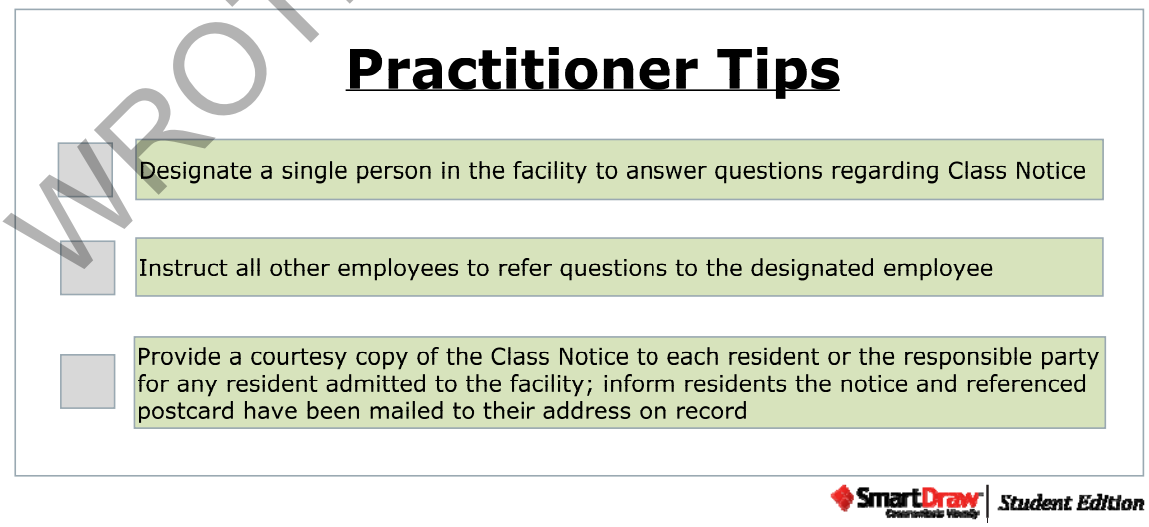
Courts have considered the strength of the class action claim is a factor in deciding which party pays the cost of notice. *Hunt v. Check Recovery System Inc.*, 2007 U.S. Dist. LEXIS 58800. In *Hunt*, the Defendant was required to bear the cost of notice based on a finding of liability.

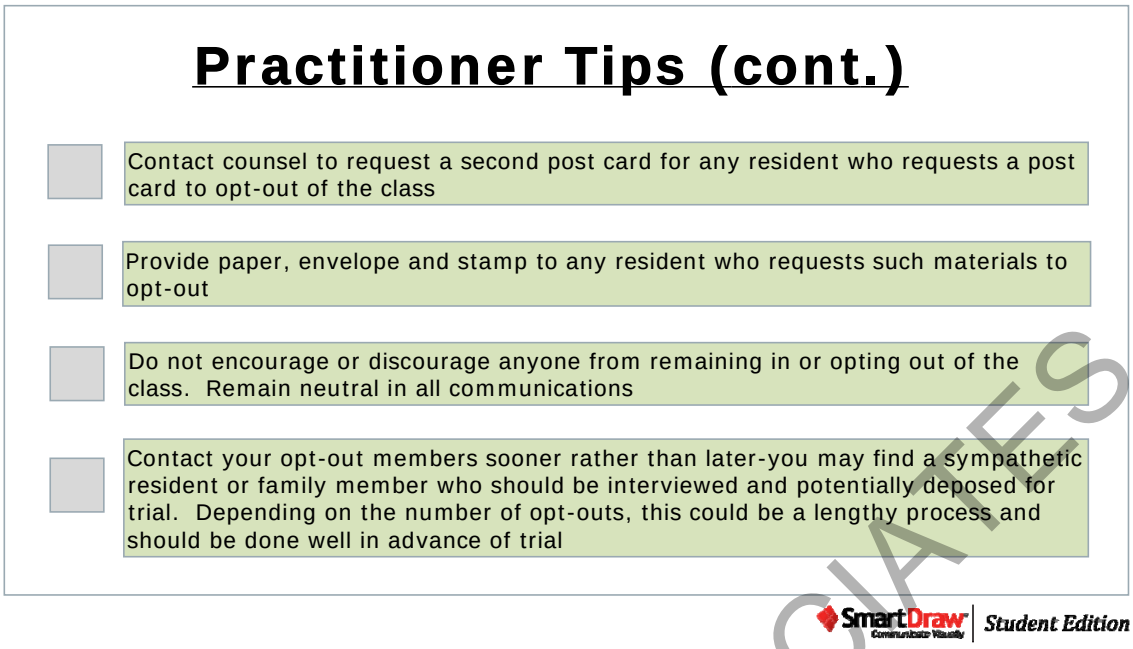
In *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 820 (1971), the court held that the class action procedures prescribed by the CLRA could and should appropriately be utilized by trial courts in all class actions. Decisions since *Vasquez* have confirmed the applicability of the CLRA's procedures in class actions. See also *Anthony v. General Motors Corp*., 33 Cal. App. 3d 699, 703, 707 (1973); *Carlson v. Super. Ct.*, 33 Cal. App. 3d 640, 649, fn. 1, 651 (1973). "Thus, under *Vasquez*, California trial courts clearly possess general authority to impose notice costs on either party, plaintiff or defendant, in a class action." *Civil Service Employees Ins. Co. v. Super. Ct. of San Francisco*, 22 Cal. 3d. 362, 376 (1978).

Opt-In v. Opt-Out

Due process requires that potential members be given notice of a class action and allow them to decide whether they wish to be part of the class or pursue an action individually. Judgments in a class action bind all class members, and as such, courts allow individuals to "opt-out" of a class to allow them to pursue their own action and not be bound by any judgment. In California, members will be included in the class unless they elect to send written notice of opting out of the suit.

In *Hypertouch Inc. v. Super. Ct. of San Mateo County*, 128 Cal. App. 4th 1527 (2005), the California Court of Appeal for the first time ruled that absent class members cannot be required to affirmatively opt-in to a class action. In *Hypertouch*, the Court of Appeal construed Rules of Court, Rule 1856(e) as meaning that absent class members cannot be required to affirmatively "opt-in" to a class action prior to a determination of the Defendant's liability. The court reasoned that an "opt-in" requirement is offensive to California's class action statutes and not required by due process.





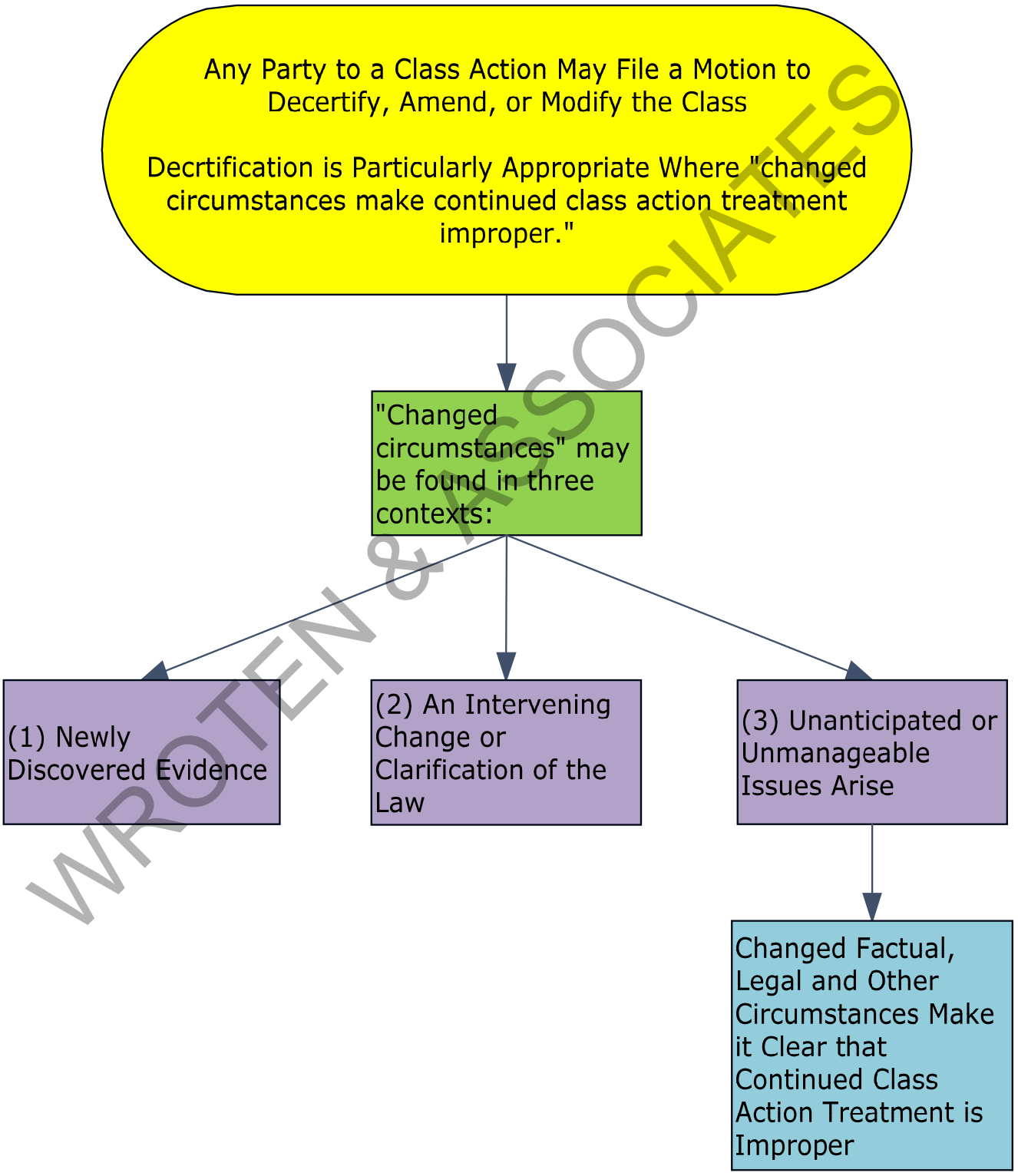
V. Decertification

Where a previously-certified class does not continue to meet the certification requirements, any party to a class action may file a Motion to Decertify, amend, or modify the class. Rule of Court, Rule 3.764(a)(3)-(4). A Motion to Decertify a class is particularly appropriate where "changed circumstances mak[e] continued class action treatment improper." *Green v. Obledo*, 29 Cal. 3d 126, 148 (1981). "Changed circumstances" may be found in three contexts:

1. Newly discovered evidence. *Walsh v. IKON Office Solutions, Inc*., 148 Cal. App. 4th 1440, 1459 (2007);
2. An intervening change or clarification of the law. *In re Tobacco II Cases*, 142 Cal. App. 4th 891, 926 (2006) (affirming trial court's class decertification order based on intervening change in law caused by passage of Proposition 64), reversed on other grounds by *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) or;
3. "If unanticipated or unmanageable individual issues . . . arise." *Sav-On Drug Stores, Inc., v. Super. Ct.*, 34 Cal. 4th 319, 335 (2004).

If one of these three "changed circumstances" is found, the class should be decertified.

DECERTIFICATION



CHAPTER 6

MERIT DISCOVERY

I. E-Discovery

In 2006, the Federal Rules of Civil Procedure were amended with regard to Electronic Discovery. Thereafter, individual states began adopting their own rules based largely upon the Federal system. The amendments to the Federal Rules of Civil Procedure concerning the discovery of "electronically stored information" (herein after "ESI") went into effect on December 1, 2006. The amendments covered five related areas:

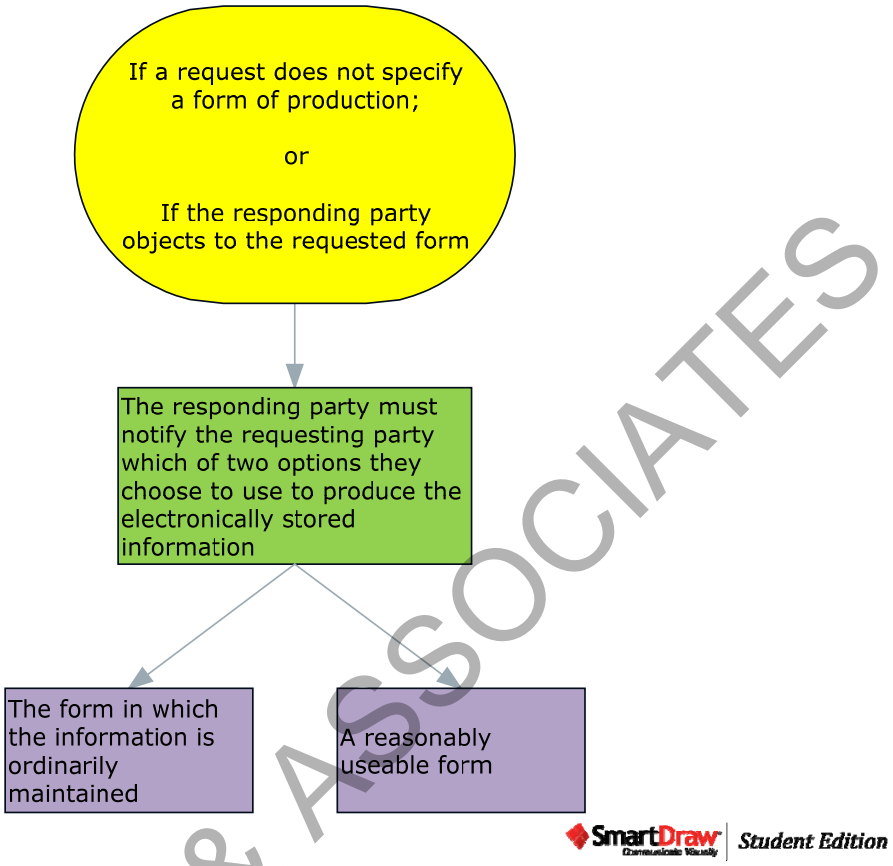
(a) Definition of discoverable material. The phrase "electronically stored information" is introduced to Rules 26(a)(1), 33, and 34, to acknowledge that electronically stored information is discoverable. The expansive phrase is meant to include any type of information that can be stored electronically. It is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and technological developments.

(b) Early attention to issues relating to electronic discovery, including the format of production. Amendments require parties to address electronically stored information early in the discovery process, recognizing that such early attention is required in order to control the scope and expense of electronic discovery and avoid discovery disputes.

(c) Discovery of electronically stored information from sources that are not reasonably accessible. The amendments permit the requesting party to designate the form or forms in which it wants electronically stored information produced. The rule does not *require* the requesting party to choose a form of production since a party may not know what form the producing party uses to maintain its information. If a request does not specify a form of production, or if the responding party objects to the requested form(s), the responding party must notify the requesting party of the form in which they intend to produce the electronically stored material – with the option of producing either

(1) in a form in which the information is ordinarily maintained, or
(2) in a reasonably usable form.

Form In Which Electronically Stored Information Is Produced

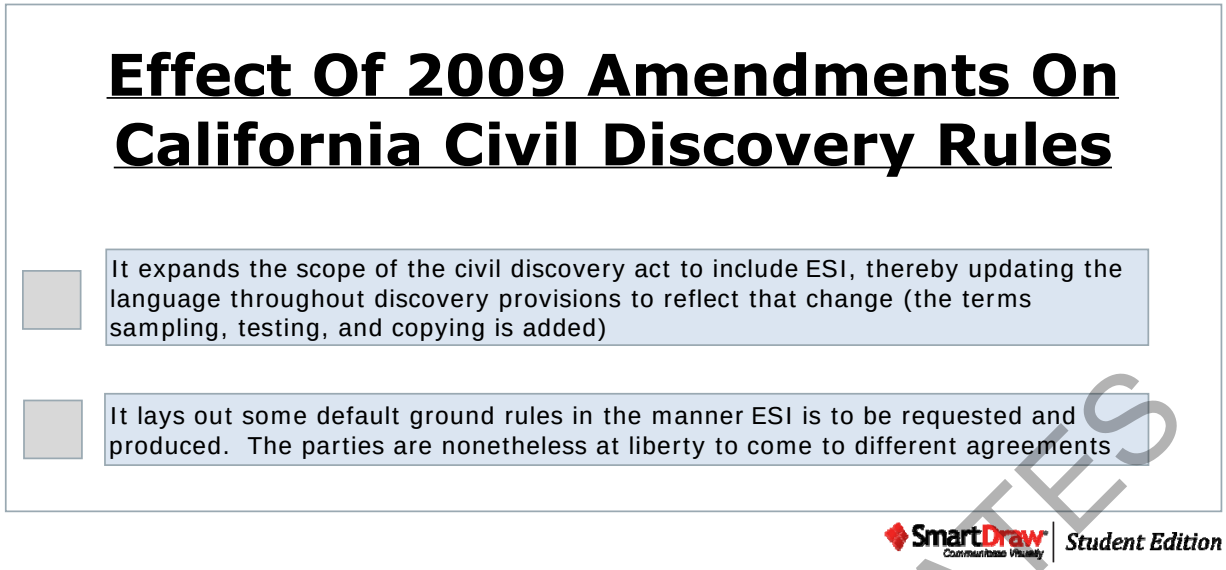


(d) Procedure for asserting claim of privilege/work product protection after production. The addition to Rule 26(b)(5) provides procedure for inadvertent production. The rule provides that once the party seeking to establish the privilege/work product claim notifies the receiving parties of the claim and the grounds for it the receiving parties must return, sequester, or destroy the specified information.

(e) A "safe harbor" limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems. This rule provides that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. It responds to the routine modification, overwriting, and deletion of information that attends the normal use of electronic information systems.

California Electronic Discovery

California's Electronic Discovery Act integrates and provides procedures for the use of ESI into routine California civil discovery. The act was signed into law on June 29, 2009, and was filed with the Secretary of State the same day.



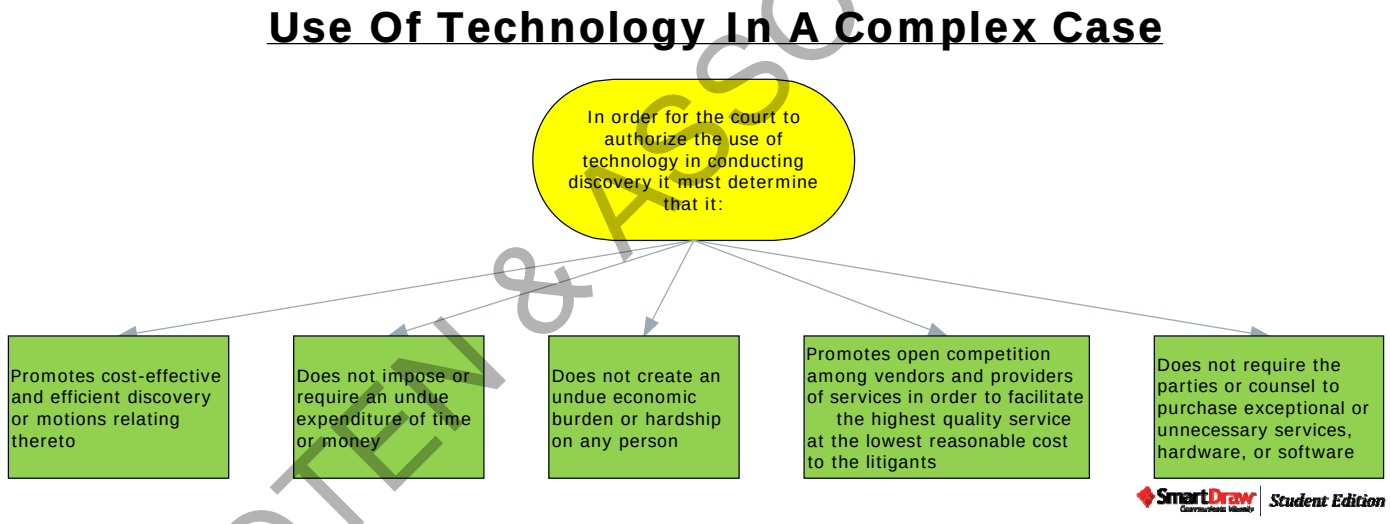
ESI Ground Rules

- If no form of the ESI is specified in the request, it must be produced in manner ordinarily maintained.
- It is not necessary to produce more than one form of ESI.
- A party must identify the source of the ESI if claiming an undue burden. The court may nonetheless order production of the ESI in question so long as good cause is shown by the propounding party.
- If necessary, a subpoenaed person must translate any data compilations into a reasonably useable form at their own reasonable expense.
- Absent exceptional circumstances, no sanctions shall be issued for lost, damaged, altered, or overwritten ESI as a result of routine, good faith operation of a document retention policy.
- When the subpoenaed party notifies the subpoenaing party to a claim of privilege or work product protection, Code of Civil Procedure § 2031.285 applies. The section allows the propounded party to notify any party having received the information, thereby making the claim and providing a basis for it.
- After being notified of the claim of privilege or work product protection, the party who received the information must either return the original and any copies, or may present it to the court under seal for determination of the claim.
- This codified legislation amends Code of Civil Procedure § 2031.010, the statute that governs the scope of discovery, to include ESI. In particular, discovery is now not only limited to traditional inspection of documents, tangible things, and other property, but also "copying, testing or sampling" of ESI. The language is infused into other provisions of the Chapter to reflect this change.

Privileged ESI

Code of Civil Procedure § 2031.285 provides a propounding party of ESI to make a claim of privilege or production for information already produced, entitling the propounding party to have the information and its copies returned. Once the claim has been made, the party having received the information "shall be precluded from using or disclosing the specified information until the claim of privilege is resolved." The section further states that if the receiving party contests the privilege claim, he or she must make a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal. In essence, this section codifies a claw back procedure for the production of ESI.

Both California and Federal law authorize e-Discovery in the class action context, assuming that the action has been designated as complex, coordinated or exceptional, or by stipulation. See Code of Civil Procedure § 2017.710 et seq, "Use of Technology in a Complex Case". In California, on noticed motion, the court may enter an order authorizing the use of technology in conducting discovery.



The court may enter orders prescribing procedures relating to the use of electronic technology in conducting discovery, including orders for service of discovery requests and responses, service and presentation of motions, conduct of discovery in electronic media, and production, storage, and access to information in electronic form.

Computer document storage and electronic communications have fundamentally changed the way that companies must manage, segregate and store business records. To manage litigation risk and minimize litigation costs, all information must be handled at the skilled nursing and/or assisted living facility with the understanding that everything created and distributed in any electronic form is potentially discoverable evidence. As soon as any word stored on any computer at any facility has been exposed to any Plaintiff as a result of an electronic discovery request, a “document” has been produced. All information must be managed, handled and controlled with this in mind.

Retention and destruction policies for electronic records will continue to receive significant attention in the courts. Having a retention policy in place that is consistently enforced is critical for a successful defense. These concerns relating to electronic discovery necessarily dovetail into all of the spoliation issues with which Defense Counsel must be concerned. Please refer to discussion on litigation holds.

Generally, demands for ESI have the potential of imposing a huge costly data retrieval burden on defendants which could ultimately lead to the total, unwitting, destruction of an entire computer system if handled improperly. Processing and producing electronic evidence must include exceedingly careful review, annotation, redaction, bates stamping and the ultimate physical output of the data onto transportable media. Costs and time required to respond to electronic discovery requests may be reduced by use of an evidence management process or software package.

Electronic discovery could also impose an actual, substantial, cost to skilled nursing and/or assisted living facilities depending on the type of data retrieval methods Plaintiffs might undertake to effectuate an electronic discovery request. There may be many computers at any facility; some of them may work off shared software, operating systems and data, some of which may operate in isolation. Any destruction of computer data would be devastating to any skilled nursing and/or assisted living facility. A neutral discovery referee may be able to handle the complex technological aspects of electronic discovery requests and may aide the parties in moving through the technical aspects of the e-Discovery process.

II. Discovery Of Insurance Information

Discovery requests for insurance information early in the case are common and permissible, as insurance plays a role in the analysis of settlement. Plaintiff will be interested in the type of coverage, whether the policy is occurrence-based or claims-made, burning limits or self-consuming and the existence of excess or umbrella policies.

III. Depositions

When depositions of facility staff are noticed in a class action, their deposition preparation must be undertaken with precision, keeping in mind that the testimony of each Administrator and Director of Nursing for every Defendant facility will be compared, contrasted and exploited by Plaintiffs. Therefore, the defense theme must be developed early and must be woven into the preparation of **all** witnesses.

IV. Corporate Compliance

Compliance issues may also be implicated in class action discovery, as Plaintiffs' attempt to reach further and further into the internal workings of the Defendants. The purpose and goal of a corporate compliance service or program is to establish internal controls to monitor provision of care and services in accord with state and federal regulations. Such programs support the effort to reduce fraud and abuse, and to further the mission of providing quality care to patients by providing a confidential arena for investigation, review, and evaluation of concerns. The

program may also establish audit and risk management committees to allow for deliberations on regulatory compliance, quality of care issues, and training programs.

Corporate Compliance Programs

Compliance services are usually developed in accord with the guidelines published via Federal Register Notice by the Office of Inspector General, or the OIG. For example, most operating entities may have a complaint hotline enabled as part of the Compliance Service to accept confidential complaints and/or concern calls from patients, families and employees. Calls made to such a complaint line, or proceedings or writings as a result of this program may be part of the operating entities' overall Quality Assurance program.

The following outlines the progression of federal legislative reform and the development of quality assurance programs which provide the foundation for the modern quality assurance process.

Federal Legislative Reform And Quality Assurance Programs

The Federal Nursing Home Reform Act ("FNHRA", Pub. L. No. 100-203, §§ 4201-4218) was enacted to address the federal government's concerns regarding the distribution of public funds to skilled nursing facilities that participate in the Medicaid program and to improve the quality of care for Medicaid-eligible skilled nursing residents. To accomplish its aim, the FNHRA established requirements geared toward achieving elaborate oversight and inspection of skilled nursing facilities participating in Medicare and Medicaid programs.

In 1987, Congress enacted the Omnibus Budget Reconciliation Act of 1987 ("OBRA 87"), a comprehensive set of skilled nursing reforms, applicable to facilities which have provider agreements under either Medicare or Medicaid. These reforms were phased in gradually, and took full effect on October 1, 1990, and are codified at 42 U.S.C. § 1395i-3 (Medicare) and 42 U.S.C. § 1396r (Medicaid).

The reforms required that each skilled nursing facility which desired Medicare and/or Medicaid funding, provide care for its residents so as to promote maintenance or enhancement of each resident's quality of life. 42 U.S.C. § 1395i-3(b)(1) Specifically, under the reformed rules, a skilled nursing facility must provide services designed to attain or maintain the highest *practicable* physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care which describes the medical, nursing and psychosocial needs of the resident and how these needs will be met. 42 U.S.C. § 1395i-3(b)(2).

In order to facilitate the new FNHRA mandate that every skilled nursing facility which accepts Medicaid or Medicare funding "must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident" (42 U.S.C. § 1395i-3 (b)(1)(A) (emphasis added), the reformed rules also required that a skilled nursing facility maintain a quality assessment and assurance committee to identify and develop plans to correct deficiencies in the quality of care provided to residents. See 42 U.S.C. § 1396r (b)(1)(B); § 1395i-3 (b)(1)(B).

Pursuant to 42 U.S.C. §1396r(b)(1)(B), a skilled nursing facility must:

> Maintain a quality assessment and assurance committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility's staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. A State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph.

In 1990, to further strengthen quality assurance procedures, Congress amended the quality assurance requirements to provide;

> [A] State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph. 42 U.S.C. § 1396r (b)(1)(B) [ii]; § 1395i-3 (b)(1)(B) (ii).

Thereafter, quality assurance committees were officially considered key internal mechanisms which allowed skilled nursing facilities opportunities to deal with quality concerns in a confidential manner and can help them sustain a culture of quality improvement.

Additionally, federal regulations also require skilled nursing facilities to maintain a quality assurance committee, which is required to meet quarterly to identify quality assurance issues, and to develop and implement plans of action to correct identified quality deficiencies. See 42 C.F.R. § 483.75 (o)(1) and (2).

The OIG guidelines were clearly designed in the interest of improving the quality of care in skilled nursing facilities. The OIG guidelines read;

> Compliance programs strengthen Government efforts to prevent and reduce fraud and abuse, as well as further the mission of all nursing facilities to provide quality care to their residents…In short, compliance measures are an investment that advance the goals of the nursing facility, the solvency of the federal health care programs, and the quality of care provided to the nursing home resident…The OIG recognizes that the implementation of a compliance program may not entirely eliminate fraud and abuse from the operations of a nursing facility. However, a sincere effort by the nursing facility to comply with applicable statutes and regulations as well as Government and private payer health care program requirements, through the establishment of a compliance program, significantly reduces the risk of unlawful or improper conduct.

By publishing its guidelines, the OIG believed that the development of compliance programs in skilled nursing facilities would result in a higher level of care, "We believe that the development and issuance of this compliance program guidance for nursing facilities will continue to serve as a positive step toward promoting a higher level of ethical and lawful conduct throughout the

entire health care industry." Please see Federal Register, Vol. 65, No. 52, March 16, 2000, beginning at page 14289.

The OIG guidelines therefore mimic the intent of both state and federal quality assurance programs. First, the FNHRA and the 1987 reforms were enacted to address the federal government's concerns regarding the distribution of public funds to skilled nursing facilities that participated in the Medicaid program and to improve the quality of care for Medicaid-eligible skilled healthcare facility residents.

Second, the FNHRA also mandated that every skilled nursing facility which accepts Medicaid or Medicare funding "must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident" 42 U.S.C. § 1395i-3 (b)(1)(A). To this end, skilled nursing facilities maintain quality assessment and assurance committees to identify and develop plans to correct deficiencies in the quality of care provided to residents. 42 U.S.C. § 1396r (b)(1)(B); § 1395i-3 (b)(1)(B). In 1990, to further strengthen quality assurance procedures, Congress amended the quality assurance requirements to provide; "[a] State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph" 42 U.S.C. § 1396r (b)(1)(B)(ii); § 1395i-3 (b)(1)(B)(ii).

Finally, state laws may also apply to protect information included in a Compliance program from being discovered.

Patient Protection And Affordability Care Act (PPPACA) Compliance and Ethics Program

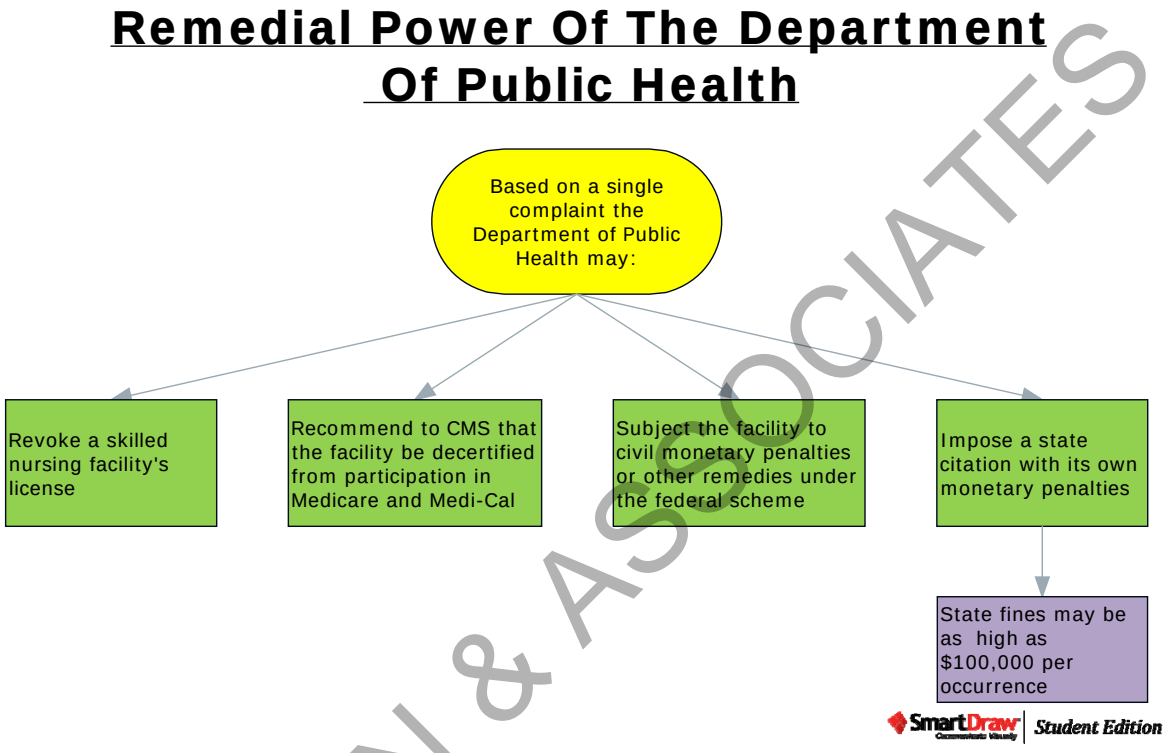
Commencing March 23, 2013 skilled nursing facilities must have implemented a compliance and ethics program that is effective in preventing and detecting criminal, civil and administrative violations and in promoting quality of care. The Secretary of Health and Human Services is tasked with establishing and implementing a quality assurance and performance improvement program no later than December 31, 2011.

V. State Regulatory Agencies

Discovery is also inextricably linked to the State Regulatory scheme applicable to Skilled Nursing Facilities.

The Legislature generally granted the Department the authority to enforce licensure requirements. By so doing, the Legislature has acknowledged that inspections by the Department is the most effective means of ensuring that long-term health care facilities provide the "highest level of care possible." Health & Safety Code § 1422. The Department also wields state enforcement and remedial powers for SNFs' violations. Health & Safety Code §§ 1417.1, 1420. As the result of even one complaint, the Department may revoke a SNF's license, it may recommend to CMS that the facility be decertified from participation in Medicare and Medi-Cal, and it may subject the facility to civil monetary penalties or other remedies under the federal

scheme, or it may impose a state citation with its own monetary penalties. State fines as high as $100,000 per occurrence are authorized. Health & Safety Code § 1424.5(a). The Department has discretion to determine whether or not to issue a citation for any particular regulatory violation that otherwise meets the minimum statutory criteria for issuance of a state citation under Health & Safety Code § 1424. Health & Safety Code § 1423(a). If the Department issues a citation, it has discretion to determine the appropriate remedy, and to fix the amount of any civil monetary penalty based on specified factors. Health & Safety Code §§ 1423, 1424.



The regulatory scheme limits the authority of federal and state governments to impose duplicative remedies, in order to avoid excessive enforcement. Health & Safety Code § 1423(a) states "No violation may result in the issuance of both a citation pursuant to state laws and the recommendation that a federal civil monetary penalty be imposed". Further, the Department's enforcement scheme is replete with unique statutory defenses affecting whether a citation will be issued for a violation, and, if so, in what amount. Health & Safety Code § 1424(a), directing the Department to consider, among other things, "[t]he good faith efforts exercised by the facility to prevent the violation from occurring"; Health & Safety Code § 1424(d) and (e), the Department must dismiss a citation where the SNF "did what might reasonably be expected of [a SNF] acting under similar circumstances".

Subpoenas For Department Of Public Health Statements Of Deficiency And Plans Of Correction

Plaintiffs' attorneys will regularly subpoena files from state regulatory agencies seeking to obtain information about Defendant facilities. After engaging in a meaningful meet and confer with

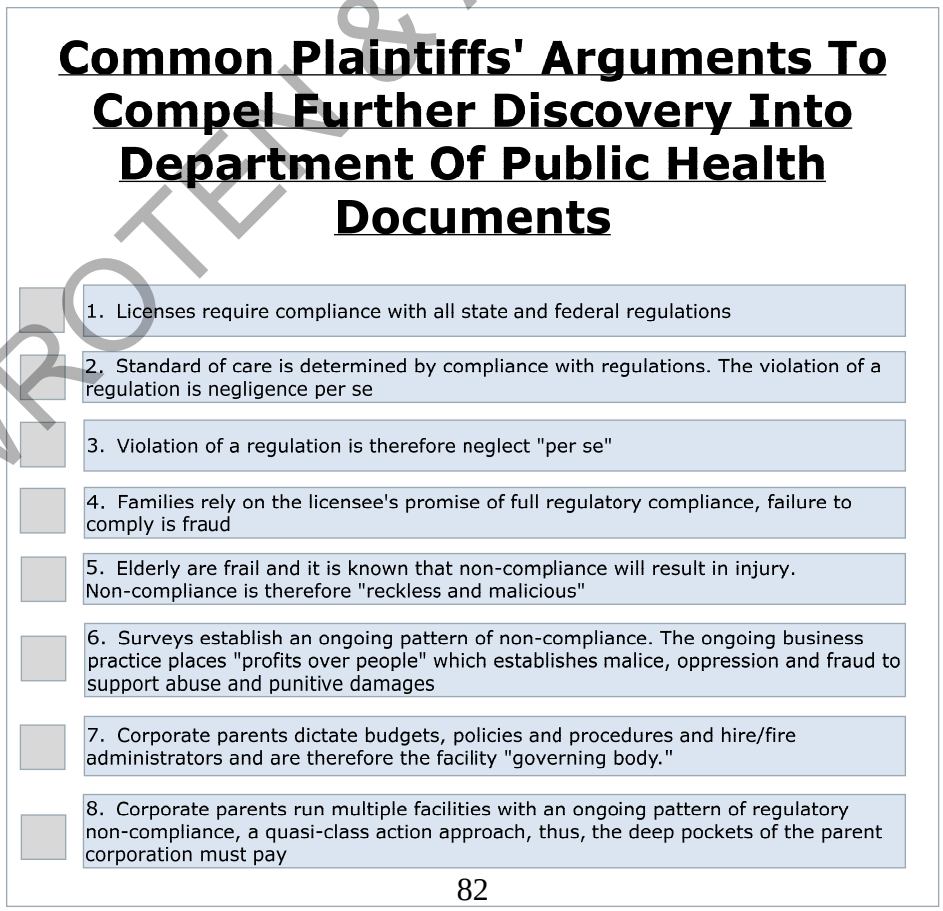
opposing counsel on the issue without any satisfactory resolution, Defense counsel should draft a motion to quash the subpoena. Plaintiff's subpoenas are typically over-inclusive, seeking a vast amount of information simply unrelated to any claim in the instant lawsuit regarding actual care administered to an individual patient or resident.

Likewise state regulatory agencies inadvertently may release documents which should be protected from disclosure due to HIPAA and other protections. Defense Counsel should consider an in-camera review to attempt to redact all privileged, confidential information, before the facility file is handed over to plaintiff's attorney in the event that the motion to quash is denied.

Defendants should adamantly seek the exclusion from introduction into evidence the contents of any Department of Public Health Statements of Deficiencies, Plans of Correction as well as any other Citations or findings. The use of this inadmissible hearsay has a profound effect on the jury as Plaintiffs use these documents to show a pattern or practice of "deficient" services.

Common Plaintiffs' Arguments To Compel Further Discovery Into Department Of Public Health Documents

Plaintiffs will argue that deficiencies noted in surveys, complaint investigations and unusual occurrence and incident reports establish knowledge of ongoing wrongdoing. Accordingly, Plaintiffs will assert this "notice" creates the foundation for a finding of malice, oppression, or fraud which will catapult a simple act of negligence into a multimillion dollar elder abuse verdict. Some of the connections Plaintiffs will attempt to make are:



Objections To Request For Production Of Department Of Public Health Documents

- [ ] 1. Overbroad/Irrelevant: The overwhelming majority of Department of Public Health records plaintiffs seek usually have absolutely no relation to any care the plaintiff received
- [ ] 2. Demands for Department of Public Health records/information constitutes harassment
- [ ] 3. Statements of Deficiency are expressions of opinion and involve the making of a conclusion regarding cause and effect involving the exercise of judgment and discretion
- [ ] 4. A Statement of Deficiency is an unchallengeable statement of opinion by a surveyor from the Department of Public Health regarding a facility's compliance with one or more regulations contained within Code of Regulations Title 22
- [ ] 5. The content of the Statement of Deficiencies are opinions resulting from the application of the surveyor's interpretation of Title 22, the medical records, interviews with facility staff and third parties, as well as intra-departmental consultation
- [ ] 6. Statements of Deficiencies almost always contain the facility's responsive "Plan of Correction," within the document. Such "Plans of Correction" are not admissible as evidence pursuant to Health & Safety Code § 1280 and Code of Federal Regulations § 405.1907, as a matter of law and acceptance of the Plan of Correction by Department of Public Health is deemed to be evidence of the facility's actual return to full compliance. Health & Safety Code § 1280(f); 42 C.F.R. § 405.1907; see also People v. Casa Blanca Convalescent, 159 Cal.App.3d 509, 522 (1984), noting that the amendment to Health & Safety Code § 1280 was passed and made effective in 1983, "making the statement of deficiencies and the plan of correction inadmissible" in a civil lawsuit, overruled on other grounds in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163 (1999)

Obtain Licensing And Certification File From DPH

Defense Counsel should request a copy of the facility's file from the local office of the state regulatory agency. Counsel will learn first hand exactly what the state regulatory agency releases to the public and opposing counsel, in response to a similar request. Defense Counsel may find the regulatory agency releases different material in response to a request from the public as opposed to responding to a subpoena. Counsel will then be well informed in the event the motion to quash is unsuccessful and the court allows opposing counsel to obtain documents from the regulatory agency pursuant to subpoena.

Practitioner Tips

- [ ] Counsel should negotiate a stipulation or protective order to prevent trade secrets and confidential information from being used for any other purpose outside the instant litigation, to prevent them from being disseminated or copied further and to require them to be either destroyed or returned after the litigation is resolved
- [ ] Obtain Licensing and Certification File from Department of Public Health

Discovery of Department of Public Health documents also comes full circle back to the issues surround staffing, because the enforcement of staffing levels in a skilled nursing facility should be deemed to be within the exclusive purview of the regulatory agency by whom such regulations were created. Defense counsel should therefore consider the assertion of an objection to all staffing related discovery demands on this basis.

In *Alvarado v. Selma Convalescent Hospital*, 153 Cal. App. 4th 1292 (2007), the Second District Court of Appeal ruled that the Department of Public Health is better equipped than trial courts to establish, evaluate and enforce the complex economic and regulatory policy of state-wide skilled nursing staffing. The Court of Appeal determined that the Department has the power, the requisite expertise, and is more effective than trial courts at evaluating and enforcing compliance with state-wide nurse staffing requirements at SNFs on a class-wide basis. *Alvarado*, *supra*, 153 Cal. App. 4th at 1303-06.

VI. Privacy

Privacy issues figure prominently in long term care class actions. Not only must the defense protect the privacy rights the residents of the Defendant facilities, but must also be careful to protect the rights of Defendant entity employees as well. The rights of officers, directors and investors of all entities must also be considered. It is expressly provided in some state constitutions that all people have the "inalienable" right to privacy.

The right to privacy in one's home includes the right to allow or present disclosure of the address of that home address for the purpose of contact by mail and also extends to disclosure of one's unlisted telephone number to a stranger. Similarly, an individual may choose to limit an intrusion into his or her privacy by restricting not just the kind of contact permitted, but also the potential number of contacts. Clearly, the disclosure of one's home address and telephone number implicates this privacy interest.

There are several well-recognized tools available to the public to prevent both the disclosure of their home telephone number, including subscription to unlisted telephone numbers through telephone service provider, as well as the disclosure of home address to prevent unsolicited advertising mail through the registration with Direct Marketing Association's Mail Preference Service. These measures are equally applicable to all skilled nursing and/or assisted living facility employees, officers, directors and investors.

Employees of the skilled nursing and/or assisted living facility have a Constitutional right of privacy with regard to their personal contact information. Courts have routinely recognized that individuals have substantial privacy interests in their home. The United States Supreme Court confirmed this notion in 2000, when it said, "the recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when 'strolling through Central Park' than when in 'the confines of one's own home' or when persons are powerless to avoid it." *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

In addition to the more obvious privacy rights of skilled nursing and/or assisted living facility employees and the business entity itself, privacy rights flow also to all of the residents of the

facilities, their families, visitors and others as well. The facilities are home to a vulnerable group of elderly and infirm, who have a right to privacy both as to their personal lives and their medical information. To the degree that a discovery request from a Plaintiff's counsel would intrude on the privacy of third parties at the facility Defense Counsel must be zealous to prevent the violation.

Furthermore, the Health Insurance Portability and Accountability Act ("HIPAA") was enacted by the federal government and sets the standards for ensuring the privacy of an individual's health information. 45 C.F.R. § 164.502(a) states that a "covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter."

Medical information is broadly defined and encompasses any information regarding a patient's medical history, mental or physical condition or treatment, regardless of whether the information is contained in a resident's medical records, notes, reports or any other type of physical form. Skilled nursing facilities are prohibited from disclosing "records" regarding other residents' private health information absent an appropriate authorization.

Simply put, Defense Counsel must be on guard for discovery requests which have the potential to impermissibly invade the fundamental right to privacy enjoyed by current and former residents of a facility, their family members, the facility's employees and other completely uninvolved third parties. Counsel must timely seek an appropriate Protective Order to prevent the injustice that such a discovery request would impose on defendants and on uninvolved nonparties including the residents of facility, employees and others.

CHAPTER 7

FINAL PRE-TRIAL PROCEEDINGS

I. Trial Management Order

Defendants should be proactive in requesting a Trial Management Order outlining a proposed structure for trial identifying those legal issues which should be decided by the court before empanelling a jury. Early rulings on issues of law will promote efficiency by shaping the scope of the issues and the evidence ultimately presented to the jury.

A Proposed Trial Management Order should also include Defendants position regarding the following logistical issues:

1. Daily trial schedule
2. Use of juror binders
3. Order limiting the number of exhibits
4. Presentation of exhibits
5. Witness notifications
6. Use of trial briefs
7. Number of alternates
8. Use juror questionnaire

II. Jury Issues

Rules of Court, Rule 3.1540(c), provides in pertinent part, "On request of counsel, the trial judge must permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of such additional questions for supplemental examination must be within reasonable limits prescribed by the trial judge in the judge's sound discretion."

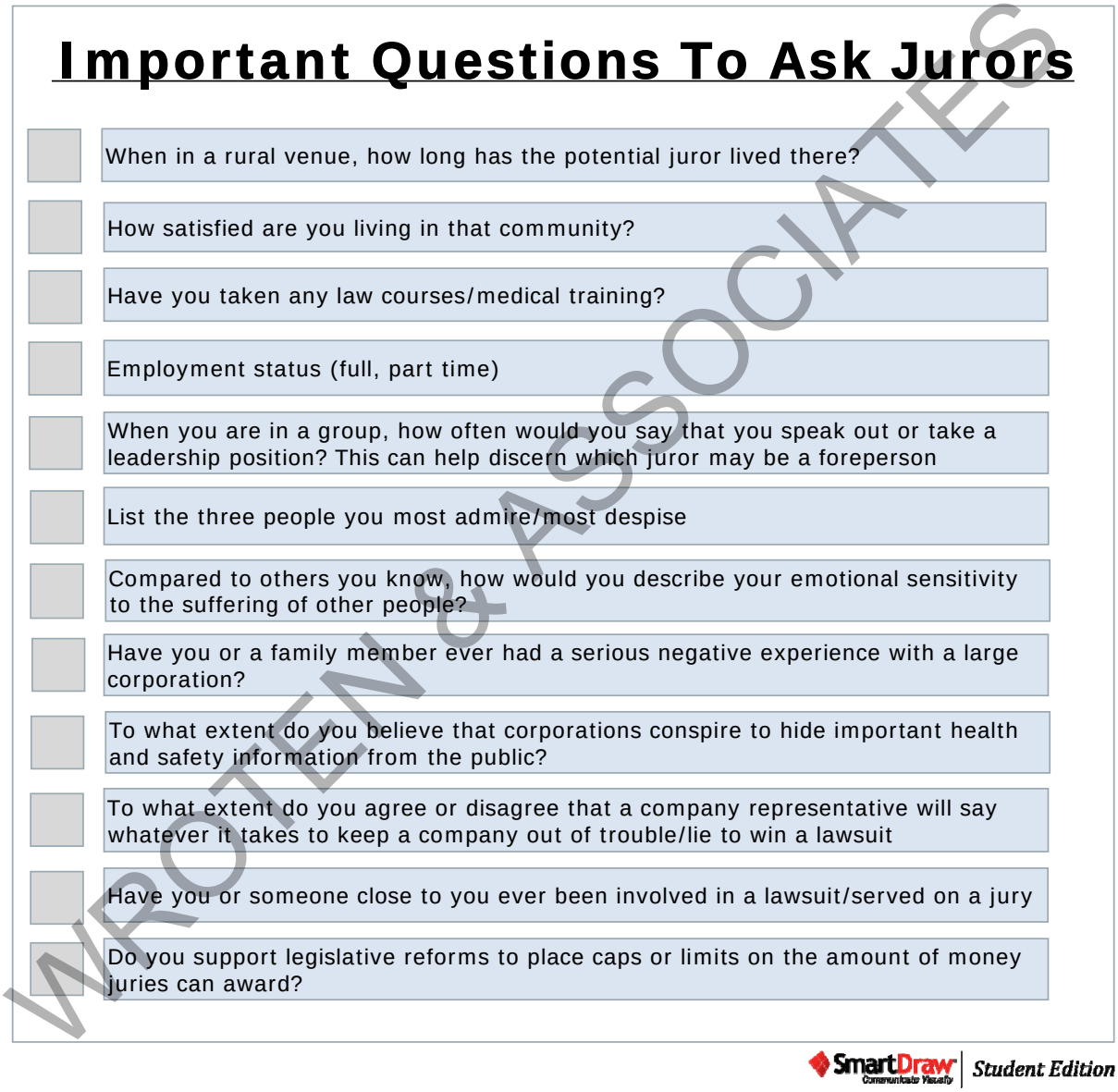
Jury Consultant

Often in high-profile, potentially large verdict jury trials, attorneys rely on jury consultants. Jury consultants are behavior experts who help attorneys research and select jurors and provide insight into juror behavior, often assisting in tailoring a jury questionnaire or assisting in preparation for voir dire. Jury consultants are also effective pre-trial as they gather and analyze demographic data for the potential jury pool.

Jury consultants additionally assist attorneys in developing trial strategies to help shape juror perceptions and lead to a favorable outcome. At trial, jury consultants provide insight into juror body language and behavior, coach witnesses and help lawyers identify arguments and develop strategies. While consultants can be costly, they provide litigators with an edge in understanding the type of person Defendants should seek on their jury.

Jury Questionnaire

The use of a jury questionnaire, when wading through a large pool of potential jurors, can provide valuable information and easier management of information regarding jurors. It is important that the questionnaire be signed under the penalty of perjury should it's use be necessary in post trial motions.



Important Questions To Ask Jurors (cont.)

- [ ] Do you agree or disagree with the statement: The best way to make companies do the right thing is to force them to pay multimillion dollar awards in lawsuits.
- [ ] Have you ever experienced the accidental or untimely death of a loved one?
- [ ] Have you or someone close to you ever had a negative experience with a healthcare provider?
- [ ] What is your overall impression of a nursing home?
- [ ] Have you or someone close to you ever been a resident in a nursing home?
- [ ] Have you ever worked or volunteered for a skilled nursing home?
- [ ] Do you have any opinions or strong feelings about skilled nursing homes?
- [ ] Have you or anyone close to you ever known someone who was mistreated or neglected in a nursing home or other care facility?
- [ ] Do you expect nursing homes to provide one-on-one care to their residents?
- [ ] Do you think most nursing homes are understaffed?
- [ ] Would you like to see corporations that own and operate nursing homes punished?
- [ ] Do you have feeling regarding class action lawsuits? What are they?

III. Motions In Limine

Motions in Limine are an effective tool for narrowing the scope of evidence and potential arguments made before the jury when issues cannot be narrowed between the parties in pre-trial conferences or the meet and confer process. Plaintiffs are foreclosed from introducing evidence of other facts, events, circumstances or raising new issues which are outside the scope of the allegations contained within their complaint. The Court in *Rainer v. Community Hospital* 18 Cal. App. 3d 240, 253 (1971) , instructed:

"One of the functions of pleadings is to limit the issues and narrow the proofs. . . . Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence." (citing *Fuentes v. Tucker*, 31 Cal. 2d at 4 (1947)).

Likewise, in *Cota v. County of Los Angeles*, 105 Cal. App. 3d 282, 293, (1980) the court held that evidence which is not pertinent to the issues raised by the pleadings is immaterial and it is error to allow introduction of such evidence.

Grounds For Making A Motion In Limine

Evidence Code § 352 provides that "the court, in its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) issues, or of misleading the jury." In determining whether offered evidence is excludable under Evidence Code § 352, the court must engage in a balancing test. In performing this balancing test, "[t]he court must balance (1) the relationship between the evidence and the relevant inferences to be drawn from it; (2) whether the evidence is relevant to the main issue or only a collateral issue; (3) the necessity of the evidence to the proponent's case. See *Mangano v. Verity, Inc*., CA App. Ct. Briefs 33286 (2008).

Documents, testimony or other evidence unrelated to the case at issue are irrelevant and therefore inadmissible. Only relevant evidence is admissible evidence. California Evidence Code § 210; Evidence Code §350. See Also *Fuentes v. Tucker,* 31 Cal. 2d 1,4 (1947).

Documents, testimony or other evidence unrelated to the case at issue may constitute inadmissible character evidence pursuant to Evidence Code § 1101(a). See Also *Hinson v. Clairemont Community Hospital,* 218 Cal. App. 3d 1110 (1990).

The matters which are the subject of this motion would be prejudicial to Defendants even if the court were to sustain objections to their introduction at the time of trial and instruct the jury not to consider such matters.

Pursuant to Code of Civil Procedure § 3295(a) a trial court may grant a Defendant a protective order in connection with financial information.

The court may preclude evidence that will waste the court's time. Defendant can argue that allowing certain evidence may prolong trial significantly, wasting valuable time and resources of the court and all other participants, while adding absolutely nothing new to the evidence.

Expert Opinion: The court should preclude testimony from an expert that lacks proper foundation. Evidence Code § 801 provides that "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

Defendants should consider the following Motions in Limine to preclude Plaintiff from mentioning or presenting evidence regarding:

Motions In Limine To Consider To Preclude The Introduction Of Evidence

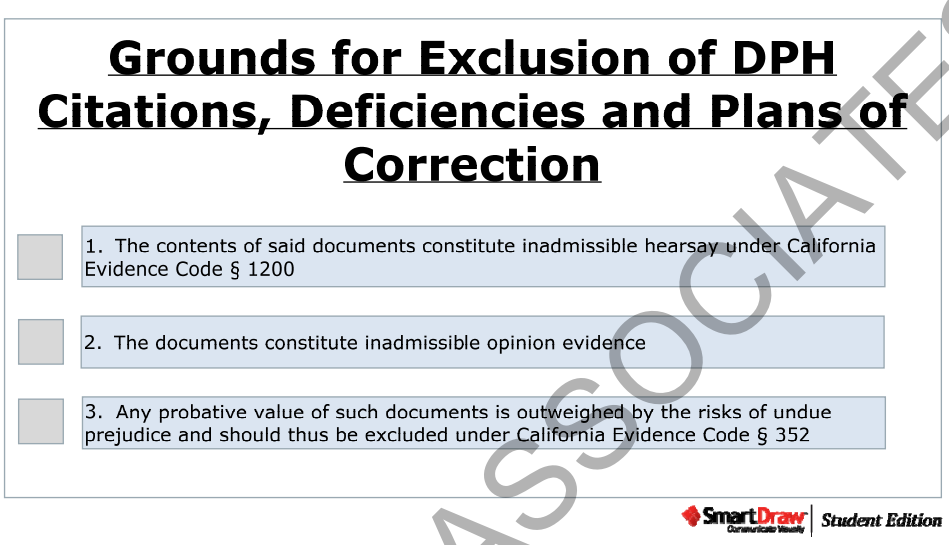
- [ ] Prior Lawsuits
- [ ] Reference to dollar amount of verdict during voir dire
- [ ] "Golden Rule" Argument (See Newmann v. Bishop (1976) 59 Cal.App.3d 541, 548; Zibbell v. Southern Pacific Co. (1911) 160 Cal. 237, 255)
- [ ] Expert Testimony regarding violations of regulations and statutes
- [ ] "Social Change" Arguments (See Westbrook v. General Tire & Rubber Co. (5th Cir. 1985) 754 F.2d 1233)
- [ ] References to Punitive Damages during voir dire
- [ ] Introduction of Evidence previously produced in other lawsuits
- [ ] Evidence of Medi-Cal payment amounts
- [ ] Employment Agreements
- [ ] Evidence of Elder Abuse (in regulatory class actions where no allegations of actual harm are made)

Motions In Limine To Consider To Preclude The Introduction Of Evidence (cont.)

- [ ] Medicare Fraud
- [ ] Evidence of Financial Records
- [ ] Expert testimony on legal questions or conclusion (See See Ferreira v. Workmen's Comp. Appeals Bd. (1974) 38 Cal.App.3d 120; Downer v. Bramet (1984) 152 Cal.App.3d 837; Summers v. A.L. Gilbert (1999) 69 Cal.App.4th 1155; Amtower v. Photon Dynamics, Inc. (2008) 158 Cal.App.4th 1582)
- [ ] Expert testimony on an opinion other than one stated at their deposition. (See Kennemur v. State of California (1982) 133 Cal. App.3d 907
- [ ] Any inadvertently produced materials
- [ ] Evidence of Elder Abuse (in regulatory class actions where no allegations of actual harm are made)
- [ ] Medicare Fraud
- [ ] For corporate Defendants, preclude the inference that consolidated financials are evidence of a single enterprise

Department Of Public Health Documents

Defendants should adamantly seek the exclusion from introduction into evidence the contents of any Department of Public Health ("DPH") Statements of Deficiencies, Plans of Correction as well as any other DSS/DPH Citations or findings. The use of this inadmissible hearsay has a profound effect on the jury as Plaintiffs use these documents to show a pattern or practice of "deficient" services.



Plaintiffs will undoubtedly attempt to reference the facility Defendants' DHS/DPH Statements of Deficiencies, Plans of Correction, Citations and findings, especially those which discuss understaffing.

Statements of Deficiencies are expressions of opinion and involve the making of a conclusion regarding cause and effect involving an exercise of judgment and discretion. Additionally, the regulatory interpretations therein are highly suspect in light of the discrepancies between the governing statutes and regulations regarding staffing. The opinions expressed result from the application of the surveyor's interpretation of Title 22, the medical records, interviews with facility staff and third parties, as well as intra-departmental consultation.

Statements Of Deficiency

Statements of Deficiencies are based on statements contained in a number of reports and similar documents (such as staffing documentation), informal interviews with facility staff and third parties, private medical records, as well as intra-departmental consultation(s). Any such statements contained therein constitute double hearsay.

Such documents, however, constitute inadmissible hearsay. Evidence Code § 1200 provides, "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible." Plaintiffs will claim they are not offering Statements of Deficiencies for the truth of the matters asserted therein, and thus they are

admissible non hearsay. Instead they will argue that they are offered as evidence that Defendants were on notice of the occurrence. This assertion is disingenuous when plaintiffs will likely simultaneously claim the Statements of Deficiency are admissible as "operative facts" on which their claims are based. Plaintiffs' argument does presume the truth of the Statements of Deficiency. It is insincere for Plaintiffs to argue that Statements of Deficiency are not offered for their truth when their very purpose requires an assumption of the truth of the matters asserted therein. Thus, there can be no other reason for Plaintiffs to seek to admit these statements other than to prove the truth of the matters stated. Therefore, these Statements of Deficiencies constitute hearsay and are inadmissible as such.

If the Court opens the door to survey results by way of admission or by way of reference by any witness, Defendants should demand the right to present its contest to the validity of each and every individual Deficiency. Health & Safety Code § 1428 already prescribes the procedures and forum for that contest, and the court should not open the proceeding to that contest. Such an action will result in a waste of the Court's time, lead to confusion of the issues, and potentially violates the privacy rights of numerous individuals not subjected to this action. Even if the court rejects Defendants' request to present this evidence, a strong appellate issue will be preserved.

Statements Of Deficiencies Constitute Inadmissible Expressions Of Opinion And The Making Of A Conclusion

The expressions of opinion and the making of conclusions based upon investigations, inquiries, and the exercise of judgment and discretion are not admissible in evidence, even if they are otherwise considered public records. *Pruett v. Burr*, 118 Cal. App. 2d 188, 200-201 (1953). That is precisely what Statements of Deficiencies are. This is also why they are not admissible as evidence at trial even though they are required to be publicly posted. See Health & Safety Code § 1280; C.F.R. § 405.1907; see also *People v. Casa Blanca Convalescent* 159 Cal.App.3d 509, 522 (1984) [noting that the amendment to Health & Safety Code § 1280 was passed and made effective in 1983, "making the statement of deficiencies and the plan of correction inadmissible" in a civil lawsuit despite the fact that they are public records] overruled on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. 20 Cal.4th 163 (1999).

First, a surveyor conducts investigations and inquiries as to a facility's compliance with Title 22 by reviewing a number of reports and similar documents, conducting several information interviews with the facility staff and non-witness third parties, as well as conducting intra-departmental consultation(s). Then, the surveyor interprets the applicable regulation, applies his or her own judgment and discretion to the situation, and cites his opinion and conclusion in the Statement of Deficiency. This type of opinion testimony is inadmissible.

Thus, in *Pruett v. Burr*, the court held the admission of letters and memoranda written by officers of the State Department of Agriculture constituted prejudicial error. Similarly, Statements of Deficiencies are "records of investigations and inquiries" concerning a facility's compliance with state regulations, and "[involves] the exercise of judgment and discretion, expressions of opinion, and the making of conclusions" as to whether the circumstances, in the surveyor's

opinion, warrant a citation of a regulation (the meaning of which the surveyor has also interpreted). See *Id*.

Plans Of Correction Are Not Admissible Under Health & Safety Code § 1280 Or 42

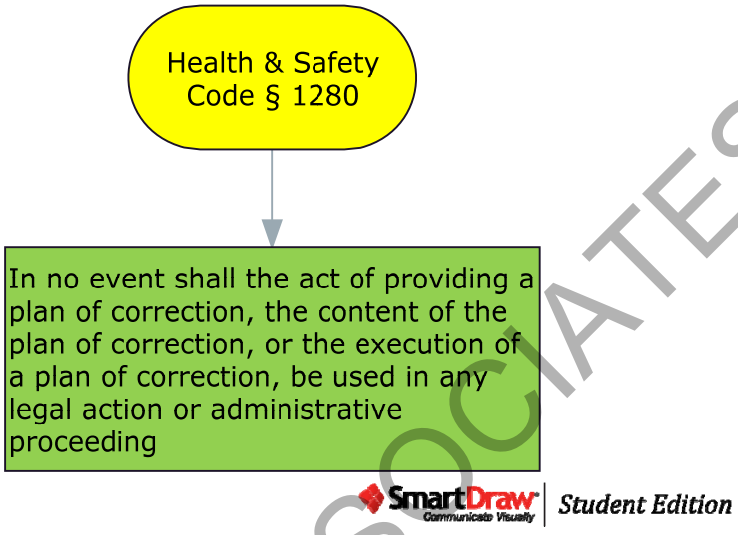
Federal Regulations §405.1907

Statements of Deficiencies almost always contain the facility's responsive "Plan of Correction," within the document. Such "Plans of Correction" are not admissible as evidence pursuant to Health & Safety Code § 1280 and Code of Federal Regulations § 405.1907, as a matter of law and acceptance of the Plan of Correction by DPHS is deemed to be evidence of the facility's actual return to full compliance. (Health & Safety Code § 1280(f); C.F.R. § 405.1907; see also *People v. Casa Blanca Convalescent* 159 Cal. App. 3d 509, 522 (1984), noting that the amendment to Health & Safety Code § 1280 was passed and made effective in 1983, "making the statement of deficiencies and the plan of correction inadmissible" in a civil lawsuit.

Health & Safety Code §1280(f) states, "In no event shall the act of providing a plan of correction, the content of the plan of correction, or the execution of a plan of correction, be used in any legal action or administrative proceeding as an admission within the meaning of §§ 1220 to 1227, inclusive, of the Evidence Code against the health facility, its licensee, or its personnel." The introduction of Plans of Correction into evidence is prohibited by Health & Safety Code §1280(f) because Plaintiffs are purporting to use these documents in a fashion that requires and assumption of the truth of the underlying facts. (i.e.: as an "admission").

It is important to understand that in a civil proceeding, which is vastly different than an administrative proceeding Statements of Deficiencies are unchallengeable statements of opinion by a surveyor from the DPH regarding a facility's compliance with the applicable regulations. Facilities and operators often elect to file plans of correction instead of contesting each deficiency. The system is intended to be a collaborative process and is not designed to handle an administrative hearing for each deficiency identified. Deficiencies rarely if ever lead to monetary sanctions. Hence, providers simply accept the findings and provide a plan of correction.

Plans of Correction Are Inadmissible Evidence



It should also be argued that if a court were to allow the admission of survey results, Defendant will have the right to present its contest to the validity of each and every individual Deficiency. Such an action will result in a waste of the court's time, lead to confusion of the issues, and potentially violate the privacy rights of numerous individuals not subject to this action.

Statements Of Deficiency Do Not Establish A Pattern Or Practice Of Wrongful Conduct

It is anticipated that Plaintiffs will attempt to offer Statements of Deficiency not for their truth but rather as admissible non hearsay evidence of Defendant's state of mind via a pattern and practice of conduct. This is a circuitous argument that utilizes the state of mind exception to hearsay provisions in a back door attempt to establish that DPH records are indeed truthful (i.e., there can be no "pattern and practice" unless the DPH records accurately record prior misdeeds). In order to be relevant to defendants' state of mind, the underlying facts which Plaintiffs' seek to introduce must evidence actual poor practices. Therefore the evidence is also being admitted for its truth.

Plaintiffs will likely rely on *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, (1970) in support for this argument. Reliance on this case is misplaced. The Haft case held that the prior inspection reports (Department of Health reports from two years preceding the incident and which indicated that the pool in question lacked all of the required safety equipment) which had a direct causal nexus to the injury at issue, showed prior knowledge by the operators of the hotel of the regulations

designed to prevent this specific type of harm (i.e., the lack of safety equipment in a pool wherein Plaintiffs' decedents drowned).

Statements of Deficiency do not establish a pattern or practice, nor does *Haft* stand for this proposition. *Haft* involved a specific observation by a Department of Health employee that the pool lacked the necessary life saving equipment. This specific observation by the Department of Health occurred on two occasions prior to the drowning of the Hafts, and apparently life saving equipment was not present at the pool at the time of the drownings. The issue was whether the hotel manager was aware that pool safety equipment was required and that the prior citations noting the deficiency were blatantly disregarded. This issue directly related to the drownings that occurred. Although Plaintiffs suggest otherwise, the *Haft* case is not about pattern and practice. Because pattern and practice evidence is necessarily founded on the truth of the prior event, a finding of admissibility on this basis would result in the requirement that each of the deficiencies issued to Defendant be litigated.

Again, the *Haft* decision discussed Health Services Inspection Reports evidencing a lack of required swimming pool life saving equipment, in the context prior inspection reports issued to hotel management which thereby established the Defendants knowledge of a regulatory scheme. "[E]vidence that such a knowing violation continued over a considerable matter of time, without any excuse, would also be relevant to establishing 'wilful and wonton'." *Haft* at 779.

This reasoning is not persuasive here, as skilled nursing facilities are required to respond to a Statement of Deficiency by preparing a Plan of Correction. The Plan of Correction is verified by the Department of Public Health and a finding of an appropriate Plan of Correction means that the facility is again in full compliance with all regulations, therefore breaking the chain of any potential causation. Thus, Plaintiffs cannot use Statements of Deficiency to show that Defendants' had knowledge of any risk, because each Plan of Correction breaks the chain of any potential causation.

Further, Plans of Correction cannot be utilized as an "admission" of the underlying truth of the deficiency. Health & Safety Code §1280(f). There is in fact, no vehicle by which a skilled nursing facility can challenge a deficiency of this nature (i.e., "fundamental fairness" is the review process, not "substantial due process" because there is no "punishment" involved in such a *de minimus* finding.

IV. Bifurcation

Defendants must evaluate the need to protect against the premature disclosure of prejudicial financial information as well as plan for the bifurcation of legal versus equitable issues.

Bifurcation Of Financial Issues

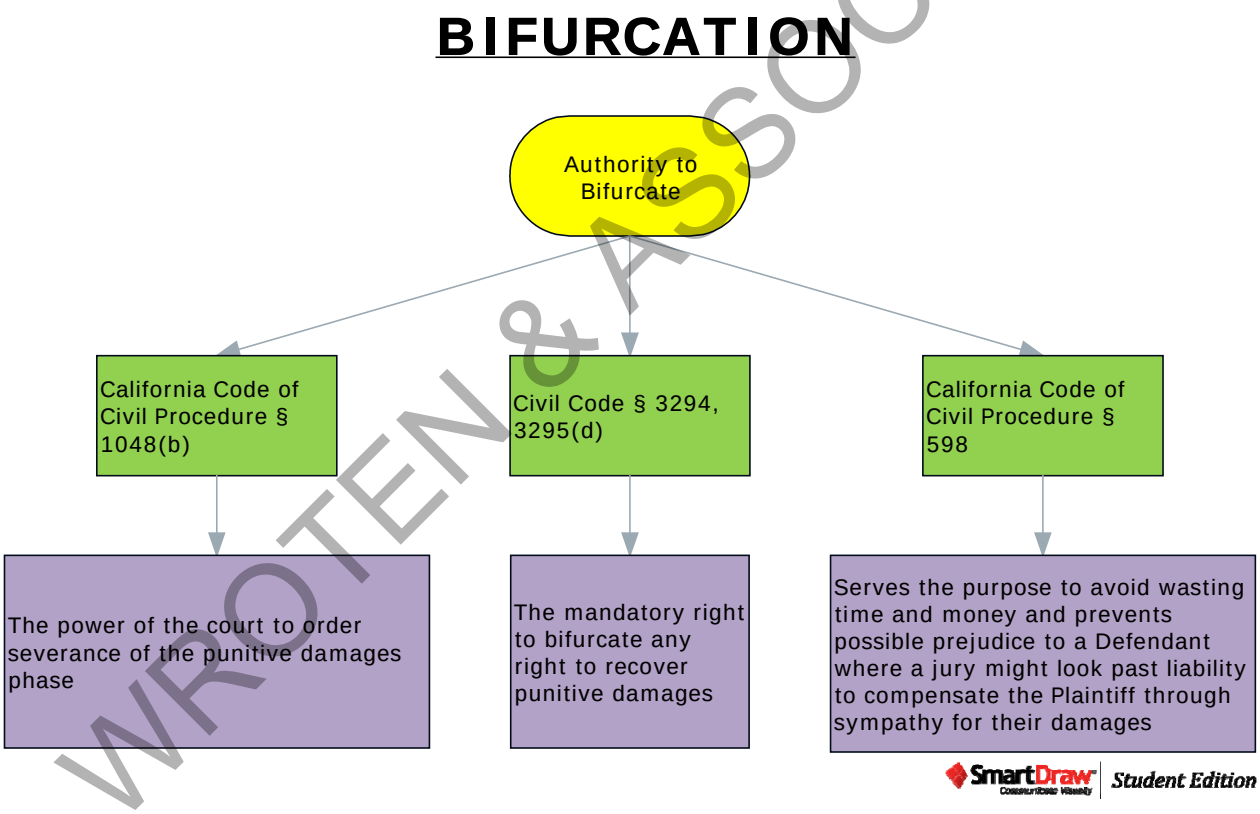
Mock trial have taught us that juries are prejudiced by evidence of corporate wealth. Consider a strategy that sanitizes the liability issues from that of corporate wealth. Move the court to segment financial issues into a separate phase so that Plaintiffs are required to establish their case on facts, not prejudice. To accomplish this, Defendants should move the court, *in limine* before

jury selection or the trial's commencement, for an order to bifurcate and sever the issue of liability and financial issues, including those related to punitive damages pursuant to:

1. The power of the court to order severance of the punitive damages aspect pursuant to Code of Civil Procedure §1048(b);

2. The mandatory right to bifurcate any right to recover punitive damages to be tried first pursuant to Civil Code §§ 3294, 3295(d); and

3. The legislative intent behind enactment of Code of Civil Procedure § 598 which serves the salutary purpose of avoiding waste of time and money and prevents possible prejudice to a Defendant where a jury might look past liability to compensate the Plaintiff through sympathy for their damages.



Code of Civil Procedure § 598 provides that the court may order certain issues tried before others when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby.

Under Code of Civil Procedure § 1048 "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, . . . or of any separate issue or of any number of causes of action or issues . . . ." Furthermore, the court shall have the power "[t]o provide for the orderly conduct of proceedings before it," Code of Civil Procedure § 128(a)(3), and "[t]o amend and control its process and orders so as to make them conform to law and justice." Code of Civil Procedure § 128(a)(8).

Requirement To Bifurcate Right To Recover Punitive Damages

Since 1987, Civil Code § 3295 has established rules for bifurcating the right to recover punitive damages from the liability portion of a trial and has barred complaints from disclosing the amount of punitive damages sought in an action. Civil Code § 3295(d) provides, "[t]he Court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with § 3294."

A court thus has no discretion under 3295(d) to prohibit bifurcation. The Supreme Court of California in *Torres v. Automobile Club of Southern California*, 15 Cal. 4th 771, 777-778 (1997) held that "As an evidentiary restriction, § 3295(d) requires a court, upon application of any defendant, to bifurcate a trial so that the trier of fact is not presented with evidence of the defendant's wealth and profits until after the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defendant. In fact, Civil Code, § 3295(d) is explicit in providing that, 'Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud . . . .'"

Defendants May Be Prejudiced If Bifurcation Is Not Granted

Under the permissive bifurcation statute, the Court has the power to order bifurcation on its own motion to avoid prejudice. Code of Civil Procedure § 1048(b) provides, "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action...or of any separate issue or of any number of causes of action or issues..." Granting or denying of a motion for separate trials lies within the trial court's sound discretion. *Grappo v. Coventry Financial Corp. 235 Cal. App. 3d 496, 504 (1991).*

The Torres court held, "Bifurcation minimizes potential prejudice by preventing jurors from learning of a defendant's 'deep pockets' before they determine these threshold issues." Additionally, in the *City of El Monte v. Superior Court* 29 Cal. App. 4th 272, 276, (1994), the Court agreed that the purpose behind bifurcation is to "protect defendants from the premature disclosure of their financial position when punitive damages are sought…" Likewise, in Medo v.

Superior Court 205 Cal. App. 3d 64, 67, (1988) the Court held that Defendant's pretrial motion made pursuant to Civil Code § 3295(d) deferred admission of the financial evidence until after the jury determined that punitive damages were warranted against one or more Defendants. Once the jury made the finding that the Plaintiff was entitled to punitive damages, he had the burden of proof as to each fact the existence of which was essential to his claim. The Court in *Medo* announced at the outset of the trial that the issue of punitive damages would be bifurcated and tried separately.

Undoubtedly, Class Plaintiffs will attempt to lead the jury to the alleged "deep pocket" Defendants to reach an exorbitant verdict. The amount of prejudice that will be incurred by not bifurcating is far outweighed by any conceivable benefits of allowing both the liability and damages phase of trial to be tried together. Bifurcation takes away any incentive to make a "deep pocket" argument. It protects Defendants' financial information until the appropriate moment in the trial. It allows the court and the trier of fact to determine if Defendants actually acted with malice, oppression, or fraud in their dealings with plaintiffs prior to discussing financial information that may prejudice a jury and allow that jury or juror to leapfrog Plaintiffs' burden to show that he is entitled to punitive damages prior to asking for them. Discussion of Defendants' financial information prior to finding of liability would constitute a grave injustice against Defendants.

Bifurcation Of Legal Versus Equitable Issues

Defendants should include a request to bifurcate legal versus equitable issues in their Proposed Trial Management Order if both legal and equitable issues present. Careful consideration should be given to the order of presentation of those causes of action tried to the judge and those tried to the jury.

V. Pre-Trial Preparation Of Verdict Forms

Verdict Forms for class action litigation involving multiple claims and parties are complicated and require the trial team's early attention. Elements of each cause of action should be structured into a draft verdict form well before trial starts in order to most effectively plan defense strategy. The draft verdict form should be reviewed often as it will certainly change shape as evidence and new legal rulings occur. Target those legal questions you have the best opportunity to defense and plan your evidentiary attack.

VI. Preparing For Your Appeals

Always assume there will be an appeal. Be insistent on making your record (even if the only record you're making is the court's refusal to allow you to make a record). Keep important case citations at close hand and augment the record with written briefs which will solidify your arguments and preserve your client's rights. Consider engaging outside appellate counsel to collaborate with. Having a second set of eyes on board is the best assurance that important issues won't slip by.

CHAPTER 8

CLASS ACTION SETTLEMENTS

I. Motion For Approval Of Settlement

Rules of Court, Rule 3.769 lays out the requirements for settlement of a class action, including the requisite court approval of a settlement. Rules of Court, Rule 3.769(a); see also *Marcarelli v. Cabell*, 58 Cal. App. 3d 51 (2d Dist. 1976).

Either Plaintiff or Defendant can serve and file a written Notice Of Motion For Preliminary Approval of a settlement. Both the settlement agreement and proposed notice to class members must be filed with the motion. Rules of Court, Rule 3.760(c). The court will then hold a preliminary settlement hearing and make an order either approving or denying the settlement. Rules of Court, Rule 3.769(d) and (e).

The Notice Of Motion For Preliminary Approval of a settlement should clearly identify all the reasons why the settlement is equitable. Included within the motion should be a case summary and description of the amount and manner of distribution of compensation, the scope of release of the class members' claims, any tax consequences for class members, the nature of any injunctive relief, and a statement of any affirmative obligations required of class members. If the settlement contains a "*cy pres*" distribution, the motion must set forth the reasons why such distribution fulfills the purpose of the underlying causes of action. See *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 722 (2006).

The court approved preliminary notice must be sent to absent class members after the court approves a preliminary order of approval.

Attorney's Fees

If an agreement has been made regarding payment of attorney's fees, the party moving for dismissal or settlement must include this agreement in an application for approval of settlement. Rules of Court, Rule 3.769(b).

Notice Of Settlement To Class

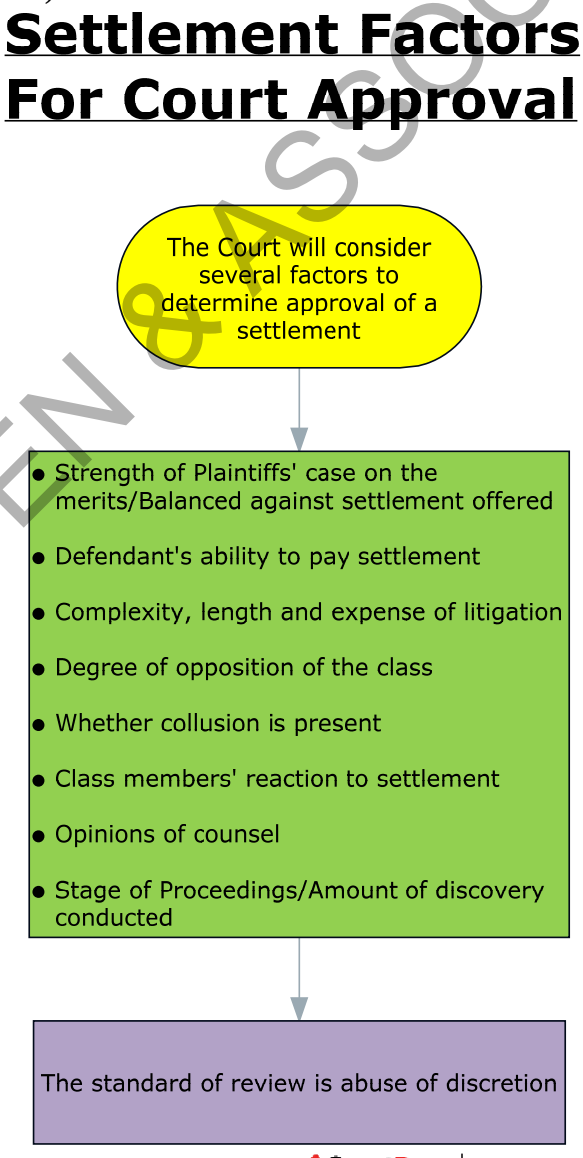
The Notice of Settlement, which had been previously approved by the court and given to the class in a manner specified by the court, must include a notice of the date of the final approval hearing. The notice must include enough information to allow class members to decide whether to opt-out of the settlement or join in the settlement. Finally, it must as well as detailed procedures for class members to follow to file written objections for use in the settlement hearing must be included. Rules of Court, Rule 3.769(f).

Standing To Object To The Settlement

Class members may object to the proposed settlement when they are an "aggrieved" party, a party of record, and their rights or interests may be injuriously affected by the judgment. *Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1128 (1990) citing *County of Alameda v. Carleson*, 5 Cal.3d 730, 736-737 (1971).

II. Settlement Hearing

Before granting final approval, the court must conduct "an inquiry into the fairness of the proposed settlement." Rules of Court, Rule 3.769(g). The court considers several factors at a hearing on approval of settlement, including the strength of the Plaintiffs' case on the merits balanced against the settlement offered, the Defendant's ability to pay, the complexity, length and expense of litigation, the degree of opposition of the class, whether collusion is present, the class members' reaction to settlement, opinions of counsel, and the stage of proceedings and amount of discovery conducted. *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 395, 314 (7th Cir. 1980).



While the court has broad powers to determine the fairness of a settlement, the court's inquiry into the class settlement may be scrutinized and may be reviewed for clear abuse of discretion. *Mallick v. Super. Court*, 89 Cal. App. 3d, 434, 438 (1979); *Dunk v. Ford Motor Co.*, 48 Cal. App.4th 1794, 1802 (1996). In *Kullar v. Foot Locker*, 168 Cal. App. 4th 116 (2008), class members objected to the settlement, claiming that judicial approval of the settlement was improper as the court did not find enough evidence to determine whether the settlement was fair and reasonable. The court found that it must be provided with "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." Id. at 133. The Court remanded the case to the trial court for the parties to show evidence supporting the settlement. See also *Clark v. American Residential Services LLC.*, 175 Cal. App. 4th 785, 790, 802-803 (2009).

Settlement Effective Date

A settlement's effective date can vary but most agreements set an effective date 60 days after the final judgment is entered and parties are notified. Thus, after 60 days, the settlement becomes final.

III. Dismissal

Rules of Court, Rule 3.770 requires court approval of the dismissal of a class action. "The court may not grant a request to dismiss a class action if the court has entered judgment following final approval of a settlement." Rules of Court, Rule 3.770. The court can grant this dismissal without holding a hearing for dismissal; if the request is not approved, however, any party can request a hearing within 15 calendar days of the court's notice of tentative disapproval. Rules of Court, Rule 3.770(b).

Notice Of Dismissal To The Class

Once a class has been certified and notice of the action provided to the class members, the notice of dismissal must be provided to the class "in the manner specified by the court." Rules of Court, Rule 3.770(c). If either of these has not been accomplished, then the action can be dismissed without notice to the class members only if the court determines that a dismissal of the action "will not prejudice" the class. Rules of Court, Rule 3.770(c).

When a dismissal is sought because the parties seek settlement with the class representative only, notice must be given to the class before dismissal can be entered. See *La Sala v. American Sav. & Loan Assn.*, 5 Cal. 3d 864, 873 (1971), holding that when a class action is to be dismissed because defendants are granting benefits to class representatives but not to other members of the class, the dismissal may not proceed without notice to the class.

FINAL WORD

The cost of litigation is always a concern. Efforts to contain escalating costs however should not be undertaken at the expense of developing your defense. Instead, reduce your costs by selecting a trial team whose experience will avoid the need to recreate the litigation wheel, who is experienced in using paralegals and technology to help control costs, and examine ways company personnel can help augment your trial team in the collection of needed data.

Remember that plaintiff attorneys strategize ways to keep defendant legal teams sidelined by overwhelming discovery demands and pleadings wars that either delay the development of affirmative defenses or cause the corporate defendant to throw in the towel. Although settlement opportunities should always be explored (either as a business decision or due to unfortunate facts) no defendant should succumb to the feeling they are being forced to settle because of inattention to litigation management. The challenge is to balance your efforts so that you keep an equal eye on both the sword and the shield for you never know which tact will win the day.

GLOSSARY

Activities of Daily Living (ADL) Worksheet: ADL Worksheets are used primarily by skilled nursing and/or assisted living facility staff to document and evaluate the residents' ability to perform daily functional activities, such as bathing, walking, toileting, eating and dressing (collectively: "Activities of Daily Living" or ADL.)

Activity Director: a person whose responsibilities include organization and coordination of resident recreational activities.

Administrator: the person, licensed by the state, who is responsible for management of a skilled nursing facility. 42 Code of Federal Regulations §483.75. The Administrator of each skilled nursing facility serves on the Governing Body for that particular facility.

Admission Coordinator: an Admission Coordinator assists in the admission process and responds to referrals by residents. The Admission Coordinator often meets with family members to explain the services that the facility offers.

Agency and/or Registry Nurses: in order to meet minimum staffing requirements, some facilities use agency or registry RNs, LVNs and/or CNAs to fill staffing vacancies when needed. A facility may have a list of agencies or registries that they commonly use to locate short-term assistance.

Alter Ego: an organization or entity set up to provide a legal shield for a person or management group actually controlling the operation. Proving that such an organization is a cover or alter ego for the real defendant breaks down that protection, but it can be difficult to prove complete control by an individual. In the case of corporations, proving an alter ego is one way of "piercing the corporate veil."

Assisted Living Facility: a group living arrangement which provides assistance with activities of daily living such as eating, bathing, and using the bathroom, taking medicine, and getting to appointments as needed. Residents often live in their own room or apartment within a building or group of buildings and have some or all of their meals together. Social and recreational activities are usually provided. Some assisted living facilities have health services on site.

Attending Physician: the personal physician of the resident who is usually not an employee of the facility.

Board of Directors: executives of a corporation elected by the shareholders. The board sets basic policy of the corporation, hires the corporation's officers and is responsible to the shareholders. The directors are responsible for corporate policy, but not day-to-day operations, which are handled by the officers who are the employees hired by the board of directors to manage the business. Most states require a minimum of three directors on corporate boards.

Board of Managers: the executives of a limited liability company (LLC) elected by the members. The board appoints the Governing Body which sets the policies for the LLC. The board of managers is not responsible for any of the day-to-day operations of the LLC. The board of managers is responsible to the investors.

Business or Financial File: a file for each resident is usually maintained in the facility business office. This file contains primarily financial and admission information. A signed arbitration agreement should be found in the business or financial file.

Business Office Manager: this person is responsible for bills, payroll, accounts payable, accounts receivable and petty cash.

Care Plan: a written plan of care for skilled nursing facility residents that is developed by an interdisciplinary team, which is required for Medicare and Medicaid certification. The Care Plan provides measurable objectives and timetables for care to meet a resident's medical, nursing and mental needs. Initial Care Plans are prepared for every resident within 24 hours of admission, followed by a comprehensive Care Plan to be prepared within 21 days of admission. The staff revises the Care Plan every time there is a significant change of condition in the resident.

Certified Nursing Assistant (CNA): nursing aides who work under supervision of a licensed or registered nurse. Their duties include: answering call bells; caring for the resident's environment; taking vital signs; measuring height and weight; making routine rounds; helping residents with bathing, toileting, grooming, eating and dressing; assisting in resident transfers; positioning and turning of residents; and providing restorative nursing services.

Center For Medicare & Medicaid Services (CMS): known as the Health Care Financing Administration ("HCFA") prior to July 1, 2001, the Center for Medicare & Medicaid Services is a federal agency that runs the Medicare program and works with states to run the Medicaid program.

Consultant Report: these reports are prepared when a resident is seen or treated by an outside physician or ancillary healthcare provider for a specific medical problem (e.g., podiatry, cardiology, neurology, dermatology).

Corporation: an organization formed with state governmental approval to act as an artificial person to do business which can sue or be sued and can issue shares of stock to raise funds with which to start a business or increase its capital. A corporation's liability for damages or debts is limited to its assets, so the shareholders and officers are protected from personal claims, unless they commit fraud.

Daily Census Report: there are several different types of census reports that may assist with determining staffing needs based on resident acuity. The report may include identifying information about the patient, payor identification (e.g., Medicaid, Medicare and private insurance), new admissions and discharges.

Daily Stand-Up Meeting: meetings that are usually attended by the Administrator, Director of Nursing, Assistant Director of Nursing and other department heads. They usually discuss a number of topics, including census, grievances, complaints and resident issues. Usually, the second part of the meeting is attended only by members of the Interdisciplinary Team, who may also be members of the facility's QA Team, to discuss action plans, Quality Reviews, census, resident falls, at-risk patients, weight loss, pressure ulcers, Care Plans and Quality Indicator related data.

Dietary Manager: the person responsible for food service, kitchen staff and operation, menus and food purchases. He/she usually identifies residents who may have nutritional concerns that should be reviewed during the Registered Dietician's periodic consultations at the facility.

Director of Nursing (DON): a registered nurse who is responsible for the nursing staff, nurses' aides, as well as monitoring the quality of care that residents receive. The DON of each facility serves on the Governing Body for that particular facility.

Document Retention Policy: this policy identifies the retention period and responsible party for retaining documents related to running the facility.

Employee Injury Incident Report: a form completed when an employee suffers an injury of any nature, which includes incidents involving resident-employee combativeness. These should be considered attorney-client privileged, attorney work product documents which are part of the Quality Assurance Program, as well as part of the employee's personnel file, thus privacy protections apply.

General Partnership: a business partnership featuring two or more partners in which each partner is liable for any debts taken on by the business. Because the partners do not enjoy limited liability, all the partners' assets can be involved in an insolvency case against the company.

Governing Body: skilled nursing facilities must have a governing body, or designated persons functioning as a governing body. The Governing Body approves the facility's annual budget, establishes and implements facility policies and hires Administrators. 42 CFR §483.75.

Incident Reports: reports prepared by organized committees of medical staff or by a peer review body responsible for evaluation and improvement of the quality of care rendered in a skilled nursing facility shall not be subject to discovery. Evidence Code §1157. (Distinguish with Unusual Occurrence Reports below, which are submitted to the Department of Public Health or to the local fire authority.)

Indirect Ownership: an ownership interest in an entity that has an ownership interest in the disclosing entity. 42 Code of Federal Regulations 455.101. This term includes an ownership interest in any entity that has an indirect ownership interest in the disclosing party.

In-Service Records: these documents reflect the professional training and education opportunities provided at the facility.

Interdisciplinary Progress Notes: these record any treatment or recommendations made by the various disciplines, including nursing, dietary, social services, physicians, activities and rehabilitation staff. They can be found within the resident's chart.

Interdisciplinary Team (IDT): usually serves as the facility QA Team and develops and monitors the resident Care Plans. The team may include the Director of Nursing, Assistant Director of Nursing, Activity Director, Rehabilitation Program Manager, MDS Coordinator, Dietary Manager, Care Plan Coordinator and/or Social Services Worker.

Licensed Vocational Nurse (LVN): must have successfully completed an accredited program of vocational nursing in order to obtain a license. LVNs provide basic bedside care under the direction of a physician or registered nurse. An LVN's duties typically include provision of basic hygienic and nursing care; measurement of vital signs; basic client assessment; documentation; performance of prescribed medical treatments; and administration of prescribed medications. Performance of non-medicated intravenous therapy and blood withdrawal requires separate certification in some states.

Limited Liability Company: a form of business enterprise which establishes the maximum any investor risks in the event of any claims against the business.

Limited Partnership: a business structure that allows one or more partners (called limited partners) to enjoy limited personal liability for partnership debts while another partner or partners (called general partners) have unlimited personal liability.

Managing Employee: the facility Administrator who, licensed by the state, who is responsible for management of a skilled nursing facility. 42 CFR §483.75. Also, pursuant to 42 CFR 455.101, a managing employee means a general manager, business manager, administrator, director or other individual who exercises operational or managerial control over the day-to-day operations of an institution or who directly or indirectly conducts the day-to-day operations.

MDS Coordinator: the person responsible for assuring that regulations governing the preparation and submission of MDS assessments are followed accurately prepared and timely submitted.

Medical Director: a physician who has a contractual relationship with the facility. Each facility is required to have a Medical Director present at the facility a certain number of hours per month. His or her responsibilities include approving all medical policies at the facility, attending QA meetings, reviewing Incident and/or Unusual Occurrence Reports and assisting the staff in meeting facility care requirements.

Medication Administration Record (MARs): the MARs identify the type of medication and dosage to be given to the resident. The nurse is responsible for noting on the MARs whether the resident has received his or her medication as ordered.

Minimum Data Set (MDS): the MDS provides a comprehensive, accurate and standardized assessment of each resident's condition and functional capabilities. It contains common

definitions and coding categories that form the basis of the comprehensive assessment for all patients in long-term care facilities who participate in Medicare and Medicaid. The MDS is prepared within fourteen days of the resident's admission and updated every ninety days of a Medicare resident's stay. In the case of Medicaid the MDS is prepared within five days of admission and updated on the fourteenth, thirtieth and ninetieth day.

Nurse's Weekly Summary: a nurse may prepare a monthly or weekly nursing summary for each resident that summarizes the resident's overall progress during that period. The report may address such issues as mobility, eating, weight gain or loss, skin condition, bladder/bowel function, respiratory status, antipsychotic medications, restraints and mental/cognitive status.

Nursing Hours Per Patient Day: also known as "NHPPD", the nursing hours per patient day are normally expressed as a ratio, determined by adding the allowable direct care hours divided by the facility census, not including bedholds.

Nursing Rounds: the nursing staff typically conducts daily rounds to monitor the residents' physical and/or emotional conditions as well as their environment for overall appropriateness.

Officer: top level management including a president, vice president, secretary, financial officer or chief executive officer of a corporation or an unincorporated business, hired by the board of directors of a corporation or the owners of a business. Officers have the actual or apparent authority to contract or otherwise act on behalf of the corporation or business.

Ombudsman: a person who investigates complaints in long term facilities and attempts to mediate between aggrieved parties, typically the facility and the resident or resident's family.

Operating Entity: the skilled nursing facilities, the assisted living facilities, the hospices, the rehabilitative therapy services and the independent businesses that provide administrative support and payroll services pursuant to contract that serve local communities.

Partnership: a business enterprise entered into for profit which is owned by more than one person, each of whom is a "partner." Each partner invests a certain amount of money, assets and/or effort which establishes an agreed-upon percentage of ownership. Each partner is also responsible for all the debts and contracts of the partnership even though another partner may have created the debt or entered into the contract.

Per Patient Day (PPD): a method of calculating the cost to a facility for providing care to its residents on a daily basis. Levels of staffing are often measured as a function of the hours of nurse staffing per patient day, or "hours PPD."

Pierce the Corporate Veil: to prove that a corporation exists merely as a completely controlled entity or alter ego for an individual or management group, so that individual defendants can be held liable for damages resulting from the actions of the corporation. If a corporation has issued stock and held regular meetings of shareholders and directors, it is unlikely a judge will "pierce" the veil, unless there is proof that the corporation was created to perpetrate fraud. It is not appropriate to pierce the corporate veil if a subsidiary is adequately capitalized.

Pressure Ulcer Log: this form identifies each resident who has a pressure ulcer. It includes information regarding the size, depth, stage, location of the ulcer and whether it was acquired at the facility. The Director of Nursing usually maintains the forms, which are part of the QA records.

Quality Assessment and Assurance Committee (QA): a facility must maintain a QA committee consisting of (1) the Director of Nursing; (2) a physician designated by the facility; and (3) at least three other members of the facility's staff. The quality assessment and assurance committee meets at least quarterly to identify issues relating to the provision of quality care and it develops and implements appropriate plans of action to correct identified quality deficits.

Quality Indicator Report: based on data gathered from the MDS, the states prepare Quality Indicator Reports.

Quality Indicators: these indicators, based solely on data from the MDS, are used by the Center for Medicare & Medicaid Services. There are twenty-four separate Quality Indicators that are used by the Center as well as the states to monitor the quality of care in facilities. Data regarding these indicators is available to the public through the CMS website at http://www.cms.gov.

Quality Review: these efforts are undertaken by the facility to prepare for the state surveys. They are usually conducted a few months before the annual state survey and are performed as part of the QA process.

Registered Dietician: a dietician who reviews dietary plans for new admissions, patients on tube feedings and residents with weight loss/gain, pressure ulcers or inadequate fluid/meal intake. He/she is also responsible for assessing a resident's nutritional status and making recommendations for dietary changes.

Registered Nurse (RN): provides: (1) Direct and indirect patient care services for the safety, comfort, personal hygiene and protection of patients; and the performance of disease prevention and restorative measures. (2) Direct and indirect patient care services, including, but not limited to, the administration of medications and therapeutic agents, necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by and within the scope of licensure of a physician, dentist, podiatrist, or clinical psychologist. (3) The performance of skin tests, immunization techniques and the withdrawal of blood from veins and arteries. (4) Observation of signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition and the determination of whether the signs, symptoms, reactions, behavior, or general appearance exhibit abnormal characteristics and the implementation, based on observed abnormalities, of appropriate reporting, or referral, or standardized procedures, or changes in treatment regimen in accordance with standardized procedures, or the initiation of emergency procedures.

Resident Assessment Protocols (RAPs): once the MDS is completed, there are 18 potential areas on the MDS that may "trigger" RAPs. These potential problem areas include delirium,

falls, nutritional status, physical restraints, ADL functional/ rehabilitation potential and behavioral symptoms. The facility must conduct an assessment of the problem area and determine whether a new or revised Care Plan is necessary once RAPs are triggered.

Resident Fall Logs: a form used to document, identify and track data for resident falls. The Director of Nursing usually maintains the logs, which are protected as QA documents.

RestorativeNursing Aide: CNAs who assist residents in sustaining their functional capabilities, i.e. mobility level and range of motion, subsequent to the resident being discharged from therapy.

Safety Committee: a committee that focuses on facility and employee safety issues. Members of the committee may include employees from human resources, maintenance, housekeeping, infection control, medical records and/or nursing.

Shareholder: the owner of one or more shares of stock in a corporation, commonly also called a "stockholder". The benefits of being a shareholder include receiving dividends for each share as determined by the board of directors, the right to vote for members of the board of directors, to bring a derivative action if the corporation is poorly managed and to participate in the division of assets upon the dissolution and winding up of the corporation.

Skilled Nursing Facility: offer 24 hour licensed professional nursing and comprehensive rehabilitation care to individuals disabled by illness or injury as well as the elderly and those who are seeking long-term care.

Social Worker: this person assists in responding to the emotional needs of the residents and their families. He or she may also assist in the admission and referral process as well as meeting with the resident and family during the admissions process.

State Survey: onsite surveys conducted that determine whether a facility meets the minimum Medicare and Medicaid quality and performance standards. Each facility undergoes an annual survey. However, the state may perform follow-up surveys and complaint surveys, especially in the event that a facility receives low ratings, the state may conduct more frequent surveys.

Treatment Administration Record (TAR): this is used to document any special treatment administered to the resident, such as wound care treatment. It is usually kept in a separate notebook at the nurses' station. At the end of the month, the TAR is placed in the resident's medical chart.

Thinning: over time as residents' charts become voluminous and thick, facilities will remove older records that are not needed on a daily basis. The "thinnings" are usually kept in a separate file in the Medical Records Department.

Unusual Occurrences: per Title 22 California Code of Regulations §72541, occurrences such as epidemic outbreaks, poisonings, fires, major accidents, death from unnatural causes or other catastrophes and unusual occurrences which threaten the welfare, safety or health of patients, personnel or visitors shall be reported by the facility to the Department of Public Health within

24 hours. An incident report shall be retained on file by the facility for one year. Every fire or explosion shall be reported within 24 hours to the local fire authority. (Distinguish with Incident Reports, above.)

Weight Variance Log: this form, which is prepared by the Registered Dietician or the Dietary Manager, identifies each resident who has had a weight variance of 5% in one month, 7.5% in three months or 10% in six months. The Director of Nursing usually maintains these logs and they are part of the QA records.

Appendix A

STATE NURSE STAFFING REQUIREMENTS

FEDERAL REGULATIONS

Code of Federal Regulations: Title 42 – Public Health
- Chapter IV – Centers for Medicare & Medicaid Services, Department of Health and Human Services
  - Subchapter G – Standards and Certification
    - Part 483 – Requirements for States and Long Term Care Facilities
      - Subpart B – Requirements for Long Term Care Facilities

§ 483.30 Nursing services.

The facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.

(a) Sufficient staff.
(1) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(i) Except when waived under paragraph (c) of this section, licensed nurses; and
(ii) Other nursing personnel.

(2) Except when waived under paragraph (c) of this section, the **facility must designate a licensed nurse to serve as a charge nurse on each tour of duty**.

(b) Registered nurse.
(1) Except when waived under paragraph (c) or (d) of this section, the **facility must use the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week**.

(2) Except when waived under paragraph (c) or (d) of this section, the **facility must designate a registered nurse to serve as the director of nursing on a full time basis.**

(3) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

ALABAMA

Alabama Administrative Code
- Alabama State Board of Health
  - Alabama Department of Public Health
    - Division of Licensure and Certification
      - Chapter 420-5-10: Nursing Facilities

420-5-10-.11 Nursing Services.

(1) The **facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care**.

(2) Sufficient staff. The facility must provide services by sufficient numbers of licensed nurses and other nursing personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(a) The **facility must use the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week.**

(b) The **facility must designate a registered nurse to serve as the director of nursing on a full time basis.**

(c) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

****No minimum direct care requirement****

ALASKA

Alaska Administrative Code
- Title 7. Health and Social Services
  - Part 1. Administration
    - Chapter 12. Facilities and Local Units
      - Article 5. Nursing Facilities

7 AAC 12.275. Nursing and medical services

(a) Except as otherwise specified in this section, a **nursing facility must have a registered nurse on duty seven days a week on the day shift and five days a week on the evening shift**.

A **licensed practical nurse must be on duty during all shifts when a registered nurse is not present**. A nursing facility must have telephone access to at least one registered nurse at all times and must post the names and phone numbers of those registered nurses at each nurse's station.

(b) A nursing facility with more than 60 occupied beds must have two registered nurses on duty during the day shift and one registered nurse on duty during other shifts.

(c) A nursing facility that shares the same building as a hospital must have a registered nurse on duty in the nursing facility seven days a week on the day shift. On the evening and night shift, a licensed practical nurse may serve as charge nurse. However, an on-duty registered nurse from the hospital must be available to make rounds at the nursing facility and to be otherwise available as needed during the evening and night shifts when a licensed practical nurse is serving as charge nurse. A nursing facility with 14 or fewer occupied beds may use an on-duty registered nurse from the hospital to meet the night shift nursing requirement set out in this subsection.

****No minimum direct care requirement****

ARIZONA

Arizona Administrative Code

- Title 9. Health Services
  - Chapter 10. Department of Health Services Health Care Institutions: Licensing
    - Article 9. Nursing Care Institutions

R9-10-906. Nursing Services

A. An administrator shall ensure that:
1. Nursing services are provided 24 hours a day in a nursing care institution;
2. A **director of nursing** is appointed who:
   a. Is a registered nurse;
   b. **Works full-time at the nursing care institution**; and
   c. Is responsible for the direction of nursing services;
3. The director of nursing or an individual designated by the administrator participates in the quality management program;
4. If the daily census of the nursing care institution is not more than 60, the director of nursing may provide direct care to residents on a regular basis.

B. A director of nursing shall ensure that:
1. Sufficient nursing personnel are on the nursing care institution premises at all times to meet the needs of a resident for nursing services;
2. **At least one nurse is present and responsible for providing direct care to not more than 64 residents;**
3. Documentation of nursing personnel on duty each day is maintained at the nursing care institution and includes:

a. The date;
b. The number of residents;
c. The name and license or certification title of each nursing personnel who worked that day; and
d. The actual number of hours each nursing personnel worked that day;

ARKANSAS

Lexis Citation: ACA 20-10-1403
Current through the 2011 Regular Session and Updates from the Arkansas Code Revision Commission through July 28, 2011

Arkansas Code of 1987 Annotated Official Edition

- Title 20 Public Health and Welfare
  - Subtitle 2. Health and Safety
    - Chapter 10 Long-term Care Facilities and Services
      - Subchapter 14 – Staffing Requirements for Nursing Facilities and Nursing Homes

20-10-1403. Ratio of staff to residents.
(a) Except for nursing facilities that the Office of Long-Term Care designates as Eden Alternative nursing facilities or Green House Project nursing facilities, all nursing facilities shall maintain the following minimum direct-care staffing-to-resident ratios:

(1) One (1) direct-care staff to every six (6) residents for the day shift. Of this direct-care staff, there shall be at least one (1) licensed nurse to every forty (40) residents;

(2) One (1) direct-care staff to every nine (9) residents for the evening shift. Of this direct-care staff, there shall be at least one (1) licensed nurse to every forty (40) residents; and

(3) One (1) direct-care staff to every fourteen (14) residents for the night shift. Of this direct-care staff, there shall be at least one (1) licensed nurse to every eighty (80) residents.

(b)
(1) Licensed direct-care staff shall not be excluded from the computation of direct-care staff-to-resident ratios while serving in a staffing capacity that requires less education and training than is commensurate with their professional licensure.

(2) Licensed direct-care staff who serve in a staffing capacity that requires less education and training than is commensurate with their professional licensure shall not be restricted from providing direct-care services within the scope of their professional licensure in order to be included in the computation of direct-care staff-to-resident ratios.

(d) Upon any expansion of resident census by the facility, the facility shall be exempt from any increase in staffing ratios for a period of nine (9) consecutive shifts from the date of the

expansion of resident census.

(e)

(1) The computation of the direct-care minimum staffing ratios shall be carried to the hundredth place.

(2) If the application of the ratios listed in subsections (a)-(c) of this section results in other than a whole number of direct-care staff for a shift or shifts, the number of required direct-care staff shall be rounded to the next higher whole number when the resulting ratio, carried to the hundredth place, is fifty-one hundredths (.51) or higher.

(3) In no event shall a facility have fewer than one (1) licensed nurse per shift for direct-care staff.

(4) All computations shall be based on the midnight census for the day in which the shift or shifts begin.

CALIFORNIA

Deering's California Codes Annotated

- Health and Safety Code
  - Division 2. Licensing Provisions
    - Chapter 2. Health Facilities
      - Article 3. Regulations

§ 1276.5. Determination of minimum number of nursing hours per patient; Qualifications of administrator

(a) The department shall adopt regulations setting forth the minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities, subject to the specific requirements of Section 14110.7 of the Welfare and Institutions Code. However, notwithstanding Section 14110.7 or any other provision of law, commencing January 1, 2000, **the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours**, except as provided in Section 1276.9.

(b)

(1) For the purposes of this section, "nursing hours" means the number of hours of work performed per patient day by aides, nursing assistants, or orderlies plus two times the number of hours worked per patient day by registered nurses and licensed vocational nurses (except directors of nursing in facilities of 60 or larger capacity) and, in the distinct part of facilities and freestanding facilities providing care for the developmentally disabled or mentally disordered, by licensed psychiatric technicians who perform direct nursing services for patients in skilled nursing and intermediate care facilities, except when the skilled nursing and intermediate care facility is licensed as a part of a state hospital, and except that nursing hours for skilled nursing facilities means the actual hours of work, without doubling the hours performed per patient day by registered nurses and licensed vocational nurses.

(2) Concurrent with implementation of the first year of rates established under the Medi-Cal Long Term Care Reimbursement Act of 1990 (Article 3.8 (commencing with Section 14126) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code), for the purposes of this section, "nursing hours" means the number of hours of work performed per patient day by aides, nursing assistants, registered nurses, and licensed vocational nurses (except directors of nursing in facilities of 60 or larger capacity) and, in the distinct part of facilities and freestanding facilities providing care for the developmentally disabled or mentally disordered, by licensed psychiatric technicians who performed direct nursing services for patients in skilled nursing and intermediate care facilities, except when the skilled nursing and intermediate care facility is licensed as a part of a state hospital.

COLORADO

Colorado Code of Regulations

- Department of Public Health and Environment
  - Health Facilities and Emergency Medical Services Division

6 CCR 1011-1. Standards for Hospitals and Health Facilities
Chapter II – General Licensure Standards
Part 7. NURSING SERVICES

7.1 ORGANIZATION. The facility shall have a department of nursing services that is formally organized to provide complete, effective care to each resident. The facility shall clearly define qualifications, authority, and responsibility of nursing personnel in written job descriptions.
7.2 DIRECTOR OF NURSING. Except as provided ill Section 7.6, a **nursing care facility shall employ a full-time (40 hours/week) Director of Nursing, who is a registered nurse, qualified by education and experience to direct facility nursing care.**

7.3 24-HOUR NURSING COVERAGE. The facility shall be staffed with qualified nursing personnel, awake and on duty, who are familiar with the residents and their needs in a number sufficient to meet resident functional dependency, medical, and nursing needs.

7.3.1 Staff shall be sufficient in number to provide prompt assistance to persons needing or potentially needing assistance, considering individual needs such as the risk of accidents, hazards, or other untoward events. Staff shall provide such assistance.

7.3.2 Except as provided in Section 7.6, a **nursing care facility shall be staffed at all times with at least one registered nurse who is on duty on the premises. Each resident care unit shall be staffed with at least a licensed nurse.**

7.3.3 Except as provided in Section 7.6, an intermediate care facility shall be staffed with at least one full-time licensed registered nurse or licensed practical nurse who is on duty on the premises on the day shift seven days per week. A facility using a licensed practical nurse as a director of nursing shall provide at least 4 hours per week of consultation by a licensed registered nurse.

7.3.4 A **nursing care facility shall provide nurse staffing sufficient in number to provide at least 2.0 hours of nursing time per resident per day.** In facilities of 60 residents or more, the time of the Director of Nursing, Staff Development Coordinator, and other supervisory personnel who are not providing direct resident care shall not be used in computing this ratio.

7.3.7 If a long-term care facility operates out of more than one building, it shall have staff on duty 24 hours per day in each building in a number sufficient to meet resident care needs.

CONNECTICUT

Regulations of Connecticut State Agencies

- Title 19 Health and Safety
  - Department of Public Health and Addiction Services
    - The Public Health Code of the State of Connecticut
      - Chapter IV Hospitals, Child Day Care Centers, Other Institutions and Children's General Hospitals

(1) Each facility shall employ sufficient nurses and nurse's aides to provide appropriate care of patients housed in the facility 24 hours per day, seven days per week.

(2) The number, qualifications, and experience of such personnel shall be sufficient to assure that each patient:

(A) receives treatment, therapies, medications and nourishments as prescribed in the patient care plan developed pursuant to subsection (o)(2)(I) of these regulations;

(B) is kept clean, comfortable and well groomed;

(C) is protected from accident, incident, infection, or other unusual occurrence.

(3) The facility's administrator and director of nurses shall meet at least once every 30 days in order to determine the number, experience and qualifications of staff necessary to comply with this section. The facility shall maintain written and signed summaries of actions taken and reasons therefore.

(4) **There shall be at least one registered nurse on duty 24 hours per day, seven days per week**.

(A) In a chronic and convalescent nursing home, there shall be at least one licensed nurse on duty on each patient occupied floor at all times.

(B) In a rest home with nursing supervision, there shall be at least one nurse's aide on duty on each patient-occupied floor at all times and intercom communication shall be available with a licensed nurse.

(5) In no instance shall a chronic and convalescent nursing home have staff below the following standards:

(A) Licensed nursing personnel:

7 a.m. to 9 p.m.:	**.47 hours per patient**
9 p.m. to 7 a.m.:	**.17 hours per patient**

(B) Total nursing and nurse's aide personnel:

7 a.m. to 9 p.m.:	**1.40 hours per patient**
9 p.m. to 7 a.m.:	**.50 hours per patient**

(6) In no instance shall a rest home with nursing supervision staff below the following standards:

(A) Licensed nursing personnel:

7 a.m. to 9 p.m.:	**.23 hours per patient**
9 p.m. to 7 a.m.:	**.08 hours per patient**

(B) Total nursing and nurse's aide personnel:

7 a.m. to 9 p.m.:	**.70 hours per patient**
9 p.m. to 7 a.m.:	**.17 hours per patient**

(7) In facilities of 61 beds or more, the director of nurses shall not be included in satisfying the requirements of subdivisions (5) and (6) of this subsection.

(8) In facilities of 121 beds or more, the assistant director of nurses shall not be included in satisfying the requirements of subdivisions (5) and (6) of this subsection.

DELAWARE

Delaware Code Annotated

- Title 16. Health and Safety
  - Part II. Regulatory Provisions Concerning Public Health
    - Chapter 11. Nursing Facilities and Similar Facilities
      - Subchapter VII. Minimum Staffing Levels for Residential Health Facilities

§ 1162. Nursing staffing

(a) Every residential health facility must at all times provide a staffing level adequate to meet the care needs of each resident, including those residents who have special needs due to dementia or a medical condition, illness or injury. Every residential health facility shall post, for each shift, the names and titles of the nursing services direct caregivers assigned to each floor, unit or wing and the nursing supervisor on duty. This information shall be conspicuously displayed in common areas of the facility, in no fewer number than the number of nursing stations. Every residential health facility employee shall wear a nametag prominently displaying his or her full name and title. Personnel hired through temporary agencies shall be required to wear photo identification listing their names and titles.

(c) On or before December 1, 2001, a comprehensive report assessing and reviewing the quality of nursing facility care in Delaware shall be completed by the Delaware Nursing Home Residents Quality Assurance Commission and submitted to the Governor and the General Assembly. The purpose of the report is to determine the efficacy of the minimum staffing levels required under this chapter, including, but not limited to, the availability of qualified personnel in the job market to meet the requirement, the cost and availability of nursing home care, and patient outcomes based on scheduled facility surveys, surprise inspections and other reviews conducted by the Division. Based on this information, the Commission will determine if increasing the minimum nurse staffing levels to 3.28 hours of direct care with the corresponding increased required shift ratios is appropriate and necessary. By January 1, 2002, the **minimum staffing level for nursing services direct caregivers shall not be less than the staffing level required to provide 3.28 hours of direct care per resident per day**, subject to Commission recommendation and provided that funds have been appropriated for 3.28 hours of direct care per resident for Medicaid eligible reimbursement. Nursing staff must be distributed in order to meet the following minimum shift ratios:

	RN/LPN	**CNA (or RN/LPN or NAIT serving as a CNA)**
Day	**1:15**	**1:8**
Evening	**1:23**	**1:10**
Night	**1:40**	**1:20**

To the extent a nursing facility meets the minimum nurse staff levels of 3.28 hours of direct care and compliance with the above referenced shift ratios provided in this subsection requires more than 3.28 hours of direct care, the Division may permit a nursing facility to alter the shift ratios above; provided, however, the alternative shift ratios as determined by the Division shall not, on any shift or at any time, fall below the following alternative minimum shift ratios:

	RN/LPN	CNA (or other direct care-givers)
Day	1:20	1:9
Evening	1:25	1:10
Night	1:40	1:22

If a nursing facility cannot meet the above referenced shift ratios due to building configuration or any other special circumstances, they may apply for a special waiver through the Division,

subject to final approval by the Delaware Nursing Home Residents Quality Assurance Commission. All nursing facilities shall conspicuously display the minimum shift ratios governing the nursing facility, along with posting requirements pursuant to subsection (a) of this section. Notwithstanding subsection (g) of this section, the time period for review and compliance with any alternative minimum shift ratios or ratios pursuant to a special waiver under this subsection shall be 1 day.

(d) Within 6 months of an appropriation by the General Assembly funding the staffing requirements of subsection (e) of this section, a comprehensive report assessing and reviewing the quality of nursing facility care in Delaware shall be completed by the Delaware Nursing Home Residents Quality Assurance Commission and submitted to the Governor and the General Assembly. The purpose of the report is to determine the efficacy of the minimum staffing levels required under this chapter, including, but not limited to, the availability of qualified personnel in job market to meet the requirement, the cost and availability of nursing home care, and patient outcomes based on scheduled facility surveys, surprise inspections and other reviews conducted by the Division. Based on this information, the Commission will determine if increasing the minimum nurse staffing levels to 3.67 hours of direct care with the corresponding increased required shift ratios is appropriate and necessary.

(e) By May 1, 2003, the minimum staffing level for nursing services direct caregivers shall not be less than the staffing level required to provide 3.67 hours of direct care per resident per day, subject to Commission recommendation and provided that funds have been appropriated for 3.67 hours of direct care per resident for Medicaid eligible reimbursement. Nursing staff, rounded to the nearest whole person, must be distributed in order to meet the following minimum shift ratios:

	RN/LPN	CNA (or RN/LPN or NAIT serving as a CNA)
Day	1:15	1:7
Evening	1:20	1:10
Night	1:30	1:15

****<u>May 1, 2003 regulations not implemented because of funding</u>****

(h) **<u>Notwithstanding the minimum staffing requirements established in this subchapter, to the extent additional staffing is necessary to meet the needs of residents, nursing facilities must provide sufficient nursing staffing</u>**. If the Division finds unsatisfactory outcomes in a facility, the Department may impose protocols for staffing adequacy, including but not limited to staffing levels above the minimum required under this subchapter. Outcomes examined shall include those outcomes as enumerated by the United States Health Care Financing Administration Quality Indicators. Evidence of a failure to meet the nursing staffing needs of residents shall be grounds for enforcement action under this chapter.

(i) **<u>All residential health facilities shall have, in addition to the requirements in subsections (b) through (h) of this section, a full-time director of nursing who is an advanced practice nurse or a registered nurse with 1 year's work experience as a registered nurse</u>**. After July 1, 2001, any newly hired director of nursing shall be an advanced practice nurse or a registered nurse with a B.S. degree in nursing and 2 years' experience in long-term care or a registered

nurse with 3 years of long-term care experience. After July 1, 2001, all newly hired directors of nursing must complete, within 3 months of hire (or as soon as a course is available), a long-term care director of nursing workshop in accordance with regulations promulgated by the Department in consultation with the Commission.

FLORIDA

Florida Annotated Statutes

- Title 29. Public Health (Chs. 381-408)
  - Chapter 400. Nursing Homes and Related Health Care Facilities
    - Part II. Nursing Homes

§ 400.23. Rules; evaluation and deficiencies; licensure status

(3) (a) 1. The agency shall adopt rules providing minimum staffing requirements for nursing home facilities. These requirements must include, for each facility:

a. A **minimum weekly average of certified nursing assistant and licensed nursing staffing combined of 3.6 hours of direct care per resident per day**. As used in this sub-subparagraph, a week is defined as Sunday through Saturday.

b. A **minimum certified nursing assistant staffing of 2.5 hours of direct care per resident per day.** A facility may not staff below one certified nursing assistant per 20 residents.

c. **A minimum licensed nursing staffing of 1.0 hour of direct care per resident per day**. A facility may not staff below one licensed nurse per 40 residents.

2. Nursing assistants employed under s. 400.211(2) may be included in computing the staffing ratio for certified nursing assistants if their job responsibilities include only nursing-assistant-related duties.

3. Each nursing home facility must document compliance with staffing standards as required under this paragraph and post daily the names of staff on duty for the benefit of facility residents and the public.

4. The agency shall recognize the use of licensed nurses for compliance with minimum staffing requirements for certified nursing assistants if the nursing home facility otherwise meets the minimum staffing requirements for licensed nurses and the licensed nurses are performing the duties of a certified nursing assistant. Unless otherwise approved by the agency, licensed nurses counted toward the minimum staffing requirements for certified nursing assistants must exclusively perform the duties of a certified nursing assistant for the entire shift and not also be counted toward the minimum staffing requirements for licensed nurses. If the agency approved a facility's request to use a licensed nurse to perform both licensed nursing and certified nursing assistant duties, the facility must allocate the amount of staff time specifically spent on certified nursing assistant duties for the purpose of documenting compliance with minimum staffing

requirements for certified and licensed nursing staff. The hours of a licensed nurse with dual job responsibilities may not be counted twice.

GEORGIA

Rules and Regulations of the State of Georgia

- Title 290: Department of Human Resources
  - Public Health
    - Chapter 290-5-8 Nursing Homes

290-5-8-.04 Nursing Service.

(1) **A registered nurse shall be employed full time as director of nursing services**. She shall not also be the administrator.

(2) The director of nursing services shall normally be employed on the daytime shift and shall devote full time to the administration of the nursing service which includes a reasonable amount of time with all nursing shifts.

(3) The director of nursing services may also serve as the director of nursing services in another facility in close proximity to the home provided she has a registered nurse assistant who is assigned to each facility full time as supervisor of nursing care. The director's assistant shall devote full time to the supervision of nursing care.

(4) **There shall be at least one nurse, registered, licensed undergraduate, or licensed practical on duty and in charge of all nursing activities during each eight-hour shift**.

(5) There shall be sufficient nursing staff on duty at all times to provide care for each patient according to his needs. **A minimum of 2.0 hours of direct nursing care per patient in a 24-hour period must be provided. For every seven (7) total nursing personnel required, there shall be not less than one registered nurse or licensed practical nurse employed**. Dining assistants are to be used to supplement, not replace, existing nursing staff requirements and as such are not considered nursing staff and are not to be included in computing the required minimum hours of direct nursing care.

(6) The nursing staff shall be employed for nursing duties only.

(7) There shall be sufficient qualified personnel in attendance at all times to ensure properly supervised nursing services to the patients, including direct supervision of dining assistants in accordance with these rules. This includes staff members dressed, awake and on duty all night.

HAWAII

Code of Hawaii Rules

- Title 11. Department of Health
  - Chapter 94. Skilled Nursing/Intermediate Care Facilities

§ 11-94.1-39. Nursing Services.

(a) Each facility shall have nursing staff sufficient in number and qualifications to meet the nursing needs of the residents. **There shall be at least one registered nurse at work full-time on the day shift, for eight consecutive hours, seven days a week, and at least one licensed nurse at work on the evening and night shifts, unless otherwise determined by the department**.

(b) Nursing services shall include but are not limited to the following:

(1) A comprehensive nursing assessment of each resident and the development and implementation of a plan of care within five days of admission. The nursing plan of care shall be developed in conjunction with the physician's admission physical examination and initial orders. A nursing plan of care shall be integrated with an overall plan of care developed by an interdisciplinary team no later than the twenty-first day after, or simultaneously, with the initial interdisciplinary care plan conference;

(2) Written nursing observations and summaries of the resident's status recorded, as appropriate, due to changes in the resident's condition, but no less than quarterly; and

(3) Ongoing evaluation and monitoring of direct care staff to ensure quality resident care is provided.

(c) There shall be a registered nurse designated as the nursing administrator or director of nursing who will be responsible for all nursing services.

****No minimum direct care requirement****

IDAHO

Idaho Administrative Code

- IDAPA 16: Department of Health and Welfare
  - Title 03
    - Chapter 02: Rules and Minimum Standards for Skilled Nursing and Intermediate Care Facilities
    -

200. NURSING SERVICES.

02. Minimum Staffing Requirements.

a. A **Director of Nursing Services (D.N.S.) shall work full time on the day shift** but the shift may be varied for management purposes. If the Director of Nursing Services is temporarily responsible for administration of the facility, there shall be a registered nurse (RN) assistant to direct patient care. The Director of Nursing Services is required for all facilities five (5) days per week.

i. The D.N.S. in facilities with an average occupancy rate of sixty (60) patients/residents or more shall have strictly nursing administrative duties.

ii. The D.N.S. in facilities with an average occupancy rate of fifty-nine (59) patients/residents or less may, in addition to administrative responsibilities, serve as the supervising nurse.

b. A supervising nurse, or registered professional nurse currently licensed by the state of Idaho, or a licensed practical nurse currently licensed by the state of Idaho, and who meets the requirements designated by the Idaho Board of Nursing to assume responsibilities as a charge nurse and meets the definition in Subsection 002.35.

c. A charge nurse, a registered professional nurse currently licensed by the state of Idaho or a licensed practical nurse currently licensed by the state of Idaho and who meets the requirements designated by the Idaho Board of Nursing to assume responsibilities as a charge nurse in accordance with the definition in Subsection 002.07. A charge nurse shall be on duty as follows:

i. In SNFs with an average occupancy rate of fifty-nine (59) patients/residents or less a registered professional nurse shall be on duty eight (8) hours of each day and no less than a licensed practical nurse shall be on duty for each of the other two (2) shifts.

ii. In SNFs with an average occupancy rate of sixty (60) to eighty-nine (89) patients/residents a registered professional nurse shall be on duty for each a.m. shift (approximately 7:00 a.m. - 3:00 p.m.) and p.m. shift (approximately 3:00 p.m. to 11:00 p.m.) and no less than a licensed practical nurse on the night shift.

iii. In SNFs with an average occupancy rate of ninety (90) or more patients/residents a registered professional nurse shall be on duty at all times.

iv. In facilities licensed exclusively as an ICF and accepting only intermediate care patients/residents a registered professional nurse or a licensed practical nurse shall be on duty at all times as charge nurse.

v. In those facilities authorized to utilize a licensed practical nurse as charge nurse, the facility must make documented arrangements for a registered professional nurse to be on call for these shifts to provide professional nursing support.

vi. Facilities licensed for both skilled and intermediate care shall meet the charge nurse

requirements for a SNF.

d. Nursing hours per patient/resident per day shall be provided to meet the total needs of the patients/ residents. The minimum staffing shall be as follows:

i. **Skilled Nursing Facilities with a census of fifty-nine (59) or less patients/residents shall provide two and four-tenths (2.4) hours per patient/resident per day**. Hours shall not include the Director of Nursing Services but the supervising nurse on each shift may be counted in the calculations of the two and four-tenths (2.4) hours per patient/resident per day.

ii. **Skilled Nursing Facilities with a census of sixty (60) or more patients/residents shall provide two and four-tenths (2.4) hours per patient/resident per day**. Hours shall not include the Director of Nursing Services or supervising nurse.

ILLINOIS

Illinois Compiled Statutes Annotated

- Chapter 210. Health Facilities
  - Nursing Home Care Act
    - Article III. Licensing, Enforcement, Violations, Penalties and Remedies
      - Part 2. General Provisions

Sec. 3-202.05. Staffing ratios effective July 1, 2010 and thereafter.

(a) For the purpose of computing staff to resident ratios, direct care staff shall include:

(1) registered nurses;

(2) licensed practical nurses;

(3) certified nurse assistants;

(4) psychiatric services rehabilitation aides;

(5) rehabilitation and therapy aides;

(6) psychiatric services rehabilitation coordinators;

(7) assistant directors of nursing;

(8) 50% of the Director of Nurses' time; and

(9) 30% of the Social Services Directors' time.

(b) Beginning January 1, 2011, and thereafter, light intermediate care shall be staffed at the same

staffing ratio as intermediate care.

(c) Facilities shall notify the Department within 60 days after the effective date of this amendatory Act of the 96th General Assembly [P.A. 96-1372], in a form and manner prescribed by the Department, of the staffing ratios in effect on the effective date of this amendatory Act of the 96th General Assembly [P.A. 96-1372] for both intermediate and skilled care and the number of residents receiving each level of care.

(d)(1) Effective July 1, 2010, for each resident needing skilled care, a minimum staffing ratio of 2.5 hours of nursing and personal care each day must be provided; for each resident needing intermediate care, 1.7 hours of nursing and personal care each day must be provided.

(2) **Effective January 1, 2011, the minimum staffing ratios shall be increased to 2.7 hours of nursing and personal care each day for a resident needing skilled care and 1.9 hours of nursing and personal care each day for a resident needing intermediate care.**

(3) Effective January 1, 2012, the minimum staffing ratios shall be increased to 3.0 hours of nursing and personal care each day for a resident needing skilled care and 2.1 hours of nursing and personal care each day for a resident needing intermediate care.

(4) Effective January 1, 2013, the minimum staffing ratios shall be increased to 3.4 hours of nursing and personal care each day for a resident needing skilled care and 2.3 hours of nursing and personal care each day for a resident needing intermediate care.

(5) Effective January 1, 2014, the minimum staffing ratios shall be increased to 3.8 hours of nursing and personal care each day for a resident needing skilled care and 2.5 hours of nursing and personal care each day for a resident needing intermediate care.

INDIANA

Indiana Administrative Code

- Title 410. Indiana State Department of Health
  - Article 16.2 Health Facilities; Licensing and Operational Standards
    - Rule 3.1 Comprehensive Care Facilities

410 IAC 16.2-3.1-17 Nursing services

Sec. 17.
(a) The facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.

(b) The facility must provide services by sufficient number of each of the following types of personnel on a twenty-four (24) hour basis to provide nursing care to all residents in accordance with resident care plans:

(1) Except when waived under subsection (f), the **facility shall provide a licensed nurse hour-to-resident ratio of five-tenths (.5) licensed nurse hour per resident per day**, averaged over a one (1) week period. The hours worked by the director of nursing shall not be counted in the staffing hours.

(2) Except when waived under subsection (f), the **facility must designate a licensed nurse to serve as a charge nurse on each tour of duty.**

(3) Except when waived under subsection (f), the **facility must use the services of a registered nurse for at least eight (8) consecutive hours a day, seven (7) days a week**.

(4) Except as waived in subsection (f), the facility must designate a registered nurse who has completed a nursing management course with a clinical component or who has at least one (1) year of nursing supervision in the past five (5) years to serve as the director of nursing on a full-time basis.

(e) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of sixty (60) or fewer residents. These hours worked may be counted toward staffing requirements.

****No minimum direct care requirement****

IOWA

Iowa Administrative Code

- Inspections and Appeals Department (481)
  - Inspections Division
    - Chapter 58: Nursing Facilities

58.11(2) Nursing supervision and staffing.

d. When the health service supervisor serves as the administrator of a facility 50 beds and over, a qualified nurse must be employed to relieve the health service supervisor of nursing responsibilities. (III)
e. The department may establish on an individual facility basis the numbers and qualifications of the staff required in the facility using as its criteria the services being offered and the needs of the residents. (III)

f. Additional staffing, above the minimum ratio, may be required by the department commensurate with the needs of the individual residents. (III)

g. **The minimum hours of resident care personnel required for residents needing intermediate nursing care shall be 2.0 hours per resident day computed on a seven-day week**. A minimum of 20 percent of this time shall be provided by qualified nurses. If the

maximum medical assistance rate is reduced below the 74th percentile, the requirement will return to 1.7 hours per resident per day computed on a seven-day week. A **minimum of 20 percent of this time shall be provided by qualified nurses**. (II, III)

h. The health service supervisor's hours worked per week shall be included in computing the 20 percent requirement.

i. **A nursing facility of 75 beds or more shall have a qualified nurse on duty 24 hours per day, seven days a week**. (II, III)

j. In facilities under 75 beds, if the health service supervisor is a licensed practical nurse, the facility shall employ a registered nurse, for at least four hours each week for consultation, who must be on duty at the same time as the health service supervisor. (II, III)

k. Facilities with 75 or more beds must employ a health service supervisor who is a registered nurse. (II)

l. **There shall be at least two people who shall be capable of rendering nursing service, awake, dressed, and on duty at all times**. (II)

KANSAS

Kansas Administrative Regulations

- Agency 28 Department of Health and Environment
  - Article 39. Licensure of Adult Care Homes
    - Boarding Care Homes

28-39-154. Nursing services.

Each nursing facility shall have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident as determined by resident assessments and individual plans of care.

(a) Sufficient staff. The facility shall employ sufficient numbers of each of the following types of personnel to provide nursing care to all residents in accordance with each resident's comprehensive assessment and care plan.

(1) The nursing **facility shall employ full-time a director of nursing who is a registered nurse**. The director of nursing shall have administrative authority over and responsibility for the functions and activities of the nursing staff.

(2) A **registered nurse shall be on duty at least eight consecutive hours per day, seven days per week**. The facility may include the director of nursing to meet this requirement.

(3) A **licensed nurse shall be on duty 24 hours per day, seven days per week**.

(A) On the day shift there shall be the same number of licensed nurses on duty as there are nursing units.

(B) If a licensed practical nurse is the only licensed nurse on duty, a registered nurse shall be immediately available by telephone.

(4) **At least two nursing personnel shall be on duty at all times in the facility**. Personnel shall be immediately accessible to each resident to assure prompt response to the resident call system and necessary action in the event of injury, illness, fire, or other emergency.

(5) The nursing facility shall not assign nursing personnel routine housekeeping, laundry, or dietary duties.

(6) Direct care staff shall wear identification badges to identify name and position.

(7) The nursing facility shall ensure that direct care staff are available to provide resident care in accordance with the following minimum requirements:

(A) **Per facility, there shall be a weekly average of 2.0 hours of direct care staff time per resident and a daily average of not fewer than 1.85 hours during any 24 hour period**. The director of nursing shall not be included in this computation in facilities with more than 60 beds.

(B) The **ratio of nursing personnel to residents per nursing unit shall not be fewer than one nursing staff member for each 30 residents** or for each fraction of that number of residents.

(C) The licensing agency may require an increase in the number of nursing personnel above minimum levels under certain circumstances. The circumstances may include the following:

(i) location of resident rooms;

(ii) locations of nurses' stations;

(iii) the acuity level of residents; or

(iv) that the health and safety needs of residents are not being met.

(b) The nursing facility shall maintain staffing schedules on file in the facility for 12 months and shall include hours actually worked and the classification of nursing personnel who worked in each nursing unit on each shift.

KENTUCKY

Kentucky Administrative Regulations

- Title 902. Cabinet for Health and Family Services Department for Public Health

- Chapter 20. Health Services and Facilities

(d) Staffing classification requirements.

1. The facility shall have adequate personnel to meet the needs of the patients on a twenty-four (24) hour basis. The number and classification of personnel required shall be based on the number of patients, and the amount and kind of personal care, nursing care, supervision, and program needed to meet the needs of the patients, as determined by medical orders and by services required by this administrative regulation.

2. If the staff to patient ratio does not meet the needs of the patients, the Division for Licensing and Regulation shall determine and inform the administrator in writing how many additional personnel are to be added and of what job classification, and shall give the basis for this determination.

3. The **facility shall have a director of nursing service who is a registered nurse and who works full time during the day**, and who devotes full time to the nursing service of the facility. If the director of nursing has administrative responsibility for the facility, there shall be an assistant director of nursing, who shall be a registered nurse, so that there shall be the equivalent of a full-time director of nursing service. The director of nursing shall be trained or experienced in areas of nursing service, administration, rehabilitation nursing, psychiatric or geriatric nursing.

4. Supervising nurse. **Nursing care shall be provided by or under the supervision of a full-time registered nurse.** The supervising nurse shall be a licensed registered nurse who may be the director of nursing or the assistant director of nursing and shall be trained or experienced in the areas of nursing administration and supervision, rehabilitative nursing, psychiatric or geriatric nursing. The supervising nurse shall make daily rounds to all nursing units performing such functions as visiting each patient, and reviewing medical records, medication cards, patient care plans, and staff assignments, and whenever possible accompanying physicians when visiting patients.

5. Charge nurse. **There shall be at least one (1) registered nurse or licensed practical nurse on duty at all times and who is responsible for the nursing care of patients during her tour of duty**. When a licensed practical nurse is on duty, a registered nurse shall be on call.

****No minimum direct care requirement****

LOUISIANA

Louisiana Administrative Code

- *Title 48. Public Health – General*
  - *Part I. General Administration*
    - *Subpart 3. Licensing and Certification*
      - *Chapter 98. Nursing Homes*
        - *Subchapter B. Nursing Services*

§9811. Nursing Service Personnel

A. The nursing home shall provide a sufficient number of nursing service personnel consisting of registered nurses, licensed practical nurses, and nurse aides to provide nursing care to all residents in accordance with resident care plans 24 hours per day.

1. **As a minimum, the nursing home shall provide 1.5 hours of care per patient each day**.
2. Nursing service personnel shall be assigned duties consistent with their education and experience, and based on the characteristics of the resident load and the kinds of nursing skills needed to provide care to the residents.
3. Nursing service personnel shall be actively on duty. **Licensed nurse coverage shall be provided 24 hours per day.**

B. The **nursing home shall designate a registered nurse to serve as the director of nursing services on a full-time basis during the day-tour of duty**. The director of nursing services may serve as charge nurse only when the nursing home has an average daily occupancy of 60 or fewer residents.

C. If the director of nursing services has non-nursing administrative responsibility for the nursing home on a regular basis, there shall be another registered nurse assistant to provide direction of care-delivery to residents.

D. **There shall be on duty, at all times, at least one licensed nurse to serve as charge nurse responsible for the supervision of the total nursing activities in the nursing home or assigned nursing unit**.

MAINE

Code of Maine Rules

- Agency 10. Department of Health and Human Services
  - Sub-Agency 144. General
    - Chapter 110. Regulation Governing the Licensing and Functioning of Skilled Nursing Facilities and Nursing Facilities

CHAPTER 9
RESIDENT CARE STAFFING

9.A. Minimum Nursing Staff Requirements

The following minimum nursing staff requirements shall be met:

9.A.1. Director of Nursing

a. **In each licensed nursing facility there shall be a Registered Professional Nurse employed**

full-time who shall be responsible for the direction of all nursing services delivered in the facility.

9.A.3. Licensed Staff Coverage

a. **There shall be a Registered Professional Nurse on duty for at least eight (8) consecutive hours each day of the week.**

b. Licensed nurse coverage shall be provided according to the needs of the residents as determined by their levels of care. **The following minimum coverage shall be met**:

1. **Day Shift**

a. **In each facility there shall be a licensed nurse on duty seven (7) days a week**.

b. Each facility must designate a Registered Professional Nurse or a Licensed Practical Nurse as the charge nurse. In facilities with twenty (20) beds or less, the Director of Nursing may also be the charge nurse.

c. In facilities larger than twenty (20) beds, in addition to the Director of Nursing, there shall also be another licensed nurse on duty.

d. An additional licensed nurse shall be added for each fifty (50) beds above fifty (50).

e. In facilities of one hundred (100) beds and over, the additional licensed nurse shall be a Registered Professional Nurse for each multiple of one hundred (100) beds.

2. **Evening Shift**

a. **There shall be a licensed nurse on duty eight (8) hours each evening**.

b. An additional licensed nurse shall be added for each seventy (70) beds.

c. In facilities of one hundred (100) beds and over, one of the additional licensed nurses shall be a Registered Professional Nurse.

3. **Night Shift**

a. **There shall be a licensed nurse on duty eight (8) hours each night**.

b. An additional licensed nurse shall be added for each one hundred (100) beds.

c. In facilities of one hundred (100) beds and over there shall be a Registered Professional Nurse on duty.

d. Registered Professional Nurse on Call

All licensed nursing facilities, regardless of size, shall have a Registered Professional Nurse on duty or on call at all times.

9.A.4. Minimum Staffing Ratios

A. The nursing staff-to-resident ratio is the number of nursing staff to the number of occupied beds. Nursing assistants in training shall not be counted in the ratios. The minimum nursing staff-to-resident ratio shall not be less than the following

1. **On the day shift, one direct-care provider for every 5 residents**;
2. **On the evening shift, one direct-care provider for every 10 residents**; and
3. **On the night shift, one direct-care provider for every 15 residents**.

MARYLAND

Code of Maryland Regulations

- Title 10. Department of Health and Mental Hygiene
  - Subtitle 07. Hospitals
    - Chapter 02. Comprehensive Care Facilities and Extended Care Facilities

12 Nursing Services.

A. Organization, Policies, and Procedures. Nursing service shall provide the care appropriate to the patients' needs with the organizational plan, authority, functions, and duties clearly defined. Nurses and supportive personnel shall be chosen for their training, experience, and ability. Policies and procedures shall be adopted and made available to all nursing personnel.

B. Director of Nursing. The **facility shall provide for an organized nursing service, under the direction of a full-time registered nurse** except that a licensed practical nurse serving as director of nursing as of the effective date of these regulations may continue to serve as director of nursing in the comprehensive care facility in which employed. Upon departure of the licensed practical nurse, the successor shall be a registered nurse.

I. Supervisory Personnel--Comprehensive Care Facilities.

(1) **Comprehensive care facilities shall provide at least the following supervisory personnel**:

Patients	Registered Nurses
(a) 2--99	One--full-time
(b) 100--199	Two--full-time
(c) 200--299	Three--full-time
(d) 300--399	Four--full-time

(2) The director of nursing is included in the above requirements.

J. Hours of Bedside Care--Comprehensive Care Facility. Comprehensive care facilities shall employ supervisory personnel and a sufficient number of supportive personnel, trained and experienced, or both, to provide a **minimum of 2 hours of bedside care per licensed bed per day, 7 days per week**. Bedside hours include the care provided by registered nurses, licensed practical nurses, and supportive personnel except that ward clerks' time shall be computed at 50 percent of the time provided in the nursing unit. Only those hours which the director of nursing spends in bedside care may be counted in the 2-hour minimal requirement. The director of nursing's time counted in bedside care shall be documented.

N. Nursing Service Personnel on Duty. **The ratio of nursing service personnel on duty to patients may not at any time be less than one to 25, of fraction thereof**.

MASSACHUSETTS

Code of Massachusetts Regulations

- Title 105: Department of Public Health
  - Chapter 150.000: Licensing of Long-Term Care Facilities

150.007: Nursing Services

(A) All facilities shall provide appropriate, adequate and sufficient nursing services to meet the needs of patients or residents and to assure that preventive measures, treatments, medications, diets, restorative services, activities and related services are carried out, recorded and reviewed.

(B) Minimum Nursing Personnel Requirement.

(1) General.

(a) Nursing personnel shall not service on active duty more than 12 hours per day, or more than 48 hours per week, on a regular basis.

(b) One director of nurses may cover multiple units of the same or different levels of care within a single facility. One supervisor of nurses may cover up to two units of the same or different levels of care within a single facility.

Where a SNCFC unit or units is in combination with an adult nursing program, there shall be a day supervisor whose sole responsibility is to the pediatric nursing program.

(c) Full-time shall mean 40 hours per week, five days per week.

(d) The amount of nursing care time per patient shall be exclusive of non-nursing duties.

(e) The minimum staffing patterns and nursing care hours as contained herein shall mean minimum, basic requirements. Additional staff will be necessary in many facilities to provide adequate services to meet patient needs.

(f) The supervisor of nurses and the charge nurse, but not the director of nurses, may be counted in the calculation of licensed nursing personnel.

(2) Facilities that provide ***LEVEL I*** care shall provide:

(a) A **full-time director of nurses during the day shift**.

(b) A **full-time supervisor of nurses during the day shift, five days a week** for facilities with more than one unit. In facilities with a single unit, the director of nurses may function as supervisor.

(c) A **charge nurse 24 hours per day, seven days a week for each unit**.

(d) Sufficient ancillary nursing personnel to meet patient needs.

(e) **As a basic minimum, facilities that provide Level I care shall provide a total of 2.6 hours of nursing care per patient per day; at least 0.6 hours shall be provided by licensed nursing personnel and 2.0 hours by ancillary nursing personnel.**

(3) Facilities that provide ***LEVEL II*** care shall provide:

(a) A **full-time director of nurses**.

(b) A **full-time supervisor of nurses during the day shift, five days a week** for facilities with more than one unit. In facilities with only a single unit, the director of nurses may function as supervisor.

A SNCFC shall provide a **full-time supervisor of nursing during the day and evening shifts seven days a week**, who shall be a registered nurse and shall have had at least one year of nursing experience in pediatrics, preferably with the developmentally disabled population.

(c) A **charge nurse 24 hours per day, seven days a week for each unit**.

(d) Sufficient ancillary nursing personnel to meet patient needs.

(e) **As a basic minimum, facilities that provide Level II care shall provide a total of 2.0 hours of nursing care per patient per day; at least 0.6 hours shall be provided by licensed nursing personnel and 1.4 hours by ancillary nursing personnel.**

1. As a basic minimum, a SNCFC shall provide a total of 5.0 hours of nursing care per patient per day. In facilities housing 40 bed units, at least 1.4 to 1.8 hours shall be provided by licensed nursing personnel and the balance by ancillary nursing personnel. In facilities having

less than 40 bed units at least 1.8 to 2.1 hours shall be provided by licensed nursing personnel and the balance by ancillary nursing personnel.

2. A SNCFC shall provided a staff nurse, 24 hours a day, seven days a week for each unit.

3. As a basic minimum an AIDSSNF shall provide 4.4 hours of nursing care per patient per day; at least 2.0 hours of this care must be provided by licensed personnel and 2.4 by ancillary personnel.

4. An AIDSSNF shall employ, at a minimum, one .5 FTE (20 hours per week) psychiatric nurse who shall be responsible for direct patient care as well as staff training. These hours are in addition to the 4.4 hours of direct nursing specified in 105 CMR 150.007(B)(3)(e)3.. The psychiatric nurse shall work closely with the social work and substance abuse counseling staff in developing and coordinating the mental health component of the resident's Individual Service Plan (ISP) as well as in developing programs for staff support.

(4) Facilities that provide ***LEVEL III*** care shall provide:

(a) A full-time supervisor of nurses during the day shift, five days a week, in facilities with more than one unit.

(b) A **charge nurse during the day and evening shifts, seven days a week, for each unit.**

(c) A nurse's aide who is a responsible person, on duty during the night shift.

(d) Sufficient ancillary nursing personnel to meet patient needs.

(e) **As a basic minimum, facilities that provide Level III care shall provide a total of 1.4 hours of nursing care per patient per day; at least 0.4 shall be provided by licensed nursing personnel and 1.0 hours by ancillary nursing personnel**.

(f) The facility shall provide additional nursing services, sufficient to meet the needs, in the event a patient has a minor illness and is not transferred to a higher level facility or unit.

MICHIGAN

Michigan Compiled Laws Service

- Chapter 333. Health
  - Public Health Code
    - Article 17. Facilities and Agencies
      - Part 217. Nursing Homes

§ 333.21720a. Director of nursing; nursing personnel; effective date of subsection (1); natural disaster or other emergency.

Sec. 21720a.

(1) A nursing home shall not be licensed under this part unless that nursing home has on its staff at least 1 registered nurse with specialized training or relevant experience in the area of gerontology, who shall serve as the director of nursing and who shall be responsible for planning and directing nursing care. The **nursing home shall have at least 1 licensed nurse on duty at all times** and shall employ additional registered and licensed practical nurses in accordance with subsection (2). This subsection shall not take effect until January 1, 1980.

(2) A nursing home shall employ nursing personnel sufficient to provide continuous 24-hour nursing care and services sufficient to meet the needs of each patient in the nursing home. Nursing personnel employed in the nursing home shall be under the supervision of the director of nursing. A licensee **shall maintain a nursing home staff sufficient to provide not less than 2.25 hours of nursing care by employed nursing care personnel per patient per day. The ratio of patients to nursing care personnel during a morning shift shall not exceed 8 patients to 1 nursing care personnel; the ratio of patients to nursing care personnel during an afternoon shift shall not exceed 12 patients to 1 nursing care personnel; and the ratio of patients to nursing care personnel during a nighttime shift shall not exceed 15 patients to 1 nursing care personnel and there shall be sufficient nursing care personnel available on duty to assure coverage for patients at all times during the shift**. An employee designated as a member of the nursing staff shall not be engaged in providing basic services such as food preparation, housekeeping, laundry, or maintenance services, except in an instance of natural disaster or other emergency reported to and concurred in by the department. In a nursing home having 30 or more beds, the director of nursing shall not be included in counting the minimum ratios of nursing personnel required by this subsection.

MINNESOTA

Minnesota Administrative Code

- Department of Health
  - Chapter 4658 Nursing Homes

4658.0500 DIRECTOR OF NURSING SERVICES

Subpart 1. QUALIFICATIONS AND DUTIES. A **nursing home must have a director of nursing services who is a registered nurse.**

Subp. 2. REQUIREMENT OF FULL-TIME EMPLOYMENT. A **director of nursing services must be employed full time, no less than 35 hours per week, and be assigned full time to the nursing services of the nursing home.**

Subp. 3. ASSISTANT TO DIRECTOR. A nursing home must designate a nurse to be responsible for the duties of the director of nursing services related to the provision of resident services in the director's absence.

4658.0510 NURSING PERSONNEL.

Subpart 1. STAFFING REQUIREMENTS. A nursing home must have on duty at all times a sufficient number of qualified nursing personnel, including registered nurses, licensed practical nurses, and nursing assistants to meet the needs of the residents at all nurses' stations, on all floors, and in all buildings if more than one building is involved. This includes relief duty, weekends, and vacation replacements.
Subp. 2. MINIMUM HOUR REQUIREMENTS. The minimum number of hours of nursing personnel to be provided is:

A. For nursing homes not certified to participate in the medical assistance program, a **minimum of two (2.0) hours of nursing personnel per resident per 24 hours.**

B. For nursing homes certified to participate in the medical assistance program, the nursing home is required to comply with Minnesota Statutes, section 144A.04, subdivision 7.

Subp. 3. ON-SITE COVERAGE. A nurse must be employed so that on-site nursing coverage is provided eight hours per day, seven days per week.

Subp. 4. ON CALL COVERAGE. A registered nurse must be on call during all hours when a registered nurse is not on duty.

MISSISSIPPI

Code of Mississippi Rules

- Agency 15. Department of Health
  - Sub-Agency 301. Office of Health Protection; Health Facilities Licensure and Certification
    - Chapter 045. Minimum Standards for Institutions for the Aged or Infirm

103.01 Nursing Facility. To be classified as a facility, the institution shall comply with the following staffing requirements:

1. **Minimum requirements for nursing staff shall be based on the ratio of two and eight-tenths (2.80) hours of direct nursing care per resident per twenty-four (24) hours**. Staffing requirements are based upon resident census. Based upon the physical layout of the nursing facility, the licensing agency may increase the nursing care per resident ratio.

2. Each facility shall have the following licensed personnel as a minimum:

a. **Seven (7) day coverage on the day shift by a registered nurse**.

b. A **registered nurse designated as the Director of Nursing Services, who shall be employed on a full time (five 5 days per week) basis on the day shift** and be responsible for all nursing services in the facility.

c. Facilities of one-hundred eighty (180) beds or more shall have an assistant director of nursing services, who shall be a registered nurse.

d. A **registered nurse or licensed practical nurse shall serve as a charge nurse** and be responsible for supervision of the total nursing activities in the facility **during the 7:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m. shift.** The **nurse assigned to the unit for the 11:00 p.m. to 7:00 a.m. shift may serve as both the charge nurse and medication/treatment nurse**. A medication/treatment nurse for each nurses' station shall be required on all shifts. This shall be a registered nurse or licensed practical nurse.

e. In facilities with sixty (60) beds or less, the director of nursing services may serve as charge nurse

f. In facilities with more than sixty (60) beds, the charge nurse may not be the director of nursing services or the medication/treatment nurse.

4. There shall be at least two (2) employees in the facility at all times in the event of an emergency.

MISSOURI

Missouri Code of State Regulations

- Title 19 – Department of Health and Senior Services
  - Division 30 – Division of Regulation and Licensure
    - Chapter 85 – Intermediate Care and Skilled Nursing Facility

30-85.042 Administration and Resident Care Requirements for New and Existing Intermediate Care and Skilled Nursing Facilities

(34) **All facilities shall employ a director of nursing on a full-time basis** who shall be responsible for the quality of patient care and supervision of personnel rendering patient care.

(35) Licensed Nursing Requirements; Skilled Nursing Facility.

(A) The director of nursing shall be a registered nurse.
(B) **A registered nurse shall be on duty in the facility on the day shift. Either a licensed practical nurse (LPN) or a registered professional nurse (RN) shall be on duty in the facility on both the evening and night shifts**.
(C) A registered nurse shall be on call during the time when only an LPN is on duty.

(36) Licensed Nursing Requirements; Intermediate Care Facilities.

(A) The director of nursing shall be either an RN or an LPN.
(B) When the director of nursing is an LPN, an RN shall be employed as consultant a

minimum of four (4) hours per week to provide consultation to the administrator and the director of nursing in matters relating to nursing care in the facility.

(C) An LPN or RN shall be on duty and in the facility on the day shift.

(D) An LPN or RN shall be on call twenty-four (24) hours a day, seven (7) days a week.

(37) All facilities shall employ nursing personnel in sufficient numbers and with sufficient qualifications to provide nursing and related services which enable each resident to attain or maintain the highest practicable level of physical, mental and psychosocial well-being. Each facility shall have a licensed nurse in charge who is responsible for evaluating the needs of the residents on a daily and continuous basis to ensure there are sufficient, trained staff present to meet those needs.

(38) **Nursing personnel shall be on duty at all times on each resident-occupied floor**.

****No minimum direct care requirement****

MONTANA

Administrative Rules of Montana

- Title 37: Public Health and Human Services
  - Chapter 106: Health Care Facilities
    - Sub-Chapter 6: Minimum Standards for Nursing Facilities

37.106.605 MINIMUM STANDARDS FOR A SKILLED NURSING CARE FACILITY FOR EACH 24 HOUR PERIOD: STAFFING

(1) The following table indicates an absolute minimum staffing pattern below which an acceptable level of care and safety cannot be maintained. Even with this staffing it would be difficult. Therefore, it is recommended that the quantity and quality of staffing should be determined by the administrator in consultation with his director of nursing. This decision should be based on the nursing needs of the patients and should reflect the current concepts of restorative and geriatric care.

	DAY			EVENINGS			NIGHTS		
No. of Beds Licensed	R.N.* Hours	L.P.N. Hours	Aide** Hours	R.N. Hours	L.P.N. Hours	Aide** Hours	R.N. Hours	L.P.N. Hours	Aide** Hours
4-8	8	0	0	0	8	0	0	8	0
9-15	8	0	4	0	8	0	0	8	0
16-20	8	0	8	0	8	4	0	8	0
21-25	8	0	12	0	8	8	0	8	4
26-30	8	0	16	0	8	8	0	8	8

31-35	8	0	20	0	8	12	0	8	8
36-40	8	0	24	0	8	16	0	8	8
41-45***	8	8	28	0	8	16	0	8	12
46-50	8	8	32	0	8	20	0	8	16
51-55	8	8	36	8	0	24	0	8	16
56-60	8	8	40	8	0	24	0	8	16
61-65	8	8	44	8	0	28	0	8	20
66-70	8	8	48	8	0	32	0	8	24
71-75	8	8	52	8	0	32	8	0	24
76-80	8	16	48	8	8	32	8	0	24
81-85	8	16	52	8	8	32	8	8	20
86-90	8	16	56	8	8	32	8	8	24
91-95	16	16	52	8	8	36	8	8	24
96-100	16	16	56	8	8	40	8	8	24

Staffing of homes with more than 100 beds will be given individual consideration.
* The two relief shifts could be provided by an L.P.N. up to 40 beds.
** The term "aide" includes orderlies.
*** In a home of 41 beds or more one R.N. in this pattern is to be the full-time director of nursing service.

NEBRASKA

Nebraska State Rules & Regulations

- Title 175. Health Care Facilities and Services Licensure (Department of Health and Human Services)
  - Chapter 12. Skilled Nursing Facilities, Nursing Facilities, and Intermediate Care Facilities

12-006.04 Staff Requirements: The facility must maintain a sufficient number of staff with the required training and skills necessary to meet the resident population's requirements for assistance or provision of personal care, activities of daily living, supervision, supportive services and medical care where appropriate.

12-006.04C Nursing Staff Resources and Responsibilities: The facility must provide sufficient nursing staff on a 24-hour basis, with specified qualifications as follows, to provide nursing care to all residents in accordance with resident care plans.

12-006.04C1 Director of Nursing Services: **The facility must employ a Director of Nursing**

Services full-time, who may serve only one facility in this capacity. The Director of Nursing Services of the facility must be a registered nurse.

12-006.04C1b The Director of Nursing Services may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

12-006.04C2 Registered Nurse Requirement: Except when waived under 175 NAC 12-006.04C2a or 12-006.04C2b, **skilled nursing facilities and nursing facilities must use the services of a registered nurse for at least eight consecutive hours a day, seven days a week.**

12-006.04C3 Charge Nurse Requirement: Except when waived under 175 NAC 12-006.04C4 or 12-006.04C5 of this section, **skilled nursing facilities and nursing facilities must designate a licensed nurse to serve as a charge nurse on each tour of duty**. Intermediate care facilities must designate a licensed nurse to serve as a charge nurse for one tour of duty each 24 hours.

12-006.04C7 Other Nursing Personnel: The facility must assign a sufficient number of qualified nursing personnel who are awake, dressed and assigned to resident care duties at all times.

****No minimum direct care requirement****

NEVADA

Nevada Administrative Code

- Chapter 449. Medical and Other Related Facilities
  - Facilities for Skilled Nursing
    - Staff and Attending Physicians

449.74517 Nursing staff. (NRS 449.037)

1. A facility for skilled nursing shall ensure that there is a sufficient number of members of the nursing staff on duty at all times to provide nursing care to and attain and maintain the highest practicable physical, mental and psychosocial well-being of each patient in the facility in accordance with his plan of care.

2. A facility for skilled nursing shall employ a full-time registered nurse to act as the chief administrative nurse. The chief administrative nurse must have:

(a) At least 3 years of experience providing nursing care in a hospital or facility for long-term care; and

(b) Experience supervising other employees.

3. A **licensed practical nurse must be designated on each shift as the nurse in charge**. The chief administrative nurse may be designated as the nurse in charge only if the facility has an average daily occupancy of not more than 60 patients.

4. A **registered nurse must be on duty at a facility for skilled nursing for at least 8 consecutive hours per day, 7 days a week.**

****No minimum direct care requirement****

NEW HAMPSHIRE

New Hampshire Code of Administrative Rules

- Agency He-P. Dept. of Health and Human Services; Division of Public Health Services
  - Chapter He-P 800. Residential Care and Health Facility Rules
    - Part He-P 803 New Hampshire Nursing Home Rules

He-P 803.17 Organization and Administration.

(a) Each nursing home shall have a medical director who is a licensed physician in the state of New Hampshire.

(c) **There shall be a full time director of nursing services** who is currently licensed in the state of New Hampshire pursuant to RSA 326-B, or licensed pursuant to the multi-state compact, and who is an RN with at least 2 years relevant experience in resident care.

(d) The director of nursing services shall be responsible for:

(6) Maintaining written personnel schedules, which shall be retained on-site for a period of at least 90 days and which include;

a. **At least one licensed nurse in the facility 24 hours a day**;

b. **At least one registered nurse, for 8 consecutive hours a day 7 days a week**; and

c. Licensed nursing assistants who have been verified in accordance with the New Hampshire board of registration in nursing

****No minimum direct care requirement****

NEW JERSEY

New Jersey Administrative Code

- Title 8. Health and Senior Services
  - Chapter 39. Standards for Licensure of Long-Term Care Facilities
    - Subchapter 25. Mandatory Nurse Staffing

§ 8:39-25.1 Mandatory policies and procedures for nurse staffing

(a) There **shall be a full-time director of nursing or nursing administrator who is a registered professional nurse licensed in the State of New Jersey**, who has at least two years of supervisory experience in providing care to long-term care residents, and who supervises all nursing personnel.

(b) During a temporary absence of the director of nursing, there shall be a registered professional nurse on duty who shall be designated in writing as an alternate to the director of nursing. The alternate shall be temporarily responsible for supervising all nursing personnel.

§ 8:39-25.2 Mandatory nurse staffing amounts and availability

(a) The facility shall provide nursing services and licensed nursing and ancillary personnel at all times. In accordance with N.J.A.C. 13:37-6.2, the registered professional nurse may delegate selected nursing tasks in the implementation of the nursing regimen to licensed practical nurses and ancillary nursing personnel.

(b) The facility shall provide nursing services by registered professional nurses, licensed practical nurses, and nurse aides (the hours of the director of nursing are not included in this computation, except for the direct care hours of the director of nursing in facilities where the director of nursing provides more than the minimum hours required at N.J.A.C. 8:39-25.1(a)) on the basis of:

1. **Total number of residents multiplied by 2.5 hours/day**; plus

2. Total number of residents receiving each service listed below, multiplied by the corresponding number of hours per day:

Wound care	0.75 hour/day
Nasogastric tube feedings and/or gastrostomy	1.00 hour/day
Oxygen therapy	0.75 hour/day
Tracheostomy	1.25 hours/day
Intravenous therapy	1.50 hours/day
Use of respirator	1.25 hours/day
Head trauma stimulation/advanced neuromuscular/orthopedic care	1.50 hours/day

(d) In facilities with 150 licensed beds or more, there shall be an assistant director of nursing who is a registered professional nurse.

(e) A **registered professional nurse shall be on duty at all times in facilities with more than 150 licensed beds**.

(f) At least **20 percent of the hours of care required by (b) above shall be provided by individuals who are either registered professional nurses or licensed practical nurses**.

(g) The nurse aide component of the facility's total hourly nurse staffing requirement, as specified in (b) above, shall be met by nurse aides who have completed a nurse aide training course approved by the New Jersey State Department of Health and Senior Services and have passed the New Jersey Nurse Aide Certification Examination, in accordance with N.J.A.C. 8:39-43, and/or by newly hired individuals who have worked in the facility for less than four months and who are enrolled in a nurse aide training program.

(h) There **shall be at least one registered professional nurse on duty in the facility during all day shifts**. (During a temporary absence, not to exceed 72 hours, the registered professional nurse may be on duty during the evening or night shift.)

(i) There **shall be at least one registered professional nurse on duty or on call during all evening and night shifts**.

NEW MEXICO

New Mexico Administrative Code

- Title 7. Health
  - Chapter 9. Nursing Homes and Intermediate Care Facilities
    - Part 2. Requirements for Long Term Care Facilities

§ 7.9.2.50. NURSING SERVICES

B. DIRECTOR OF NURSING SERVICES IN SKILLED CARE AND INTERMEDIATE CARE FACILITIES:

(1) Staffing requirement: **Every skilled care facility and every intermediate care facility shall employ a full-time director of nursing services who may also serve as a charge nurse. The director of nursing services shall work only on the day shift except as in an emergency or required for the proper supervision of nursing personnel**.

(2) Qualifications: The director of nursing services shall:

(a) Be a registered or licensed practical nurse; and

(b) Be trained or experienced in areas such as nursing service administration, restorative nursing, psychiatric nursing, or geriatric nursing.

C. CHARGE NURSES IN SKILLED CARE FACILITIES AND INTERMEDIATE CARE FACILITIES:

(1) Staffing requirement:

(a) A **skilled nursing facility shall have at least one charge nurse on duty at all times**.

(b) An intermediate care facility shall have a charge nurse during every tour of duty.

(2) Qualifications: Unless otherwise required under this paragraph, the charge nurses shall be registered nurses or licensed practical nurses, and shall have had training, or be acquiring training, or have had experience in areas such as nursing service administration, restorative nursing, psychiatric nursing, or geriatric nursing.

§ 7.9.2.51. NURSING STAFF
In addition to the requirements of Section 7.9.2.50 NMAC, the following conditions shall be met:

A. ASSIGNMENTS: There shall be sufficient nursing service personnel assigned to care for the specific needs of each resident on each tour of duty. Those personnel shall be briefed on the condition and appropriate care of each resident prior to beginning hands-on care of residents.

E. TWENTY-FOUR (24) HOUR COVERAGE: All **facilities shall have at least one nursing staff person on duty at all times.**

F. STAFFING PATTERNS: The assignment of the nursing personnel required by this subsection to each tour of duty shall be sufficient to meet each resident's needs and implement each resident's comprehensive care plan.

(1) Nursing department personnel means, the director of nursing, the assistant director of nursing, nursing department directors, licensed nursing personnel, certified nursing assistants, nursing assistants who have completed 16 hours or more of orientation and demonstrated competency and restorative nursing assistants.

(2) The director of nursing, the assistant director of nursing, and nursing department directors may be counted towards the minimum staffing requirements only for the time spent on the shift providing direct resident care services.

(a) A **skilled nursing facility or facility that offers intermediate and skilled nursing shall maintain a nursing department minimum staffing level of two and a half (2.5) hours per patient day calculated on a seven (7) day average.**

(b) An intermediate care facility shall maintain a nursing department minimum staffing level of two and three-tenths (2.3) hours per patient day calculated on a seven (7) day average.

(c) Within one hour of shift change, facilities shall post the number of nursing personnel on duty in a conspicuous and consistent location for public review. Shifts are informally defined as the day shift, evening shift, and night shift. Employees working variations of these shifts shall be included within the shift count where a majority of the hours fall. **EXAMPLE**: For a facility with 100 patients, 2.3 hours per patient day averages one nursing department employee on duty

for approximately every 10 to 11 patients. For a facility with 100 patients, 2.5 hours per patient day averages one nursing department employee for every 9 to 10 patients. These are daily averages that will vary from shift to shift so that actual staffing might approximate:

	2.3 Hours Per Patient Day	**2.5 Hours Per Patient Day**
Day Shift	1 staff for 8 patients	**1 staff for 7 patients**
Evening Shift	1 staff for 10 patients	**1 staff for 10 patients**
Night Shift	1 staff for 13 patients	**1 staff for 12 patients**

NEW YORK

New York Codes, Rules and Regulations

- Title 10. Department of Health
  - Chapter V. Medical Facilities
    - Subchapter A. Medical Facilities – Minimum Standards
      - Article 3. Residential Care Facilities
        - Part 415. Nursing Homes – Minimum Standards
          - Clinical Services

§ 415.13 Nursing services

The facility shall have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. The facility shall assure that each resident receives treatments, medications, diets and other health services in accordance with individual care plans.

(a) Sufficient staff.

(1) The facility shall provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(i) Registered professional nurses or licensed practical nurses;

(ii) Certified nurse aides; and

(iii) Other nursing personnel.

(2) The **facility shall designate a registered professional nurse or licensed practical nurse to serve as a charge nurse on each tour of duty who is responsible for the supervision of total nursing activities in the facility**. Alternatively, as necessitated by resident care needs, the facility may designate one charge nurse for each tour of duty on each resident care unit or on proximate nursing care units in the facility provided that each nursing care unit in the facility is under the supervision of a charge nurse.

(b) Registered professional nurse.

(1) The **facility shall use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week**.

(2) The **facility shall designate a registered professional nurse to serve as the director of nursing on a full-time basis**.

(3) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

****No minimum direct care requirement****

NORTH CAROLINA

North Carolina Administrative Code

- Title 10A. Department of Health and Human Services
  - Chapter 13. NC Medical Care Commission
    - Subchapter 13D. Rules for the Licensing of Nursing Homes
      - Section .2300. Patient and Resident Care and Services

.2303 NURSE STAFFING REQUIREMENTS

(a) The facility shall provide licensed nursing personnel consistent with applicable occupational regulations and sufficient to accomplish the following:

(1) patient needs assessment;

(2) patient care planning; and

(3) supervisory functions in accordance with the levels of patient care advertised or offered by the facility.

(b) The facility shall provide other nursing personnel sufficient to ensure that activities of daily living, personal care, delegated restorative nursing tasks and other health care needs, as identified in each patient's plan of care, are met.

(c) A multi-storied facility shall have at least one direct-care staff member on duty on each patient care floor at all times.

(d) Except for designated units with higher staffing requirements noted elsewhere in this Subchapter, **daily direct patient care** nursing **staff, licensed and unlicensed, shall equal or exceed 2.1** nursing **hours per patient per day**.

(1) Inclusive in these nursing hours is the requirement that at least **one licensed nurse is on duty for direct patient care at all times.**

(2) Nursing care shall include the services of a **registered nurse for at least eight consecutive hours a day, seven days a week**. This coverage can be spread over more than one shift if such a need exists. The director of nursing may be counted as meeting the requirements for both the director of nursing and patient staffing for facilities with a total census of 60 nursing beds or less.

(3) Nursing support personnel, including ward clerks, secretaries, nurse educators and persons in primarily administrative management positions and not actively involved in direct care, shall not be counted toward compliance with minimum daily requirements for direct care staffing.

NORTH DAKOTA

North Dakota Administrative Code

- Title 33. State Department of Health
  - Article 7. Licensing Medical Hospitals
    - Chapter 3.2 Nursing Facilities

33-07-03.2-14. Nursing services.

1. **Nursing services must be under the direction of a nurse executive (director of nursing) who is employed by the facility and is a registered nurse** licensed to practice in North Dakota.

3. The facility shall have sufficient qualified nursing personnel on duty at all times to meet the nursing care needs of the residents including:

a. **At least one registered nurse on duty eight consecutive hours per day, seven days a week**; and

b. **At least one licensed nurse on duty and designated to work charge twenty-four hours a day seven days a week.**

****No minimum direct care requirement****

OHIO

Ohio Administrative Code

- 3701 Department of Health – Administration and Director
  - Chapter 3701-17 Nursing Homes

3701-17-08. Personnel requirements.

(A) Each nursing home and home for the aging shall arrange for the services of an administrator who shall be present in the home to the extent necessary for effectively managing the home and assuring that needs of the residents are being met, but not less than sixteen hours during each calendar week.

(B) Each nursing home shall employ a registered nurse who shall serve as director of nursing. The **director of nursing shall be on duty five days per week, eight hours per day** predominantly between the hours of six A.M. and six P.M. to direct the provision of nursing

services. In the event the director of nursing is absent from the nursing home due to illness, vacation or an emergency situation, the home shall designate another registered nurse in its employ to serve as acting director of nursing. The director of nursing shall not be counted toward meeting the other nurse staffing requirements of this rule unless the home's licensed capacity is no greater than sixty beds.

(C) Each nursing home shall have staff sufficient in number on each shift to provide care and services to meet the needs of the residents in an appropriate and timely manner and to provide a **minimum daily average of two and three-fourths hours (2.75) of direct care and services per resident per day as follows**:

(1) A **minimum daily average of two hours per resident per day to be provided by nurse aides with the ratio of nurse aides to residents not exceeding one nurse aide for every fifteen residents** or major part thereof at any time. Licensed nurses may be counted toward meeting this requirement if the nurses are performing the same types of services as nurse aides and are not counted toward meeting the other nursing requirements of this paragraph;

(2) A **minimum daily average of two-tenths of an hour per resident per day to be provided by registered nurses.**

(3) The remainder of the hours may be provided by nurses, nurse aides, activities aides, occupational therapists, physical therapists, dietitians, and social service workers who provide direct care and services to the residents. Each nursing home shall have a registered nurse on call whenever one is not on duty in the home.

OKLAHOMA

Oklahoma Administrative Code

- Title 310. Oklahoma State Department of Health
  - Chapter 675. Nursing and Specialized Facilities
    - Subchapter 13. Staff Requirements
    -

310:675-13-12 Direct care staffing

(a) Each facility shall maintain at least the minimum direct-care-staff-to-resident ratios specified in the Act at 63:1-1925.2. **(BELOW)**

(b) A **licensed nurse shall be on duty eight hours a day, seven days a week on the day shift**.

(c) If the director of nursing is a licensed practical nurse, a registered nurse shall be employed for at least eight hours per week as a consultant.

(d) There **shall be a licensed nurse on duty twenty-four hours per day**; provided however, that a facility licensed as a specialized facility for the developmentally disabled shall only be required to provide 24 hour nursing when it has a resident who has a medical care plan. The

department may waive this requirement when the facility demonstrates it has been unable, despite diligent effort, to recruit licensed nurses. The Department shall determine that a waiver of this requirement will not endanger the health or safety of the residents.

(e) There shall be at least one certified medication aide on duty when any shift is not covered by a licensed nurse.

(f) **At least two direct care staff persons shall be on duty and awake at all times regardless of the number of residents**

Lexis Citation: 63 Okl. St. § 1-1925.2 (2011)
Current through Chapters effective July 1, 2011 of the 53rd Legislature First Regular Session
Annotations current though November 10, 2010

Oklahoma Statutes

- Title 63. Public Health and Safety
  - Chapter 1. Public Health Code
    - Article 19. Nursing Home Care Act

§ 1-1925.2. Reimbursements from Nursing Facility Quality of Care Fund--Staffing ratios--Name and title posting--Rule promulgation--Appeal--Nursing Facility Funding Advisory Committee

3. On and after September 1, 2003, subject to the availability of funds, nursing facilities subject to the Nursing Home Care Act and intermediate care facilities for the mentally retarded with seventeen or more beds shall maintain, in addition to other state and federal requirements related to the staffing of nursing facilities, the following **minimum direct-care-staff-to-resident ratios**:

a. **from 7:00 a.m. to 3:00 p.m., one (1) direct-care staff to every six (6) residents**, or major fraction thereof,

b. **from 3:00 p.m. to 11:00 p.m., one (1) direct-care staff to every (8) eight residents**, or major fraction thereof, and

c. **from 11:00 p.m. to 7:00 a.m., one (1) direct-care staff to every fifteen (15) residents**, or major fraction thereof.

5. a. On and after January 1, 2004, a facility that has been determined by the State Department of Health to have been in compliance with the provisions of paragraph 3 of this subsection since the implementation date of this subsection, may implement flexible staff scheduling; provided, however, such **facility shall continue to maintain a direct-care service rate of at least two and eighty-six one-hundredths (2.86) hours of direct-care service per resident per day**.

b. At no time shall direct-care staffing ratios in a facility with flexible staff-scheduling privileges fall below one direct-care staff to every sixteen residents, and at least two direct-care staff shall be on duty and awake at all times.

c. As used in this paragraph, "flexible staff-scheduling" means maintaining:

(1) a direct-care-staff-to-resident ratio based on overall hours of direct-care service per resident per day rate of not less than two and eighty-six one-hundredths (2.86) hours per day,

(2) a direct-care-staff-to-resident ratio of at least one direct-care staff person on duty to every sixteen residents at all times, and

(3) at least two direct-care staff persons on duty and awake at all times.

OREGON

Oregon Administrative Rules

- Chapter 411 Department of Human Services, Seniors and People with Disabilities Division
  - Division 86 Nursing Facilities/Licensing – Administration and Services

411-086-0100 Nursing Services: Staffing

(3) MINIMUM STAFFING, GENERALLY. Resident service needs must be the primary consideration in determining the number and categories of nursing personnel needed. Nursing staff must be sufficient in quantity and quality to provide nursing services for each resident as needed, including restorative services that enable each resident to achieve and maintain the highest practicable degree of function, self-care and independence, as determined by the resident's care plan. Such staffing must be provided even though it exceeds other requirements specified by this rule or specified in any waiver.

(4) MINIMUM LICENSED NURSE STAFFING.

(a) **Licensed nurse hours must include no less than one RN hour per resident per week**.

(b) When a RN serves as the administrator in the temporary absence of the administrator, the RN's hours must not be used to meet minimum nursing hours.

(c) In facilities with 41 or more beds, the hours of a licensed nurse who serves as facility administrator must not be included in any licensed nurse coverage required by this rule.

(d) The licensed nurse serving as a charge nurse must not be counted toward the minimum staffing requirement under section (5)(c) of this rule.

(e) The **facility must have a licensed charge nurse on each shift, 24 hours per day**.

(A) A **RN must serve as the licensed charge nurse for no less than eight consecutive hours between the start of day shift and the end of evening shift, seven days a week**.

(B) The Director of Nursing Services may serve as the charge nurse only when the facility has 60 or fewer residents.

(5) MINIMUM CERTIFIED NURSING ASSISTANT STAFFING.

(c) The number of residents per nursing assistant must not exceed the ratios:

(B) Beginning April 1, 2009:

(i) **DAY SHIFT: 1 nursing assistant per 7 residents**.

(ii) **SWING SHIFT: 1 nursing assistant per 11 residents**.

(iii) **NIGHT SHIFT: 1 nursing assistant per 18 residents**.

(e) This rule does not prohibit nursing assistants from providing services to a resident to whom they are not assigned.

(g) Nursing assistants with a restricted duty status may be counted toward meeting the minimum staffing ratio, as set forth in section (5)(c) of this rule, if the nursing assistant is able to perform 90 percent of the authorized duties and responsibilities, with or without accommodation, required by a certified nursing assistant as determined by the Oregon State Board of Nursing (OAR 851-063-0030(1)(a)(A) through OAR 851-063-0030(1)(g)(H)).

(h) The facility must ensure that nursing assistants are not assigned more residents than the number for which they can meet the individual service needs.

(i) The **facility must have a minimum of two nursing staff on duty within the facility at all times**.

(j) Nursing staff must be present at all times, in each detached building, distinct and segregated area, including those separated by closed doors, and on each level or floor where residents are housed.

(k) Nursing assistants do not include dining assistants.

(l) Effective September 1, 2008, nursing assistants serving as restorative aides must not be counted toward the minimum staffing requirement under section (5)(c) of this rule.

(n) The facility must ensure no more than 25 percent of the nursing assistants assigned to residents per shift, pursuant to section (5)(c) of this rule, are uncertified nursing assistants.

PENNSYLVANIA

Pennsylvania Administrative Code

- Title 28. Health and Safety
  - Part IV. Health Facilities
    - Subpart C. Long-Term Care Facilities
      - Chapter 211. Program Standards for Long-Term Care Nursing Facilities

§ 211.12. Nursing services

(a) The facility shall provide services by sufficient numbers of personnel on a 24-hour basis to provide nursing care to meet the needs of all residents.

(b) **There shall be a full-time director of nursing services who shall be a qualified licensed registered nurse.**

(e) The facility shall designate a registered nurse who is responsible for overseeing total nursing activities within the facility on each tour of duty each day of the week.

(f) In addition to the director of nursing services, the following daily professional staff shall be available.

(1) **The following minimum nursing staff ratios are required**:

Census	Day	Evening	Night
59 and under	**1 RN**	**1 RN**	**1 RN or 1 LPN**
60/150	**1 RN**	**1 RN**	**1 RN**
15 1/250	**1 RN and 1 LPN**	**1 RN and 1 LPN**	**1 RN and 1 LPN**
25 1/500	**2 RNs**	**2 RNs**	**2 RNs**
501/1,000	**4 RNs**	**3 RNs**	**3 RNs**
1,001pward	**8 RNs**	**6 RNs**	**6 RNs**

(2) When the facility designates an LPN as a nurse who is responsible for overseeing total nursing activities within the facility on the night tour of duty in facilities with a census of 59 or under, a registered nurse shall be on call and located within a 30-minute drive of the facility.

(g) **There shall be at least one nursing staff employee on duty per 20 residents**.

(h) **At least two nursing service personnel shall be on duty**.

(i) A minimum number of general nursing care hours shall be provided for each 24-hour period. The **total number of hours of general nursing care provided in each 24-hour period shall, when totaled for the entire facility, be a minimum of 2.7 hours of direct resident care for each resident**.

(j) Nursing personnel shall be provided on each resident floor.

(k) Weekly time schedules shall be maintained and shall indicate the number and classification of nursing personnel, including relief personnel, who worked on each tour of duty on each nursing unit.

(l) The Department may require an increase in the number of nursing personnel from the minimum requirements if specific situations in the facility -- including, but not limited to, the physical or mental condition of residents, quality of nursing care administered, the location of residents, the location of the nursing station and location of the facility -- indicate the departures as necessary for the welfare, health and safety of the residents.

RHODE ISLAND

Code of Rhode Island Rules

- Agency 14. Department of Health
  - Sub-Agency 090. Health Facilities, Licensure, Construction
    - Chapter 023. Licensing of Nursing Facilities

Section 24.0 Nursing Service.

24.1 Each facility shall have a formally organized nursing service with an organization chart reflecting the lines of communication. The authority, responsibilities and duties for each nursing service position and/or category shall be clearly delineated in writing through job descriptions.

24.2 The **nursing service shall be under the direction of a Director of Nurses who shall be a registered nurse employed full-time**. A relief registered nurse shall be employed to insure full-time coverage in the absence (including vacation, sick time, days off, or other) of the designated registered nurse.

24.3 **Each facility shall have a registered nurse on the premises twenty-four (24) hours a day.** In addition, the necessary nursing service personnel (licensed and non-licensed) shall be in sufficient numbers on a 24 hour basis, to assess the needs of resident, to develop and implement resident care plans, to provide direct resident care services, and to perform other related activities to maintain the health, safety and welfare of residents.

a) There shall be a master plan of the staffing pattern for providing 24 hour nursing service; for the distribution of nursing personnel for each floor and/or residential area; for the replacement of nursing personnel; and for forecasting future needs. The staffing pattern shall include provisions for nurses, aides, orderlies and other personnel as required.

b) The number and type of nursing personnel shall be based on resident care needs and classifications as determined for each residential area. Each nursing facility shall be responsible to have sufficient qualified staff to meet the needs of the residents.

c) At least one individual who is certified in Basic Life Support must be available twenty-four hours a day (24 hrs./day) within the facility.

24.8 The Director of Nurses may act as a charge nurse only when the facility is licensed for 30 beds or less.

24.10 No nursing staff of any facility shall be regularly scheduled for double shifts.

****No minimum direct care requirement****

SOUTH CAROLINA

Code of Laws of South Carolina Annotated

- Code of Regulations
  - Chapter 61 Department of Health and Environmental Control

SECTION 600 - STAFF/TRAINING

606. Staffing

A. Licensed Nursing Staff. An adequate number of licensed nurses shall be on duty to meet the total nursing needs of residents. Licensed nursing staff shall be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation.

1. The **facility shall designate a registered nurse as a full-time Director of Nursing**. Another registered nurse, who is employed by the licensee, shall be designated in writing to act in his or her absence. In facilities with a licensed bed capacity of twenty-two (22) or fewer beds, the Director of Nursing may be included in the requirements of Section 606.A.2.

2. There **shall be at least one (1) licensed nurse per shift for each staff work area**. If there are more than forty-four (44) residents per staff work area, there shall be two (2) licensed nurses on first shift and at least one (1) licensed nurse on second and third shift.

3. At **least one (1) registered nurse shall be on duty in the facility, or on call, whenever residents are present in the facility**.

4. An administrator who is a registered nurse or licensed practical nurse shall not be included in meeting the staffing requirements of this section.

B. Nonlicensed Nursing Staff. The required number of nurse aides and other nonlicensed nursing staff shall be determined by the number of residents assigned to beds at the facility. Additional staff members shall be provided if the minimum staff requirements are inadequate to provide appropriate care and services to the residents of a facility.

1. **Nonlicensed nursing staff shall be provided to meet at least the following resident-to-staff ratio schedule:**

a. **Nine to one (9 to 1) for shift one (1);**
b. **Thirteen to one (13 to 1) for shift two (2);**
c. **Twenty-two to one (22 to 1) for shift three (3)**

SOUTH DAKOTA

South Dakota Administrative Code

- Title 44. Department of Health
  - Article 4. Medical Facilities
    - Chapter 6. Nursing and Related Care Services

44:04:06:09. Nursing service staffing for nursing facilities

Each nursing facility must maintain a licensed nurse in charge of nursing activities during each tour of duty. The director of nursing may not serve as charge nurse in a nursing facility with an average daily occupancy of 60 or more residents. Adequate staff must be provided to meet the resident's total care needs at all times. The ratio of registered and licensed practical nurses to aides and orderlies must be sufficient to assure professional guidance and supervision in the nursing care of the patients.

****No minimum direct care requirement****

TENNESSEE

Rules and Regulations of the State of Tennessee

- Rules of the Tennessee Department of Health, Department of Environment and Conservation, and Department of Finance and Administration
  - Bureau of Health Licensure and Regulation; Division of Health Care Facilities; Board for Licensing Health Care Facilities
    - Chapter 1200-08-06 Standards for Nursing Homes

1200-08-06-.06 BASIC SERVICES

(4) Nursing Services.

(a) Each nursing home must have an organized nursing service that provides twenty-four (24) hour nursing services furnished or supervised by a registered nurse. **Each home shall have a licensed practical nurse or registered nurse on duty at all times and at least two (2) nursing personnel on duty each shift.**

(b) The facility must have a well-organized nursing service with a plan of administrative

authority and delineation of responsibilities for resident care. **The Director of Nursing (DON) must be a licensed registered nurse** who has no current disciplinary actions against his/her license. The DON is responsible for the operation of the service, including determining the types and numbers of nursing personnel and staff necessary to provide nursing care for all areas of the facility.

(d) The nursing service must have adequate numbers of licensed registered nurses, licensed practical nurses, and certified nurse aides to provide nursing care to all residents as needed. **Nursing homes shall provide a minimum of two (2) hours of direct care to each resident every day including 0.4 hours of licensed nursing personnel ti**me. There must be supervisory and staff personnel for each department or nursing unit to ensure, when needed, the availability of a licensed nurse for bedside care of any resident.

TEXAS

Texas Administrative Code

- Title 40. Social Services and Assistance
  - Part 1. Department of Aging and Disability Services
    - Chapter 19. Nursing Facility Requirements for Licensure and Medicaid Certification
      - Subchapter K. Nursing Services

§ 19.1001. Nursing Services

The facility must have sufficient staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. Nursing services to children must be provided by staff who have been instructed and have demonstrated competence in the care of children. Care and services are to be provided as specified in § 19.901 of this title (relating to Quality of Care).

(1) Sufficient staff.

(A) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(i) except when waived under paragraph (3) of this section, licensed nurses; and

(ii) other nursing personnel.

(B) Except when waived under paragraph (3) of this section, the **facility must designate a licensed nurse to serve as a charge nurse on each tour of duty.**

(2) Registered nurse.

(A) Except when waived under paragraph (3) or (4) of this section, the **facility must use the services of a registered nurse for at least eight consecutive hours a day, seven days a week**.

(B) Except when waived under paragraph (4) of this section, the **facility must designate a registered nurse to serve as the director of nursing on a full-time basis, 40 hours per week**.

(C) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

§ 19.1002. Additional Nursing Services Staffing Requirements

(a) The ratio of licensed nurses to residents must be sufficient to meet the needs of the residents.

(1) At a minimum, the **facility must maintain a ratio (for every 24-hour period) of one licensed nursing staff person for each 20 residents or a minimum of .4 licensed-care hours per resident day.** To determine licensed-care hours per resident day, multiply the number of licensed nurses by the number of hours they work in a single day and divide the product by the number of residents in the facility. Three nurses working eight-hour shifts is 24 hours, divided by 60 residents, equals .4 licensed-care hours per resident day.

(2) Licensed nurses who may be counted in the ratio include, but are not limited to, director of nursing, assistant directors of nursing, staff development coordinators, charge nurses, and medication/treatment nurses. These licensed nurses may be counted subject to the limitations of paragraphs (3) and (4) of this subsection.

(3) Staff, who also have administrative duties not related to nursing, may be counted in the ratio only to the degree of hours spent in nursing-related duties.

(4) If a multi-level facility (nursing facility or Medicare SNF) has one director of nursing over the entire facility, he may not be counted in the nursing ratio. A director of nursing for a single distinct part may be counted in the ratio for the distinct part.

****No minimum direct care requirement****

UTAH

Utah Administrative Code

- Health
  - R432. Family Health and Preparedness, Licensing.
    - R432-150. Nursing Care Facility.

R432-150-5. Scope of Services.

(1) An intermediate level of care facility must provide 24-hour licensed nursing services.

(a) The facility shall ensure that nursing staff are present on the premises at all times to meet the needs of residents.

(b) The facility shall provide at least one registered nurse either by direct employ or by contract to provide direction to nursing services.

(c) The facility may employ a licensed practical nurse to act as the health services supervisor in lieu of a director of nursing provided that a registered nurse consultant meets regularly with the health services supervisor.

(2) A skilled level of care facility must provide 24-hour licensed nursing services.

(a) The facility shall ensure that nursing staff are present on the premises at all times to meet the needs of residents.

A licensed nurse shall serve as charge nurse on each shift.

(b) The **facility shall employ a registered nurse for at least eight consecutive hours a day, seven days a week.**

(c) The **facility shall designate a registered nurse to serve as the director of nursing on a full-time basis**. A person may not concurrently serve as the director of nursing and as a charge nurse.

****No minimum direct care requirement****

VERMONT

Code of Vermont Rules

- Agency 13. Agency of Human Services
  - Sub-Agency 110. Department of Disabilities, Aging and Independent Living
    - Chapter 005. Licensing and Operating Rules for Nursing Homes
      - 1. General Provisions

7.13 Nursing Services

The facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care or as specified by the licensing agency.

(a) Sufficient staff. The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in

accordance with resident care plans:

(1) licensed nurses and

(2) other nursing personnel.

(b) The **facility must designate a licensed nurse to serve as a charge nurse on each tour of duty**.

(c) Registered Nurse.

(1) The **facility must use the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week.**

(2) The **facility must designate a registered nurse to serve as the director of nursing on a full time basis.**

(3) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

(d) Staffing Levels. The facility shall maintain staffing levels adequate to met resident needs.

(1) At a minimum, nursing facilities must provide:

(i) **no fewer than 3 hours of direct care per resident per day, on a weekly average, including nursing care, personal care and restorative nursing care, but not including administration or supervision of staff; and**

(ii) **of the three hours of direct care, no fewer than 2 hours per resident per day must be assigned to provide standard LNA care** (such as personal care, assistance with ambulation, feeding, etc.) performed by LNAs or equivalent staff and not including meal preparation, physical therapy or the activities program.

VIRGINIA

Virginia Administrative Code

- Title 12. Health
  - Agency No. 5. Department of Health
    - Hospitals, Nursing Homes, and Related Institutions and Services
      - Chapter 371. Regulations for the Licensure of Nursing Facilities
        - Part III. Resident Services

12 VAC 5-371-200. Director of nursing

A. **Each nursing facility shall employ a full-time director of nursing to supervise the**

delivery of nursing services. The individual hired shall be a registered nurse licensed by the Virginia Board of Nursing.

C. A registered nurse, designated in writing by the administrator, shall serve in the temporary absence of the director of nursing so there is the equivalent of a full-time director of nursing on duty for a minimum of five days a week.

D. The director of nursing shall not function as a nursing supervisor in facilities with 60 or more beds.

12 VAC 5-371-210. Nurse staffing

B. The nursing facility shall provide qualified nurses and certified nurse aides on all shifts, seven days per week, in sufficient number to meet the assessed nursing care needs of all residents.

****No minimum direct care requirement****

WASHINGTON

Washington Administrative Code

- Title 388. Social and Health Services, Department of Aging and Adult Services
  - Chapter 97. Nursing Homes
    - Subchapter I Resident Rights, Care and Related Services
      - Nursing Services

WAC 388-97-1080. Nursing services.

(1) The nursing home must ensure that a sufficient number of qualified nursing personnel are available on a twenty-four hour basis seven days per week to provide nursing and related services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident as determined by resident assessments and individual plans of care.
(2) The ***nursing home must***:

(a) Designate a registered nurse or licensed practical nurse to serve as charge nurse, who is accountable for nursing services on each tour of duty; and

(b) **Have a full time director of nursing service who is a registered nurse**.

(3) The ***nursing home must have***:

(a) A **registered nurse on duty** directly supervising resident care a **minimum of sixteen hours per day, seven days per week**; and

(b) A **registered nurse or licensed practical nurse on duty directly supervising resident care the remaining eight hours per day, seven days per week**. "Directly supervising" means

the supervising individual is on the premises and is quickly and easily available to provide necessary assessments and other direct care of residents; and oversight of supervised staff.

(4) The nursing home must ensure that staff respond to each resident's requests for assistance in a manner which promptly meets the quality of life and quality of care needs of all the residents.

****No minimum direct care requirement****

WASHINGTON, D.C.

Code of D.C. Municipal Regulations

- Title 22. Public Health and Medicine
  - Subtitle B. Health
    - Chapter 32. Nursing Facilities

22-B3210. LICENSED NURSING COVERAGE.

3210.1 **Each facility shall employ a charge nurse on each unit twenty-four (24) hours a day**.

3210.2 Each charge nurse shall be a licensed registered nurse or licensed practical nurse in the District with experience in geriatric, rehabilitation, psychiatric, or other appropriate nursing discipline.

3210.3 When a licensed practical nurse serves as a charge nurse, he or she shall have ready access to consultation with a registered nurse.

22-B3211. NURSING PERSONNEL.

3211.2 Each facility shall have at least the following employees:

(a) **At least one (1) registered nurse on a twenty-four (24) hour basis, seven (7) days a week**;

(b) **Twenty-four (24) hour licensed nursing staff sufficient to meet nursing needs of all residents**;

(c) **At least one practical or registered nurse, serving as charge nurse, on each unit at all times**; and

(d) **A minimum of two (2) nursing employees per nursing unit, per shift**.

3211.3 Beginning no later than January 1, 2005, each **facility shall employ sufficient nursing staff to provide a minimum daily average of 3.5 nursing hours per resident per day.** Nursing staff shall include Registered Nurses (RN), Licensed Practical Nurses (LPN), and Certified Nurse Aides (CNA).

3211.6 To meet the requirements of subsections 3211.2 and 3211.3(b), facilities of thirty (30) licensed occupied beds or more shall not include the Director of Nursing Services or any other nursing supervisory employee who is not providing direct resident care.

WEST VIRGINIA

West Virginia Code of State Rules

- Title 64. Legislative Rules
  - Division of Health
    - Series 13. Nursing Home Licensure Rule

8.14. Nursing Services Staffing.

8.14.a. A nursing home shall have sufficient nursing personnel to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. **Staffing shall not**, other than during short unforeseeable emergencies, **be less than an average of two and twenty five one hundredths (2.25) hours of nursing personnel time per resident per day.**

8.14.a.1. Minimum hours of resident care personnel to residents are outlined in table 64-13.A of this rule.

8.14.a.2. Facilities with fewer than fifty-one (51) beds are staffed at higher hours as outlined in table 64-13.A. of this rule.

8.14.b. A nursing home shall provide services by sufficient numbers of each of the following types of personnel on a twenty-four (24) hour basis to provide nursing care to all residents in accordance with resident care plans:

8.14.b.1. Licensed nurses; and

8.14.b.2. Other nursing personnel. Based on the residents' needs and the nursing home services, the nursing home may determine the combination of licensed nurse time and nursing assistant time if the total meets the minimum 2.25 hours nursing personnel time requirement.

8.14.c. Charge Nurse. **A nursing home shall designate a licensed nurse to serve as a charge nurse on each shift;**

8.14.d. Registered Nurse. **A nursing home shall have a registered nurse on duty in the facility for at least eight (8) consecutive hours, seven (7) days a week**.

8.14.d.1. In facilities with fewer than sixty (60) beds, the director of nursing may serve to meet this requirement.

8.14.e. Nurse on Call. If there is not a registered professional nurse on duty, there shall be a registered professional nurse on call.

8.14.f. Director of Nursing. **A nursing home shall designate in writing a registered nurse to**

serve as the director of nursing services on a full-time basis, who shall be on duty at least five (5) days a week, eight (8) hours a day during the day shift.

WISCONSIN

Wisconsin Annotated Statutes

- Charitable, Curative, Reformatory and Penal Institutions and Agencies
  - Chapter 50. Uniform Licensure
    - Subchapter I Care and Service Residential Facilities

(2) REQUIRED PERSONNEL.

(b) **Each nursing home shall employ a charge nurse**. The charge nurse shall either be a licensed practical nurse acting under the supervision of a professional nurse or a physician, or shall be a professional nurse. The department shall, by rule, define the duties of a charge nurse.

(d) **Each nursing home, other than nursing homes that primarily serve the developmentally disabled, shall provide at least the following hours of service by registered nurses, licensed practical nurses, or nurse aides** and may not use hours of service by a feeding assistant, as defined in s. 146.40 (1) (aw), in fulfilling these requirements:

1. For each resident in need of **intensive skilled nursing care, 3.25 hours per day, of which a minimum of 0.65 hour shall be provided by a registered nurse or licensed practical nurse**.

2. For each resident in need of **skilled nursing care, 2.5 hours per day, of which a minimum of 0.5 hour shall be provided by a registered nurse or licensed practical nurse**.

3. For each resident in need of **intermediate or limited nursing care, 2.0 hours per day, of which a minimum of 0.4 hour shall be provided by a registered nurse or licensed practical nurse**.

WYOMING

Code of Wyoming Rules

- Agency 048. Department of Health
  - Sub-Agency 020. Aging Division
    - Chapter 011. Rules and Regulations for Program Administration of Nursing Care Facilities

Section 9. Nursing Services.

The facility shall have sufficient nursing staff to meet the needs of the residents.

(a) Director of Nursing Services. The **facility shall designate a Registered Nurse to be a full-**

time director of nursing services, and he/she shall have experience in areas such as nursing service administration, rehabilitation nursing, psychiatric or geriatric nursing.

(i) Staffing.

(i) **Each nursing station shall be staffed with a Registered Nurse or qualified Licensed Practical Nurse, who is the charge nurse on the day tour of duty seven (7) days a week**.

(A) All other tours of duty shall be staffed with a Registered Nurse or a Licensed Practical Nurse.
(ii) Each nursing station shall be staffed separately and shall have a separate staffing pattern.

(iii) Each nursing station shall be staffed with sufficient non-licensed nursing personnel to give adequate nursing care to the residents twenty-four (24) hours a day, seven (7) days a week.

(iv) Each facility shall have awake and on duty sufficient nursing personnel for the night tour of duty. Additional staff may be needed, depending on condition of residents, and to assure resident safety in case of fire or disaster.

(j) Nursing Care Hours (minimum).

(i) **Nursing care hours shall be two and one quarter (2.25) hours for each skilled resident in a Nursing Care Facility in each twenty-four (24) hour period, seven (7) days a week,** and one and one half (1.50) for each resident who is not skilled in each twenty-four (24) hour period, seven (7) days a week.

Appendix B

CORPORATE CONSIDERATIONS

Class actions in the long term care context will undoubtedly involve a challenge to your company's corporate structure. Class Action complaints may name multiple entities as Defendants, from the actual operating skilled nursing facility entity to the corporate parent and likely any entities in between. Plaintiffs will allege that the corporate entity(s) "owned and operated" the facility and that corporate personnel oversaw virtually every aspect of facility operations and, therefore, all Defendants are essentially a "single enterprise" which is operated from the top down. The complaint may also allege that under simple agency principles, the parent entity(s) aided the facility in violating the law and that the corporate entity(s) is also directly liable because of their actual participation in the wrongdoing.

Practitioner Tip

Ironically, despite levying allegations of the global corporation operated as a single enterprise, Plaintiffs will reverse course when asking for damages. There Plaintiffs will attempt to stack multiple duplicative awards as providing unique damages, thereby creating a multiplier of any single award

Fundamental to the American way of doing business is the notion that the under the law, separate entities are considered just that; separate. In California, well recognized and well entrenched legal principles establish that corporate entities are presumed to have a separate existence, and that common ownership or control is never enough to establish liability. *Laird v. Capital Cities*, 68 Cal. App. 4th 727, 737 (1998). Further, there is nothing inherently improper about inter-corporate connections. *Inst. of Vet. Path. Inc. v. Ca. Health Labs, Inc.*, 116 Cal. App. 3d 111 (1981). Because there is a presumption of separateness, "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation is not liable for the acts of its subsidiaries." *U.S. v. Bestfoods, et. al.*, 524 U.S. 51, 56 (1998). In fact, the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require, and only where there has been a perverted abuse of the legitimate business purpose of the corporation. *Messler v. Bragg Management Co.*, 39 Cal.3d 290, 301 (1985).

Alter Ego

Alter ego is the theory of vicarious liability as applied between corporations. *Doney v. TRW, Inc.,* 33 Cal. App. 4th 245, 249 (1995). The alter ego doctrine is an *equitable* doctrine employed only where an inequitable result would follow if the court were not to ignore the corporate form. *Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210 Cal. App. 2d 825, 836-837 (1962). This is why "it is a fundamental rule that the conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case." (Citations omitted.) *Id.*

This is also why there are **two** mandatory requirements that must be found to exist before the corporate existence will be disregarded: (1) that there is such a unity of interest and ownership that separate personalities of the corporation and the individual no longer exist, **and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.** *Id.* at 837; *Sonora Diamond Corp. v. Super. Ct.,* 83 Cal. App. 4th 523, 538 (2000). The corporate form is not to be disregarded unless doing so, under the particular circumstances, would "sanction a fraud or promote injustice." *Associated Vendors, Inc., supra,* 210 Cal. App. 2d at 837; *Tomaselli v. Transamerica Ins. Co.,* 25 Cal. App. 4th 1269, 1285 (1994); *Webber v. Inland Empire Investments, Inc.*, 74 Cal. App. 4th 884, 900 (1999).

Courts have noted that more is required than solely a parent-subsidiary corporate relationship to create liability of a parent for the actions of its subsidiary. *Walker v. Signal Companies, Inc,*. 84 Cal. App. 3d 98, 1001 (1978). To justify piercing the corporate veil to hold the parent liable for the acts or omissions of its subsidiary, "a plaintiff must demonstrate that there is such unity of interest and ownership between the entities that their separate personalities no longer exist, and that an inequitable result will follow if the parent were not held liable." *Laird v. Capital Cities/ABC, Inc*., 68 Cal. App. 4th 727, 742 (1998).

When analyzing the "unity of interest" prong, California courts require a showing of control before the actions of the subsidiary will be imputed to the parent. The nature of the parent's control over the subsidiary must be "over and above that to be expected as an incident of the parent's ownership of the subsidiary and must reflect the parent's purposeful disregard of the subsidiary's independent corporate existence." *DVI, Inc. v. Super. Ct. (Papworth),* 104 Cal. App. 4th 1080, 1094 (2002); *Sonora Diamond Corp. v. Super. Ct., supra,* 83 Cal. App. 4th at 542.

In addition to establishing a unity of interest, Plaintiffs must also demonstrate that an inequitable result will follow if the entities are allowed to maintain their corporate separateness. *Mesler v. Bragg Management Co., supra,* 39 Cal.3d at 300-301. "The essence of the alter ego doctrine is that justice be done." *Id*. at 301. "The court will not disregard the corporate entity unless it is necessary in order to prevent fraud or injustice." *Meadows v. Emett & Chandler,* 99 Cal. App. 2d 496, 499 (1950). No reliance can be had on the alter ego theory without pleading that the recognition of the corporate entity would sanction a fraud or promote injustice. *Id*. The court in *Walker v. Signal Companies, Inc., supra,* 84 Cal. App. 3d at 1001 observed that more is required than solely a parent-subsidiary corporate relationship to create liability of a parent for the actions of its subsidiary.

Practitioner Tip

During your initial investigation, consider whether a "fraud will be perpetrated" if the corporate form is respected. Or whether adherence to the corporate structure will "promote an injustice." Is your client an "investment holding company" with no active management of daily operations? Or do they actively participate in each and every part of the subsidiary's operations

Some courts have required a plaintiff to show "specific manipulative conduct" by the parent toward the subsidiary which relegates the subsidiary to the status of merely an instrumentality of or conduit for the parent corporation. *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc*., 116 Cal. App. 3d 111, 119-120 (1981). The parent "must be shown to have moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy." *Sonora Diamond Corp. v. Super. Ct., supra*, 83 Cal. App. 4th at 542. See also *Calvert v. Huckins*, 875 F.Supp. 674, 679 (E.D. Cal. 1995); *Rollins Burdick Hunter of So. Cal., Inc. v Alexander & Alexander Services, Inc.*, 206 Cal. App. 3d 1, 9 (1988). When such a showing is made, an alter ego theory of vicarious liability may be imposed and the corporate veil may be pierced. *Institute*, at 119.

The court in *Rollins* noted that a finding of alter ego is appropriate where the parent so controls and dominates the subsidiary to such an extent that the independent corporate existence of the subsidiary is disregarded. *Rollins, supra*, 206 Cal. App. 3d at 9. The *Rollins* court found that the subsidiary was the alter ego of the parent because the parent dictated every facet of the subsidiary's business, from "broad policy decisions to routine matters of day-to-day operation." The court found that the domination and control was "complete and pervasive." *Id*. at 11.

Control is the key element of the agent/principal relationship. *Sonora Diamond Corp., supra,* 83 Cal. App. 4th at 541. Vicarious liability will be found where the parent dictates every facet of the subsidiary's business, from broad policy decisions to routine matters of day-to-day operation. *Rollins, supra,* 206 Cal. App. 3d at 11.

To find that the subsidiary is the agent of the parent, the parent must exercise "such a degree of control over its subsidiary corporation that the subsidiary can legitimately be described as only a means through which the parent acts, or nothing more than an incorporated department of the parent." *Sonora*, at 541. The broad oversight generally exercised by a parent over its subsidiary is not enough. Rather, plaintiffs must show that the parent controls and manages the subsidiary to such a degree that the subsidiary becomes an agent or mere instrumentality of its parent corporation. *Calvert, supra,* 875 F.Supp. at 679. The parent must be shown to have taken over performance of the subsidiary's day-to-day operations. *Sonora*, at 542.

The determination of the degree of involvement between the entities involves a fact specific analysis of the operations of each of the Defendant entities. In *Assoc. Vendors Inc., v. Oakland Meat Co, Inc.*, 210 Cal. App. 2d 825 (1962), the California Court of Appeal articulated a series of factors to help in this analysis, including:

1) Commingling of funds and other assets;

2) failure to segregate funds of the separate entities;

3) unauthorized diversion of corporate funds or assets to other than corporate uses;

4) treatment by an individual of the assets of the corporation as his own;

5) failure to obtain authority to issue stock or to subscribe to or issue the same;

6) holding out by an individual that he is personally liable for the debts of the corporation;

7) failure to maintain minutes or adequate corporate records, and confusion of records of separate entities;

8) identical equitable ownership in the two entities;

9) identification of the equitable owners thereof with the domination and control of the two entities;

10) identification of the directors and officers of the two entities in the responsible supervision and management;

11) sole ownership of all of the stock in a corporation by one individual or the members of a family;

12) use of the same office or business location; employment of the same employees and/or attorney;

13) failure to adequately capitalize a corporation; total absence of corporate assets and undercapitalization;

14) use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation;

15) the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities;

16) disregard of legal formalities and failure to maintain arm's length relationships among related entities;

17) use of the corporate entity to procure labor, services or merchandise for another person or entity;

18) diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another;

19) contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and

20) formation and use of a corporation to transfer to it the existing liability of another person or entity. *Id*.

In *U.S. v. Bestfoods*, 524 U.S. 51 (1998), the court was faced with a subsidiary whose parent corporation selected the board of directors as well as the key executive officers. These executive officers were also employed by the parent corporation. The District Court determined that these facts were sufficient to find liability of the parent corporation. The Supreme Court found this analysis too simplistic.

In determining respondent's liability in *Bestfoods*, the Court determined that activities that are consistent with the parent's investment status, such as monitoring of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability. *Id*. at 72.

Other courts have echoed the tenets of *Bestfoods*; financial transactions between a parent and subsidiary do not make the parent liable for the subsidiary's actions. See *Sonora Diamond Corp, supra*, 83 Cal. App. 4th at 539. "The parent is not 'exposed to liability for the obligations of [the subsidiary] when [the parent] contributes funds to [the subsidiary] for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud,'" quoting *Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1263 (10th Cir. 1989); even control of a subsidiary's budget is not sufficient to impose liability upon the parent even if it causes the subsidiary to suffer financial hardship. *Waste Mgmt, Inc. v. Super. Ct.* 199 Cal. App. 4th 105, 110 (2004).

Of course, protection of shareholders is not absolute. The corporate veil may be pierced and shareholders held liable for a corporation's conduct when, among other things, the corporate forum would otherwise be misused to accomplish certain wrongful purposes such as fraud, on the shareholders behalf. However, where stock ownership has been used for the purpose of participating in the affairs of the corporation in a normal and usual manner, for the purpose of controlling the subsidiary corporation, there is no justification for piercing the corporate veil.

However, the facts facing the U.S. Supreme Court in *Bestfoods* were more subtle than simple control of a subsidiary through the exercise of shareholder rights. The question facing the Court was the type of control beyond shareholder rights which would impose liability on the parent. In answering this question, the U.S. Supreme Court rejected any tests that looked to or asked questions about the relationship between the parent and subsidiary corporations. Instead, the

Court indicated that the inquiry should be directed to questions asked about interactions with the subsidiary's physical facility. The Court found that if the parent corporation directly operated a facility owned by the subsidiary, direct liability of the corporate parent could be established.

> The question is not whether the parent operates the subsidiary, but rather whether it operates the facility and that operation is evidenced by participation in the activities of the facility, not the subsidiary.
> *Bestfoods, Id*.

Despite such allegations, Plaintiffs cannot, as a matter of law, hold a parent or sister company liable for the actions of their related subsidiary corporations without proving both elements to an alter ego theory of liability. *Id.*; *Sonora Diamond Corp., supra,* 83 Cal. App. 4th at 538. To do so would be to completely ignore the protection an entity is afforded by its corporate form.

Satisfaction of a Judgment

The *ability to satisfy a massive judgment* is not the test for adequate capitalization for purposes of application of the alter ego doctrine:

> The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard. *Sonora Diamond Corp., supra,* (2000) 83 Cal. App. 4th at 539.

Also, "the parent is not 'exposed to liability for the obligations of [the subsidiary] when [the parent] contributes funds to [the subsidiary] for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud.' (Citations)." *Id.*.

If a Limited Liability Company is named as a Defendant, it will be important to note that the "Operating Agreement" sets the rules for governing the company, including the rights and responsibilities of members. A limited liability company (LLC) is a hybrid business form under the Corporations Code whose investors (members) own an interest. *Paclink Communications Internet, Inc. v. Super. Ct.*, 90 Cal. App. 4th 958, 963 (2001). The company has a legal existence that is separate from individual "members." The principles applicable to limited liability companies are similar to those that apply to a corporate shareholder (i.e., "members" are investors who hold a "membership" interest in a company whereas "shareholders" are investors who hold a "share" of a company).

An LLC is, by design, a vehicle by which investors can actively be involved in management without being exposed to personal liability. That the investor is a company does not alter this legal right. It is therefore important to review the LLC's Operating Agreement which defines how the LLC will be managed. Members may take an active role in day-to-day management without piercing the limited liability protections provided by statute.

Common Law Principles

The common law rule of licensee liability and the non-delegable nature of the duties owed by a licensee is well-settled. Under this "well-established rule of nondelegable dut[y] of licensees," a licensee remains liable for the acts of its agents and employees. (*Ibid*.) "The rule of nondelegable duties for licensees is of common law derivation. [Citations.] The essential justification for this rule is one of ensuring accountability of licensees so as to safeguard the public welfare." *California Assn. of Health Facilities v. Department of Health Services,* 16 Cal.4th 284, 296 (1997); *California Emergency Physicians Medical Group v. Pacificare of California,* 111 Cal. App. 4th 1127, 1131 (2003). Otherwise, effective regulation would be impossible as the licensee could immunize itself to liability by simply shifting the duties to others by contract. See *Camacho v. Youde,* 95 Cal. App. 3d 161 (1979); *Van Arsdale v. Hollinger,* 68 Cal. 2d 245, 255 (1968). (Overruled on other grounds.) "'The first genuine case of liability for misconduct of an independent contractor or his employees is the case of the so-called "nondelegable" duty. Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. . . . It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law…'"

Licensee liability is akin to the principle of respondeat superior; if the licensee elects to operate his business through employees, then the licensee must be responsible to the licensing authority for the conduct of its employees in the exercise of the license. The justification for this rule lies in establishing accountability by the licensee as a safeguard for public welfare. Without such accountability, effective regulation would be impossible; a licensee could simply contract away all responsibility to independent contractors and render itself immune to disciplinary action. See *Cal. Ass'n of Health Facilities, supra,* Cal. 4th at 295, "By virtue of the ownership of a license the owner has a responsibility to see to it that the license is not used in violation of the law. The rule that licensees can be held liable for the acts of their employees comports with general law governing principal-agent liability."

"[I]f a parent corporation exercises such a degree of control over its subsidiary corporation that the subsidiary can legitimately be described as only a means through which the parent acts, or nothing more than an incorporated department of the parent, the subsidiary will be deemed to be the agent of the parent . . .." *Sonora Diamond Corp. supra*, 83 Cal. App. 4th at 541.

"The parent's general executive control over the subsidiary is not enough; rather there must be a strong showing beyond simply facts evidencing 'the broad oversight typically indicated by [the] common ownership and common directorship' present in a normal parent-subsidiary relationship. [Citations.] As a practical matter, the parent must be shown to have moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy." *Id*. at 542.

Alter ego liability under single-enterprise doctrine

Alter ego liability can be found between sister corporations when they are being operated as a single enterprise. *Tran v. Farmers Group, Inc.* 104 Cal. App. 4th 1202, 1219 (2002); *Las*

Palmas Associates v. Las Palmas Center Associates, 235 Cal. App. 3d 1220, 1249-1250 (1991). In finding alter ego liability under the single-enterprise doctrine, courts have found that even though there are two or more companies, there is but one enterprise and that enterprise has been operated in such a manner that it should respond, as a whole, for the debts and obligations of its component parts. *Las Palmas*, at 1249-1250. The test for single enterprise is similar to that of Alter Ego:

> 1. such unity of interest and ownership that the separate corporate personalities are merged, such that the companies form a single enterprise; and
>
> 2. an inequitable result will follow if the acts in question are treated as those of one corporation alone. *Tran, supra,* 104 Cal. App. 4th at 1219.

While courts have yet to articulate a definitive list of elements to establish the presence of a single-enterprise, case law suggests that the following elements are most important:

1. the entities were set up for the furtherance of a single business venture such that the separate entities form a single enterprise;

2. the entities are entirely dependent on each other to conduct some significant aspect of the business enterprise; and

3. the entities are set up in such a manner as to shield the enterprise's assets from potential claims against any entity. *In re Antovich Construction, Inc. Bankr*. (N.D. Cal., Dec. 28, 2006) 2006 Bankr. LEXIS 3698, 10-13; *Tran*, at 1219-1220.

Some courts have looked to whether the entities were set up and are operated as a single enterprise in furtherance of a single business venture. The court in *Hamilton Beach Brands* found the evidence concluded that evidence of (1) use of the same office location and phone number, (2) similar shareholders and directors, and (3) one individual acting as president of both companies, was insufficient to establish that the companies were set up for the furtherance of a single business venture and formed a single enterprise. *Hamilton Beach Brands, Inc. v. Metric and Inch Tools, Inc*. (C.D. Cal. May 7, 2009) 2009 U.S. Dist. Lexis 42278, 6.

In contrast, the court in *Antovich Construction* noted that each company was entirely dependent on the other. In re *Antovich Construction, supra,* 2006 Bankr. LEXIS 3698 at 3. One company (ACI) held all of the assets, performed the work, entered into contracts and received payment for services rendered, yet had no employees to perform services. The other company (M-K) supplied employees, hired and paid all the employees that ran both companies and entered into all labor union contracts for the employees that performed the services, yet depended on ACI to meet its payroll demands because it had no assets. *Id*. The court noted that "[e]ach corporation's reliance on the other is strong proof that they are in reality a single enterprise and should be treated as such." *Id*., at 12.

Practitioner Tip

Various regulations establish that the licensee holds certain non-delegable duties. These regulations, some of which are below, should be reviewed and considered as a means to combat plaintiffs' argument that the corporate entity controlled facility operations. Given the non-delegable nature of certain of these duties, a forceful argument to the Court should be prepared on the following:

- The Administrator of each individual Defendant Facility was responsible for the management of the day to day operations of that facility. 42 Code Federal Regulations § 483.75(2)(i) and (ii). Furthermore, Title 42 Code of Federal Regulations § 455.101 defines the "managing employee" of this facility as the "…administrator"

- Pursuant to Federal law, each facility must have a governing body that is legally responsible for establishing and implementing policies regarding the management and operation of the facility. 42 Code of Federal Regulations §483.75(d)

- California Code of Regulations Title 22, §72501 (a): The licensee shall be responsible for compliance with licensing requirements and for the organization, management, operation and control of the licensed facility. The delegation of any authority by a licensee shall not diminish the responsibilities of such licensee

- California Code of Regulations Title 22, §72501 (b): The licensee, if an administrator, may act as the administrator or shall appoint an administrator, to carry out the policies of the licensee. A responsible adult who is knowledgeable in the policies and procedures of the licensee shall be appointed, in writing, to carry out the policies of the licensee in the absence of the administrator. If the administrator is to be absent for more than 30 consecutive days, the licensee shall appoint an acting administrator to carry out the day-to-day functions of the facility

- California Code of Regulations Title 22, §72501(c): The licensee shall delegate to the designated administrator, in writing, authority to organize and carry out the day-to-day functions of the facility

- (e) The licensee shall employ an adequate number of qualified personnel to carry out all the functions of the facility and shall provide for initial orientation of all new employees, a continuing in-service training program and competent supervision

The preceding regulations should be used to educate the Court as it relates to the non-delegable nature of skilled nursing facility operations. In other words, a parent entity cannot

Appendix C

DOCUMENT LIST

☐ Copy of complete facility chart related to class rep
☐ Brochures/marketing materials
☐ Copy of business file
☐ Billing records
☐ License
☐ Management contracts
☐ Third party contracts/agreements
PT/OT/ST HMO/IPA
Dental Medical director
X-ray Wound consultant
Lab Nursing students
☐ Plans of operations
☐ Budget reports
☐ Marketing reports
☐ Governing body documents
☐ List of disgruntled employees (hire and fire dates)
☐ Job descriptions
☐ Staffing documents including a) Direct care staff, staff, dietary, maintenance, nursing relief or pool personnel. b) Punch detail reports, work schedules, sign in sheets, & time sheets c) Determine which personnel worked on same wing, unit or station as resident d) Any staffing documents calculating staffing ratios (eg Key Factor Reports) e) Identify individuals who are cross trained (hold CNA certification but have been promoted to other positions and are available to assist)
☐ Schedule of in service classes conducted during relevant time period

☐ In-service sign in sheets for relevant in-services
☐ Policies & procedures for relevant time period (Table of Contents)
a) posting staff data
b) maintaining staffing levels
c) nursing services
d) administration, management or operations
☐ Unusual occurrence log for relevant time period
☐ Incident reports re resident (similar issue)
☐ Written minutes of resident council meetings
☐ Written minutes of family council meetings
☐ Organizational chart showing major programs of the facility
☐ Organizational chart of corporate structure
☐ Writings received from former employees referencing staffing levels
☐ Writings sent to former employees referencing plaintiff
☐ Long Term Care Application for Medicare/Medical/Medicaid
☐ Applications for licensing
☐ Medical Cost Report (OSHPD)
☐ Resident census for relevant time period
☐ Facility quality indicator profile
☐ Questionnaires or surveys regarding employee satisfaction
☐ Questionnaires, inquiries, or surveys concerning resident and/or family satisfaction
☐ D.H.S. survey results past five (5) years
☐ Citations last five (5) years
☐ Notes re: contacts with Ombudsman during relevant time period re: resident

Appendix D

STAFFING RATIO - REQUEST FOR PRODUCTION CHECKLIST

Philosophy:

The 3.2 nursing hours per patient day relevant to California skilled nursing facility cases represents an arbitrary marker established by the regulators and is intended to reflect a daily average for all staff for all residents in the facility. This arbitrary figure does not dictate how many nursing hours a specific resident will receive at any specific moment in time. The Facility Administrator is responsible to oversee the facility operations, including the staff distribution.

- ☐ Please produce all Grievances from Facility staff;
- ☐ All documents showing Deficiencies found/Citations issued/Enforcement action by DHS re: staffing or quality of care;
- ☐ All documents Facility intends to rely on to establish adequate staffing;
- ☐ All documents re: use of Medicare/MediCal funding to increase staffing;
- ☐ All Facility vacancy reports;
- ☐ All key factor reports;
- ☐ All Job Announcements;
- ☐ All staffing analysis reports;
- ☐ All nursing PPD calculation reports;
- ☐ All bi-weekly payroll summary reports;
- ☐ All assignment sheets, licensed nurse schedule sheets, nursing aide schedule sheets;

- ☐ All documents showing Governmental inspections, evaluations, enforcements relating to staffing or quality of care;
- ☐ All documents showing budgeted labor costs; and
- ☐ All census data.

Appendix E

ADMINISTRATOR/DON MEETING CHECKLIST

DONE	DESCRIPTION
	Tour facility and note appearance, cleanliness, and what information is posted
	Obtain all brochures, advertising or promotional materials for facility
	Clarify organizational structure if unknown
	Governing body identification
	Confirm who actually employees the facility's care givers
	Obtain management contract
	Obtain copy of licenses for the three years prior to admission
	Identification of outside consultants
	Discuss staffing issues and determine if staffing ratio is already calculated or not. Identify method for calculating staffing (i.e. matrix used, identify non-employees and ancillary not used in ratio but available). Key Factor or other similar reports with staffing summaries
	Clarify process followed by quality assurance committee in promulgating policy and procedure Check unusual occurrence log for relevant time period
	Obtain Incident Reports/Unusual Occurrence Reports
	Look at policy and procedure notebook, any relevant to issues in case Check policy notebook for disclaimer page.
	Obtain signature/initial matrix to assist identifying handwriting. Employee

DONE	DESCRIPTION
	information should include employee dates of employment.
	Obtain report of DHS deficiencies and review plan of correction
	Obtain copies of declaration sheets of insurance policies, if not available through carrier
	Determine if more than one unit/station (can limit staffing discovery)
	Check statistics (quality indicator profile) for decubitus ulcers, fecal impactions etc.
	Review notes from resident and/or family counsel meetings
	Determine what if any consultants are used at the facility
	Check if there are any notes from ancillary services not contained in the patient's chart
	Identify any major programs offered at the facility
	Identify all key employees from a review of the record
	Determine if there are any former disgruntled employees who were involved in the care of the resident
	Determine if there are any omissions or gaps in charting from review of chart with the DON
	Note if any contacts with Ombudsman during relevant time
	Determine if the medical records are complete and arrange for copying and bate stamping once records are placed in desired order (see medical records organization under FORMS-8888)