

Navigating a Challenging Landscape

By || **STEVEN M. LEVIN**

Proving negligence in nursing home wrongful death cases requires focusing on the systemic problems that have plagued facilities and the industry for decades and how those failures compounded during the pandemic.

Trial attorneys who advocate for vulnerable nursing home patients and their bereaved family members are learning in real time how the pandemic has changed litigation. But proving negligence in COVID-19 wrongful death cases will hinge on the same question as in all nursing home cases—can we anticipate and undermine

the facility's central defense that harm and death were unavoidable? Here are some steps to take to obtain justice for your clients.

To fully understand the context in which a nursing home patient's wrongful death occurred, begin by investigating source material on the pandemic as it started to unfold over a year ago.¹ This includes mainstream outlets and publications run by industry groups, advocacy organizations, employee unions, and any other source that provides comments by industry experts, public health experts, and advocates about the right and the wrong ways facilities responded. Also familiarize yourself with state and federal regulations on infection control.² COVID-19 is a highly dangerous communicable infection, but it's not the first infection nursing homes have faced—look to see whether reasonable standards were already in place. This research will prepare you to make your own arguments, but it is also the best way to understand the defense arguments you are likely to encounter.

Ask Key Questions

In each stage of the case, find ways to pose key questions and compile evidence to answer them. Assess when the facility first became aware that the virus was deadly and highly contagious.³ Then establish and gather proof of key themes.

In written interrogatories, document when the facility first became aware of the outbreak of the virus and identify the names of all individuals generally or specifically responsible for responding to

the COVID-19 outbreak at the facility. Gather evidence that the nursing home did not immediately change existing policies governing visits by family members, outside health care professionals, or other individuals who provide services to the nursing home; did not promptly issue protocols for employees who showed symptoms or may have been exposed; and did not enact policies to limit group activities. Demonstrate a chain of causation in which that negligence led to the resident's wrongful death.

Nursing home owners and operators. When interviewing nursing home owners and operators, ask them to describe the steps taken to assess the risk, form and implement a plan, communicate that plan to residents and their families, and monitor and evaluate its effectiveness. Unless the defense can prove that the nursing home owners and operators followed certain steps, it cannot claim that the impact of COVID-19 was unavoidable. Ask nursing home owners and operators:

- When did you first learn of the virus's existence?
- When was the first communication between the nursing home and any medical professional to seek guidance on how to respond?
- Did you consult internal or external health care professionals about what measures should be taken to a) prevent the virus from entering the facility, b) mitigate the spread once the virus had entered, and c) assess and treat individual symptomatic residents? Specifically, did you ask them how to safely separate residents, what kind of restrictions

- to impose on staff, and what to do if you have inadequate staffing?
- What role did the medical director or the patient’s attending physician play in crafting the facility’s response?
- Given the information that was readily available at the time,⁴ did you take appropriate action?
- How did the virus initially enter the facility and on what date? Was it immediately identified, and what steps did you take to mitigate harm at that stage?
- How did you respond to individual cases?
- What were your plans for protecting staff and maintaining adequate staffing levels when staff was out sick?
- What infection-control procedures were in place before the pandemic, and how have you expanded on them?
- Did you withhold information from residents or staff to manage perceived fear or prevent staff from refusing to come into work?⁵

Direct care workers. When you interview direct care workers, make it clear that your case is not targeting them—they likely took great risk to continue serving the residents in their care. Rather, emphasize that you want to demonstrate how the powerful owners of these facilities failed to protect *both* the residents and the staff. Acknowledge that direct care workers were put in an impossible situation by their employers’ inaction. Ask direct care workers:

- Did the facility inform you of its plan to mitigate risks associated with COVID-19?
- Did the facility implement this plan?
- Did the facility evaluate the effectiveness of this plan and make changes as new information came to light?

- Were you adequately trained in infection control measures specific to preventing the spread of COVID-19?
- Were you provided with adequate personal protective equipment (PPE)?
- Was the facility sufficiently staffed?
- How did the facility address individual cases?
- Did the facility keep you informed as events unfolded so you could make decisions about how to protect yourself? What did they say to you about when you could and couldn’t come into work? What did they say to you about testing?
- How have you or your family been affected by the pandemic?

Residents and family members.

In these interviews, try to determine whether the facility informed them of its plan to mitigate risks associated with COVID-19. Then ask whether the facility followed through by implementing the plan and updating it as new information came to light. Find out when and how the facility communicated its plan and what options were given to make changes that might reduce resident risk.

Experts. In addition to deposing witnesses, retain experts experienced in public health and infection control. Think about hiring infectious disease specialists or academic and industry experts who are well-positioned to deal with the policy questions raised by systemic problems in nursing homes—while the experts we regularly work with focus on patients as individuals.⁶

Uncover Juror Bias

Once your case is headed to trial, try to identify and eliminate jurors for whom the defendant’s “unavoidable” argument will resonate. This will include at least three types of people.

The ‘stuff happens’ jurors. First, identify potential jurors who believe that

bad things happen to everyone in life by posing a question such as: “Some people believe that you simply can’t control events and may say, ‘If I get coronavirus, I get it.’ Other people believe that they can and should make reasonable efforts to prevent the spread of the virus. Which side are you closer to?”

When jurors say things “just happen,” that means no one can be blamed and held responsible. With this reluctance to attribute causation, it may be that no amount of evidence could overcome their personal convictions, and they may be unable to follow the judge’s instructions when considering the case.

The ‘culling the herd’ jurors. Also try to identify jurors who may consider lawsuits in COVID-19 nursing home cases pointless or wasteful, reasoning that it was “inevitable” these people were going to die soon anyway from something. Identify these jurors with a question such as: “Some people believe that significant resources shouldn’t be spent caring for older people who have multiple medical conditions; other people believe that older people are entitled to live as long as they want and receive the same medical care as younger people. Tell me what you think about this issue?”

The ‘anti-mask’ jurors. Some people continue to deny scientific evidence about the spread and severity of the virus, believing it is a hoax or that personal freedom outweighs government mandates to wear a mask. An outward manifestation of this belief is a person’s refusal to wear a mask to protect himself or others from infection. Ask jurors whether they comply with mask and social distancing recommendations, and be wary of those who downplay the virus’s significance or even its existence.

Facility Shortcomings

Once you reach the courtroom—or the virtual courtroom—focus your opening

statement on the right way to respond to a highly contagious and deadly virus before even discussing the defendant's conduct. It is only after the jury understands how pandemics should be handled that you can talk about what happened in your client's case and why you are attempting to hold the defendant accountable. Here are a few things to focus on.

Infection control in the long-term care setting. Nursing homes serve large populations of older people who have complex medical conditions and live communally in an enclosed space, with almost no control over their environment and no ability to leave. This is even truer during a pandemic, when residents' mobility is tightly restricted. They also cannot control who enters the facility or their individual room or where they eat, sleep, bathe, or conduct any other activities of daily life. Residents who do not have family or friends to act as advocates—or who find their advocates' access restricted due to COVID-19—are hugely vulnerable to abuse, neglect, and infection, especially during the pandemic.

Well-documented systemic failures pre-pandemic were compounded. The vulnerability of the nursing home population is compounded by the long-standing systemic failures of the nursing home industry to follow basic infection control guidelines and, in general, assess risks, form plans, implement those plans, communicate about them with residents and their families, and monitor and evaluate plans' effectiveness. Essentially, the correlation between the for-profit model and the falling standard of care made things worse during the pandemic.⁷

Many facilities were unwilling or unable to follow guidance issued by the Centers for Medicare & Medicaid Services (CMS) and the Centers for Disease Control and Prevention (CDC)

Research the facilities' histories of citations, and pull out relevant language about deficiencies related to infection control, such as handwashing and PPE violations.

on COVID-19 infection control for nursing homes,⁸—and their widespread noncompliance is well-documented.⁹ Demonstrate that your client's case was not the result of a single act of misjudgment by an individual but of systemic problems that far predate the pandemic.

Records. Do your homework on the regulatory compliance record of the nursing homes, which includes the records of the facility in which your case occurred and other facilities managed by the same owners and operators. Research the facilities' histories of citations, and pull out relevant language about deficiencies related to infection control, such as handwashing and PPE violations. This information foreshadows how a virus like COVID-19 was likely to spread.

By framing the data, you can show how the outcome—unmitigated spread of the virus and the death of your client—was tragically predictable. Then

establish a chain of causation regarding how the virus came into the facility and the actions the facility did or did not take to mitigate the spread.

The applicable negligence standard. Depending on the state in which you practice, you may encounter an executive order or legislation shielding nursing home owners from liability for deaths related to COVID-19. By raising the standard to gross negligence, these orders and laws make it extremely difficult to litigate wrongful death cases. As you prepare your cases, it is imperative to understand the specific terms and provisions in any applicable liability shield orders.

Regardless of the standard for legal blame, the key is to establish whether the facility acted reasonably in assessing the risks, creating and implementing the plan, communicating about it, and monitoring and evaluating the plan's effectiveness. Show how nursing homes should be the experts in infection prevention, management, and control given the central role those tasks play in caring for medically vulnerable residents—yet they failed to lead when the virus began to spread and failed to follow CMS and CDC guidelines.

Focus the responsibility for negative outcomes on facility owners, not the individual care workers who lacked the basic resources to perform their duties. Explain how care workers are also victims of dysfunctional policies and may have experienced psychological trauma and, in the COVID-19 era, even death as a direct result.

Trial attorneys who bring COVID-19 wrongful death cases against nursing homes face a challenging landscape. But with careful preparation, you can construct arguments that will prevail in court and at the negotiation table—and deliver justice for these vulnerable clients. 



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NOTES

1. See, e.g., Josh Margolin & James Gordon Meek, *Intelligence Report Warned of Coronavirus Crisis as Early as November: Sources*, ABC News, Apr. 8, 2020, <https://tinyurl.com/y4y2yglb>.
2. See Stefan B. Feidler, *The Prevent & Control Road Map*, p. 42.
3. Timeline of Novel Coronavirus 2019, on file with author. We use this time line as an introduction to our complaint to provide context and frame the issue, but we treat it as a living document as the case proceeds and more information is discovered about the response. The defense may claim that information in the time line is true but not relevant to the case. Get ahead of that by

intentionally linking the testimony of witnesses and other evidence in your case to the broader context of the overall response to the pandemic.

4. *Id.*
5. It has been widely reported that many nursing home owners and operators instructed staff to continue coming into work when they were sick and not to tell residents and their families about the risks of exposure. Judith Graham, *As COVID-19 Lurks, Families Are Locked Out of Nursing Homes. Is It Safe Inside?*, Kaiser Health News, May 4, 2020, <https://tinyurl.com/yb42cgsn>; Suzy Khimm, *The Forgotten Front Line: Nursing Home Workers Say They Face Retaliation for Reporting COVID-19 Risks*, NBC News, May 19, 2020, <https://tinyurl.com/y8hfp52o>; Katie Reilly, *'It's Getting Worse.' Nursing Home Workers Confront Risks in Facilities Devastated by Coronavirus*, Time, May 29, 2020, <https://tinyurl.com/y7y89wzl>.
6. You can identify experts by combing through media coverage and material published by advocacy groups.
7. Matthew Goldstein, Jessica Silver-Greenberg, & Robert Gebeloff, *Push for Profits Left Nursing Homes Struggling to Provide Care*, N.Y. Times, May 7, 2020, <https://www.nytimes.com/2020/05/07/business/coronavirus-nursing-homes.html>.
8. U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes (Revised)*, Mar. 13, 2020, <https://www.cms.gov/files/document/3-13-2020-nursing-home-guidance-covid-19.pdf>; Ctrs. for Disease Control & Prevention, *Preparing for COVID-19 in Nursing Homes*, Nov. 20, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>; Ctrs. for Disease Control & Prevention, *Nursing Homes and Long-Term Care Facilities*, Aug. 24, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/nursing-home-long-term-care.html>.
9. See, e.g., Ritu Prasad, *Coronavirus: How Bad Is the Crisis in U.S. Care Homes?*, BBC, July 13, 2020, <https://www.bbc.com/news/world-us-canada-53172302>.

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