When Not to Be a Volunteer

By Tim Behan, JD

My colleagues reading the headline of this Sentinel article will find it amusing and ironic as I am a graduate of not one, but two rival SEC schools of the University of Tennessee. Though we are in the thick of the college football season, this article is not about our rivalries. It is also not to cast aspersion on the incredible Volunteer friends, graduates, and fans I've worked for and with over my 27 years at SVMIC. This article is a cautionary example of when not to be a volunteer if a situation arises that calls for SVMIC expertise and assistance.

The story begins over a decade ago on a July day in the central time zone. At 4:38 pm, an assistant called me and said that she had a very upset physician on the phone from East Tennessee who wanted to discuss two deaths at the nursing home where she had been the medical director. She was also the local family practice physician in the small town along the I-81 corridor. As such, she was the treating physician as well for these two patients who had passed away. The assistant who forwarded the call to me was correct; the doctor was very upset and angry about the conditions that led to the two unfortunate outcomes. She had resigned from her role as the medical director of the nursing home

eleven months earlier.

The first patient we discussed was a 90-year-old female resident of the facility. She was in the advanced memory care unit due to her severe dementia from Alzheimer's disease. The patient had a history of falls. Despite our insured's best efforts, the staff failed to properly monitor her to prevent her from roaming about the facility leading to the falls. The staff also failed to report these falls and significant bruises to our insured. Eventually the patient fell again, hitting her head against a wall. This led to a massive subdural hematoma and the patient's death. The second death also involved a memory care patient. This time it was an 87-year-old male who fell while on Coumadin. Our physician was informed of the fall and ordered an INR. Unfortunately, the order was overlooked. The patient passed away before our Insured was made aware that the INR was not performed. This was the final straw for the doctor, and she resigned from her role as medical director and refused to see patients at this nursing home.

As mentioned above, the purpose of the call to SVMIC was to discuss the deaths of these two patients. An attorney representing the families of the deceased, as well as an Investigator for the State, were requesting to speak to our physician about the conditions at the nursing home. These contacts stirred up the emotions of the physician. She was told these conversations would be "off the record." The attorney wanted insights into the care provided by the staff to use against the nursing home in potential lawsuits against the facility. The State was looking for confirmation of the poor conditions inside the facility in order to sanction the nursing home. The physician said she very much wanted to sit down with the attorney and the investigator to talk about the "deplorable" conditions inside the facility. She wanted them to be punished for what she described as the mistreatment of patients during her time there.

The conversation lasted for over an hour. I told her that while I understood her anger and frustration, she still had potential liability since the statute of limitations had not expired. She replied that she had done all she could to bring these issues to the attention of the nursing home executives during her six-month tenure as the director. I again stated that I understood her desire to make it right, but that "off the record" conversations, while she could still be sued, were not in her best interest. I advised her that since she still had exposure to litigation, the best course of action was to hire local counsel experienced in defending medical malpractice and healthcare litigation to protect her interests. She reluctantly agreed. I promised to get counsel assigned the following morning since it was well past 6:30 in the eastern time zone.

My first order of business the next day was to secure an attorney to advise and protect the interests of my policyholder in East Tennessee. It takes some time to complete the process as conflict checks must be run. What I learned from counsel a few days later changed the entire nature of the situation. As it turned out, the physician voluntarily met with the attorney for the families as well as the State Investigator the next day despite my admonition and before defense counsel was in place to assist her. She told her retained attorney that the lawyer for the families said he was not going to sue her even though he

would have to put her on the notice of intent letters. Lawsuits were eventually filed and true to his word, the attorney for the families did not sue the physician. The nursing home, however, quickly brought my provider into the two cases by alleging she was at fault for the deaths of the two patients in their facility. Her vengeance became theirs.

The lawsuits were eventually resolved favorably for our physician. But our provider had to endure over two years of very stressful litigation. Two years that potentially could have been avoided had she waited for me to get her defense attorney on board to guide and assist her. She no doubt would have been a witness in the cases and she would have been advised and expected to give truthful testimony in depositions. Thus, she may have been brought in regardless of her off the record meetings. Her willingness to talk voluntarily, when prudence and caution were better options, practically guaranteed she would become a defendant. Emotions were high and the goal was noble. The plan, however, stood a great chance of warding off needless litigation and stress had our physician not been so willing to be such an eager volunteer.
