

Nursing & Assisted Living Facility Professional

“NEWS AND VIEWS YOU CAN REALLY USE”

APRIL 2018
ISSUE 4, VOLUME 8

SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

THE HAT ADVANTAGE by Rebecca Adelman

The 2018 Conference Overview!



The 2018 Litigation Risk and Defense Strategies for Long-Term Care & Assisted Living Providers, Insurers, and Brokers Conference was a great success and lots of fun! On April 4 and 5, Hagwood Adelman Tipton, co-host firms, and a distinguished group of industry experts gathered with our special guests

in Houston for the sixth annual conference. Over 100 joined to network, attend education sessions, and enjoy the city of the World Champion Houston Astros. There have been many stories to tell and we are looking forward to our seventh year anniversary back in Memphis where the conference began. Please mark your calendars for April 3-4, 2019! Stay tuned for details.

Here is an overview of the event! Big thanks to everyone who attended, participated, and shared their expertise.

LT. General Russell L. Honore', USA (Ret.) delivered the keynote address – *Resilient Leadership: Prepare Today To Prevail Tomorrow*. As the commander of Joint Task Force Katrina, he became known as the “Category 5 General” for his striking leadership style in coordinating military relief efforts in post-hurricane New Orleans. From global and domestic terrorist threats to natural disasters, Gen. Honore' discussed how we encounter new risks to our individual, community and economic security each day. And while we can't predict what's around the corner, we can prepare—because when faced with seemingly insurmountable challenges, it is strong leadership guided by clarity of purpose and practical tactics for overcoming adversities that drive us to prevail—better prepared and more resilient. Enter Gen. Honoré expertly connected his 3+ decades of military leadership—including his crucial role in managing New Orleans' relief efforts post Hurricane Katrina—to the natural disasters and man-made tragedies dominating global headlines to reveal critical strategies for transforming individuals into leaders and helping organizations and communities effectively prepare, react, rebound and unify.

Chastiti Horne, Founding Partner of Horne Rota Moos, LLP, Cornelia Jammer, MPA, Professional Development Specialist at RJH & Associates, LLC and Leah Therio, Associate, Cowan Law Firm, LLC presented the opening session, *Surviving Disaster: What We Know Now*. The group shared the experiences of past natural

disaster issues and the effects on the long term care industry. We then navigated through what was learned from the past to assist providers with the tools to avoid and prepare for the ramifications of these disasters.

The program *Falls and Infection – Two of the Most Common Risks in Long Term Care* was comprised of panelists Dr. Keith David Bjork and Dr. Carl Vartian. This presentation focused on 2 of the most prolific risk issues in long term care settings. Dr. Bjork (orthopedic surgeon) and Dr. Vartian (infectious disease expert) provided tools needed to prevent and defend these claims via risk management strategies and provided current methods to assist facilities in navigating and identifying potential issues.

Social Media Risk Management & Best Practices was presented by Beth Berger, Managing Director of Gallagher Healthcare, Jeff Mongrelli, CEO of Acentec and Amy Evans, Executive Vice President. These thought leaders defined social media, benefits and risks involved. They explained how to respond to negative posts, best practices for management of social media, and real-life examples in the healthcare industry.

Understanding Audit Trails and Discovery Preservation - Staying Ahead of the Game was my topic. In the world of medical malpractice litigation, the resident/patient medical record is Exhibit 1. The importance the healthcare records play in defending long-term care lawsuits cannot be overstated. From the completeness of the record to each chart entry, the healthcare record is scrutinized by plaintiff and defense attorneys, all experts and provider witnesses. In every case, the integrity of the healthcare record is a central issue and many challenges to face and obstacles to overcome as to the liability of the care provider, causation and damages. This presentation highlighted the current and emerging risks associated with Electronic Medical Record (EMR) as they relate to litigation specifically, metadata and audit trails. We learned about the duties imposed on nursing homes by state and federal legislation and rules to implement technical safeguards for electronic information systems including EMR. The program presented the objections to production of information in medical malpractice lawsuits and case studies. The evidence developed related to the audit trail will be central to the development of the lawsuit and themes that will emerge. We also discussed how increasing awareness and best practice regarding EMR documentation will enhance the defense of the chart and the lawsuit.

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*** Special Announcement in Back Page Column ***

Michael Goodin, managing attorney at Hagwood Adelman Tipton, PC in Memphis joined me for a presentation on *Litigation Hold and Spoliation: Preserving and Protecting*. Spoliation of electronic evidence can be a relatively common occurrence. Many companies routinely delete ESI as part of document retention policies. For that reason, in litigation involving the production of Electronically Stored Information, a litigation hold letter is an essential tool for parties to pin down their opponents and prevent the destruction of ESI. In this program, we learned about a Litigation Hold letter, when the hold takes effect, the scope of the litigation hold and best practices for implementation. The destruction of, alteration of or failure to preserve evidence is referred to as spoliation. Courts have the ability to impose a variety of sanctions against a party for spoliation of evidence, regardless of whether the spoliation was intentional or negligent. Spoliation of evidence may result in monetary sanctions, issue sanctions, evidentiary sanctions or, in the case of egregious intentional spoliation, even terminating sanctions. A defensible litigation hold protocol will be presented along with form letters and policies. The program provided a comprehensive approach to evidence preservation best practices.

When Hospice Care Results in a Hospice Case and Improving End of Life Care: Strategies and Best Practices were the compelling topics presented by Steven Weiner and Jonathan Rubin, Partners of Kaufman Borgeest & Ryan LLP and Njoki Wamiti, Vice President at IronHealth. The traditional view has been that lawsuits arising out of care provided by Hospice providers would not be pursued by plaintiff's attorneys given that such patients are typically viewed as being terminal and at end of life. At one time, that was also the perspective as it pertained to commencing suits on behalf of the elderly against nursing homes. As there has been a sea change in regard to the exposure of nursing homes to suits, there is an evolving view that Hospice providers can prove fertile targets as well. Given the large number of providers offering such services as well as Governmental focus on the reimbursement for hospice care, suits are on the increase. This lecture section focused on the nature of the services provided in a Hospice setting and the types of claims and litigation concerns that can arise as a consequence of the provision of Hospice care. The session also explored the current state of end-of-life care in America and key recommendations to ensure individual preferences for care are honored near the end of life. Mr. Rubin also reviewed lessons learned from New York's MOLST program, a founding member of National POLST Paradigm. He explained how eMOLST improves quality and patient safety, ensures accessibility and achieves the quadruple aim.

Alicia Luke, ALN Consulting, described The Unique Role of Legal Nurse Consultants.

Why do we still think that all pressure ulcers are the fault of nurses when there was a 2010 Prospective study funded by the US Department of Justice proving they can happen under the best of care? Caroline Fife, MD, Chief Medical Officer at Intellicure, Inc. was a show-stopper with her presentation and deep dive into *Pressure Ulcer/Pressure Injury: An Old Problem, New Term, Big Implications*. I urge you to research Dr. Fife's wealth of research and writings shining the light on wound care management. Chronic wounds affect 15% of Medicare patients and may cost \$96 Billion a year. Pressure ulcers affect 1.8% of the Medicare population and cost ~ \$3.9 Billion in 2014 (conservatively). The Deficit Reduction and Reconciliation Act (DRA) of 2005 required CMS by 2007 to identify conditions that were: high cost or high volume or both, resulted in the assignment of a case to a DRG that has a higher payment when present as a secondary diagnosis and could reasonably have been prevented through the application of evidence based guidelines. CMS selected 8 such conditions, 4 of which were classified in the Federal register

as "Serious Preventable Events" (aka Never Events). Pressure ulcers are found under Subpart (F)(b) "Hospital Acquired Conditions" BUT not under Subpart (F)(c) "Serious Preventable Events". That section begins AFTER pressure ulcers are discussed, when the topic changes to retention of foreign body in a surgical patient. That means that pressure ulcers are not "Never Events." However, the National Quality Forum (NQF) classifies Pressure Ulcers as "Serious Reportable Events" that are always the result of poor care. Dr. Fife illustrated her points and provided arguments supporting her various arguments that can be used by defense counsel.

Day 1 of the conference ended with a delicious and entertaining dinner event at Pinkerton's. This barbecue held true to its motto "This is barbecue as it should be." The cake and pie were as they should be, too!

Day 2 started with a delicious breakfast and then a moderated panel lead by Mario Giannettino, attorney at Kaufman Borgeest & Ryan, L.P., including Thomas Cowan, Partner, Cowan Law Firm, LLC and Janet Walsh, Vice President, Product Manager Healthcare at Swiss Re on *Snakes in the Courtroom: Charming the Reptile Theory*. Reptile Theory is touted as a revolutionary trial strategy that influences jurors to believe the conduct of the defendant poses a safety risk to the community at large. In the context of medical malpractice and long term care defense, Reptile Theory seeks to replace the reasonableness standard of care with safety rules. In this program, we learned through real life case examples and the experiences of leading professionals in the insurance and legal fields how to recognize and prepare for the Reptile Theory during all phases of litigation, including the pleadings, discovery and depositions. The panel provided with tactics and techniques on how to undermine the Reptile during voir dire, opening and closing statements.

Our final session was presented by Joan Gilbride, Partner at Kaufman Borgeest & Ryan, LLP and Cassandra Ferguson, Vice President RSUI Group, Inc. on the subject of *Sexual Harassment and the #MeToo Movement*. This presentation examined the #MeToo movement and its potential impact upon sexual harassment claims against employers. The presenters explored the prevalence of sexual harassment in the workplace as well as what responsible employers can do to promote a civil working environment and avoid the expense, disruption and negative consequences that flow from sexual harassment in the workplace. There was also a discussion of legislative responses to the #MeToo movement and what employers can expect to hear from their insurers in the wake of recent headlines.

The conference delivered on its promise of outstanding and in-depth education by thought-leaders and experts. We also had loads of fun and strengthened our relationships through personal time together learning and growing. We are already planning our eighth anniversary event in Memphis! Please plan to attend, as we will have some special events with blues and barbecue and as always, relevant and thought-provoking topics.

Rebecca Adelman, PLLC, Esq. - Ms. Adelman is an entrepreneur and founding shareholder of Hagwood Adelman Tipton, PC and practices in the firm's Memphis, TN office. For nearly 30 years, Rebecca has concentrated her practice in insurance defense litigation representing national insurance carriers and self-insureds with a concentration in healthcare law. She also has an active business and employment practice.

Please feel free to contact her at radelman@hatlawfirm.com or visit her website: www.rebeccaadelman.com and Instagram @rebecca_adelman

Training and Education, The Difference and Why It Matters



As I've mentioned before, reading is one of my passions. I would like to share another incredible book that I recently finished, one that has impacted my work tremendously. I underlined over 200 passages in Henry Neave's book *The Deming Dimension*. If you aren't familiar with W. Edwards Deming, he was a famous 20th century statistician whose work on the System of Profound Knowledge influenced countries around the world and continues to do so today. Neave worked with Deming for years and his book is a masterpiece. I'm going to

highlight just one smidgen of an essential concept.

Neave writes extensively about the difference between training and education. It is imperative that leaders understand the difference as this distinction impacts the success of the facility and the well-being of the people that work there.

Training is rather simple; training teaches someone how a job is supposed to be done. Everyone, no matter the position, needs training to learn the skills to do a job. Training should be uniform and leave little doubt about what is required to perform the job. Neave says, "How can a worker carry out a job if he does not know what the job is?"

Sounds simple, doesn't it?

Stop for a moment and think about the quality of training (for each position) in your facility. I'm not talking about mandatory inservices or the act of signing a job description upon hire. How do you prepare a new employee for success in their position? Do they spend a couple of hours with a current employee and voila, ready to go? Is there an expectation of learning "on the job" or "trial and error?"

Or, is the training and onboarding a thorough process whereby each aspect of the job is explained with ample opportunity to ask questions, demonstrate proficiency, and receive follow-up as needed? Is there a mentoring component to the training? Regarding the quality of the training Neave says, "Once something has been learned wrong, learning it right consists of two parts: getting rid of the wrong and then receiving the right. The former is difficult, very difficult." Neave recounts a story in which a manager told Deming, "We do little training here, because of the high turnover of staff." Unbelievable, or is it?

And yet, what typically happens when the budget is tight? Training is cut. This short-sighted action has long-lasting effects. Again, to quote Neave, "How can anybody, staff or management, do their job properly if they do not know what their job is...Think how

little proper training costs, as a proportion of the total costs involved with an employee over the months and years he may be working for the company. It is minute in comparison with the potential advantage to the company of that worker understanding his job."

Let's switch to education and how it differs from training. Neave gives us different ways of thinking about education. He calls it an investment in the future and teaches that education is not specific but instead growth, development, and expansion. It has no bounds; one cannot define when an educational task is complete. Education is a form of *intrinsic motivation*, something that inspires an individual from within, a desire to learn and grow as a human being, as a professional, and in pursuit of a craft.

There is meant to be an inherent joy in education that compels a person to expand their knowledge, to learn the theories about their craft, e.g. leadership, medicine, and then use that knowledge for improvement. Do we provide opportunities for education (and not just for department managers) in our facilities? Perhaps a group of nurses would be interested in learning more about traumatic brain injuries, Huntington's disease, or the benefits of exercise to decrease agitation. Maybe the maintenance staff would like to become more proficient in energy conservation and explore ways to decrease the facility footprint. Get creative! Education doesn't have to be expensive. Explore what community colleges, local agencies and community centers provide. I'd also bet that you have hidden gems right in your facility too, staff that have knowledge and skills and are willing to share and to teach others.

Facilitating these opportunities is but one part of the process; the second part is creating a culture of learning and education in your facility that welcomes new ideas and is willing to try new things. Deming said, "Institute a vigorous program of education, and encourage self-improvement for everyone." Ask staff what they would love to learn about and help them achieve those goals!

This abbreviated passage from Scott Berkun's book *The Year Without Pants* is quoted from the creed of the company, Automattic and conveys the essence of a desire to learn, to be educated, "I will never stop learning. I won't just work on things that are assigned to me...I am in a marathon, not a sprint..."

Lace up your running shoes dear colleagues, we are in the marathon for long-term care, and we've much education ahead of us.

Berkun, S. *The Year Without Pants and the Future of Work*. San Francisco, CA: Jossey-Bass; 2013.

Neave, H. *The Deming Dimension*. Knoxville, TN: SPC Press, Inc.; 1990.

Contact Paige at 520-955-3387 or at paige@paigeahead.com
Discover more about her at www.paigeahead.com

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Best-of-all: you will get both presentations on the same DVD. You just select which offering you wish to show from the DVD menu, that best suits your educational and risk management requirement at the moment. Here, as well, if a resident transitions from short-term to long-term care you can encourage the family or responsible party to watch the LTC video program.

PLEASE NOTE: Despite the fact that you will be getting two complete presentations on one DVD, there will be NO INCREASE in your investment in the "Setting Realistic Expectations" program(s). You are literally getting two video programs for the same investment. When's the last time you can say you received double the amount of something, and didn't pay any extra for this? It's my

way of saying thanks for your loyalty and support over the years! And if you're a facility that hasn't yet experienced what "Setting Realistic Expectations" with new admitting families and responsible parties can do for your building, there never been a better time to request a 30-day risk-free review: if you don't like what you see and hear then return it and owe nothing!

I invite you to visit ExtendedCareProducts.com to watch sample footage of each presentation and to request your DVDs. You may also call us at 800-807-4553 for more information.

Now entering our 17th year, we're pleased to be your partner in obtaining even stronger relationships with your families and responsible parties!

NAL Professional Not Coming Addressed to You Personally?

We want to make sure you are personally getting this newsletter each month, not just have it forwarded to you because you're now holding down the position of a predecessor! Let us know you now are on the job. E-mail your name, facility/company name and address to chip@ecpnews.net & we'll update our records. Just put NAL Professional on the e-mail subject line and we'll take care of the rest.

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Johnson City, TN 37604

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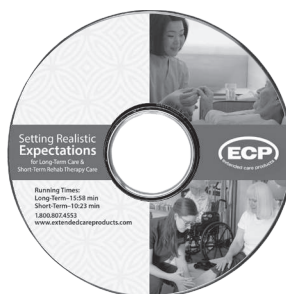
by Chip Kessler

“Are You Setting Realistic Expectations?”

Announcing Major Changes to the Landmark Video Presentation

In 2002, Extended Care Products first introduced the then VHS family educational and nursing facility risk management video program “Setting Realistic Expectations.” The presentation helped families and responsible parties understand what nursing facilities provided in the way of care and services, and to have reasonable expectations. The video was shown during the admissions process, and then ideally the new admitting parties were also given a copy of the program to share with other relatives and to keep for future reference. As you know, it's quite often the “other relatives” who are first to complain to you, so the more folks watching the video the better.

Accordingly: lawsuits against facilities went down because more and more people better understood about the realities of care. We knew we had a hit on our hands when the so-called “lawsuit lawyers” began bad mouthing the video program! No wonder the plaintiff attorneys were upset- fewer misunderstandings meant families and responsible parties weren't as angry against facility staff. In other words, the “Setting Realistic Expectations” video had thrown a giant monkey wrench into the lawsuit lawyers' formula for success: *misunderstandings over care + anger= lawsuits*, resulting in facilities often paying out huge amounts of money in settlements



and judgments.

A couple of years later we came out with “Setting Realistic Expectations for Assisted Living.” It was the same premise here, though this program was specific to the unique challenges faced in the assisted living environment.

Through the years we've updated the programs, keeping up as well with the switch from VHS to DVD. All told, nursing and assisted living facilities in all 50 states have made “Setting

Realistic Expectations” a major part of their admissions process. In fact some 500,000 copies of the presentations have been delivered in the past 16 years, and for this we are very grateful.

SPECIAL ANNOUNCEMENT: Here we are in 2018. The landscape in today's nursing facility has shifted with the changing times, and the demand that rehabilitation therapy services play a major role in a building's care and services. Not everyone who comes to the facility are considered long-term care residents, while some who come for short-term rehab may indeed transition into long-term care. Because of this shift in the way you provide care and services, the “Setting Realistic Expectations” video is also changing to meet your present family educational and risk management needs.

The result: two brand-new “Setting Realistic Expectations” video programs. I'm pleased to introduce you to *Setting Realistic Expectations for Long-Term Care*, and to *Setting Realistic Expectations for Short-Term Rehab Therapy Care*. Both are modern, updated presentations filmed live at a nursing facility with staff and residents. Each program is specific to the particular educational and risk management needs of long-term, and short-term care.

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