

Nursing & Assisted Living Facility Professional

"NEWS AND VIEWS YOU CAN REALLY USE"

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

THE HAT ADVANTAGE by Rebecca Adelman

THE 2016 LITIGATION CONFERENCE OVERVIEW – SEE YOU IN NEW ORLEANS FOR 2017!



The 2016 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 March 31 and April 1, Hagwood Adelman Tipton, co-host firms, and a distinguished group of industry experts gathered with our special guests in New York City

for the fourth annual conference. Over 120 joined to network, attend education sessions, and enjoy the Big Apple. There have been many stories to tell and we are looking forward to our fifth year anniversary in 2017 in New Orleans! Stay tuned for details.

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

Barbara A. McFadden, MSA, RN, LNHA, WCC President and CEO of McFadden & Healthcare Associates Consultants, LLC delivered the keynote address - *The Impact of Evolving Nursing Home Regulations on Direct Care*. This keynote provided a selected overview of changes in Federal and State Regulations as it pertains to long-term care within the last 10 years. The presentation highlighted anecdotal and composite examples of how these regulations transformed the delivery of direct care in nursing homes and assisted living settings. The changes in regulations altered the way documentation is entered on the clinical record and how direct care is provided. Some changes discussed were: (1) inclusion of ancillary nursing staff documentation within the electronic medical record and the resultant implications; (2) outcome vs. process-based reimbursement; (3) the move toward bundling payments; (4) diagnoses based prevention of avoidable hospitalization; (5) bedside clinical procedures, staff competencies, and risk versus benefit for the resident.

Michael E. Phillips, Shareholder of Hagwood Adelman Tipton, PC, and Jonathan D. Rubin, Partner at Kaufman Borgeest & Ryan LLP presented the opening session, *Defending the Non-Traditional, Everything-but-the-Kitchen Sink, Nursing Home Case: A Review of Significant Trends in LTC for 2016 - Hot Button Issues Worth Discussion*. We learned about emerging trends affecting healthcare providers in the long-term care and assisted living arena. Significant trends included:

- How short-term and rehabilitation stays can turn into "catastrophic cases"
- Preventing and dealing with patient injuries, including falls, aspiration pneumonia and medication errors
- Patient contract provisions, including arbitration agreement and venue clauses
- Pinning one party against another (nursing home administrator vs. nursing home)
- Litigation vs. arbitration cost benefit analysis

Richard J. Henry, President of Pendulum, LLC moderated a panel of insurance experts, including Lee McClure, Professional Liability Broker, CRC Insurance Services, Inc. and Carl Swan, National Senior Living Sales Executive, Propel Insurance. In this panel discussion, *Manage Your Risk or Manage Your Lawsuit, a 'State of the Market' report* was presented. The panel discussed what areas of operations to focus on and how to find the right balance between risk and defensibility in the healthcare setting. The presenters reviewed the Top Ten risk recommendations made by Pendulum Risk Consultants and we learned how these recommendations apply to the risk reduction process. A compelling discussion included risks identified and assessed from retail and wholesale insurance broker perspectives. The panel had engaging conversation about risk control strategies, retail agency strategies and wholesale brokerage strategies to better serve insureds.

Understanding the regulatory scheme for healthcare providers and changes on the horizon will enable participants to plan for regulatory changes with enhanced risk management and quality programs were the issues discussed in the presentation *Regulations, Corporate Compliance, and Quality Improvement - Litigation and Risk Management Connections*. Presenters were Rebecca Adelman and Hunter Carroll, Founding Shareholders of Hagwood Adelman Tipton, PC and Alicia Luke, RNC, LNCC, President and CEO of ALN Consulting. Participants learned about the sweeping changes proposed in nursing home reform and their potential to impact litigation and risk issues and the interplay between the quality of care, regulatory overhaul, and the corporate compliance provisions is an objective of this session as the costs and risks associated with implementation of regulatory change must be anticipated. The program also focused on Quality Assurance and Performance Improvement (QAPI) requirements.

Is There a Recipe for Successful Defense of Ulcer Claims? That was the question addressed by Louis A. Kaplan, PA-C, CWS, WCC, Director of Subacute Service, Kings Harbor Multicare Center; Barbara A. McFadden, MSA, RN, LNHA, WCC, President and CEO of McFadden & Healthcare Associates Consultants, LLC; and Steven D. Weiner, Partner of Kaufman Borgeest & Ryan LLP. Those faced with plaintiff allegations in the long-term care setting recognize that plaintiffs often prosecute claims, particularly those involving ulcers, with a recipe of assertions that often repeat. Knowing what can be expected, is there a countervailing recipe that can be incorporated at the facility level to enhance the successful defense of these claims? The panel took on this challenge and offered principles and recommendations that have been successfully applied.

Moderator: J. Roslyn Lemmon, Founding Partner of Cowan & Lemmon, L.L.P. guided an impressive industry panel to discuss the *Insurance*

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Pathway to Rehabilitation Excellence

By Gina Tomcsik
Director of Compliance
Privacy Officer

THE HUGE REASON TO NEVER HUG THE RUG

Who doesn't like a hug now and then? Giving and receiving a hug will decrease stress and show others that you care.

But when you "hug a RUG", that will have the opposite effect. You will increase stress and the auditors will show you they care!

On March 9, 2016 CMS issued a report, which can be found by clicking on CMS fact sheet, outlining SNF Medicare payments through RUGs. CMS has instructed Medicare auditors to look at SNFs to determine if overbilling is taking place. The report states, **"To help ensure that patient need rather than payment incentives are driving provision of therapy services, CMS is providing approval to the Medicare Fee-for-Service Recovery Auditor Contractors (RACs) to investigate this issue."**

So what's the big deal? "Hugging the RUG" is the big deal because rather than each resident's therapy care being individualized, the report shows industry patters of "hugging the RUG". What does that mean? Take a look at the below information taken from CMS' report:

CMS found that:

51% of all RV assessments showed therapy provided between 500 and 510 minutes.

65% of all RU assessments showed therapy provided between 720 and 730 minutes.

For 88 providers, all of their RV assessments showed therapy provided between 500 and 510 minutes.

For 215 providers, all of their RU assessments showed therapy provided between 720 and 730 minutes.

More than one in five providers had more than 75% of both RU and RV assessments that showed therapy provided within 10 minutes of the minimum threshold.

Do you see the concern now? It clearly shows that the industry standard is to deliver therapy on or as close to the minimum amount of minutes necessary to meet the RUG—that is called "Hugging the RUG". Since the delivered therapy minutes drive the RUG, which drives payment for the SNF, CMS clearly suspects that SNFs are overbilling. This has been a focus for years and the OIG report to Congress has addressed this concern.

And guess what? The U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) has requested an increase of \$77 Million for its FY 2017 budget to \$419 million. The OIG cites several priority areas and one would wonder if this proposal to increase their budget will reflect an increase in government audits in the SNF...I would venture a guess and say, yes!

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Therapy is under extreme scrutiny and it's disappointing because SNF providers work hard to meet the needs of their residents. We aren't overbilling! We historically have been poor documenters and because of this, we often times find ourselves being labeled as the people who "find loopholes" or who "overbill". These stereotypes are ludicrous; residents come to us sicker and more acute and that is why we are providing so much care--because they need it, period.

For more information, please contact Gina Tomcsik, Director Compliance Functional Pathways at gtomcsik@fp rehab.com or call 865-531-2204. You may also discover more at www.functionalpathways.com

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Company's Perspective on the Impact of Litigation Against Other Providers in Context of Nursing Home and Assisted Living Cases. Panel members included Meredith M. Akerlind, Vice President, Long Term Care & Misc. Medical Facilities Claims, Ironshore Healthcare Liability Division Ironshore; Laura Anderson, Lead Casualty Specialty Adjuster at GuideOne Insurance; Thomas C. Cowan, Founding Partner of Cowan & Cowan, L.L.P.; Leah T. Therio, Associate at Cowan & Lemmon, L.L.P. and J. David Thurber, Director of Litigation & Claims Management at Alliance Insurance Group. This educational session explored the issues of standard litigation against nursing homes and assisted living facilities and other medical and nonmedical providers being named in lawsuits to increase the probability of recovery. Various providers discussed included treating physicians, physician assistants, nurse practitioners, hospice, home health agencies, physical/occupational therapists, dieticians, labs, providers/manufacturers of medical equipment, and managed care companies relating to directing care. The panel discussed insurance and defense strategies related to the provider defendants.

Chastiti N. Horne, Equity Partner at Horne Rota Moos LLP and Kymberlee Dougherty Tysk, President and CEO at Hummingbird Risk Advisors discussed *Great Expectations in Assisted Living and Long Term Care: How to Meet or Beat Them Before and During the Claims/*

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Code Status Discussion, PART II

What IS a Cardiopulmonary Resuscitation?



In last month's column I discussed when code status should be obtained and who should have that initial conversation. Just to recap, the nurse doing the admission should engage the patient in discussion regarding code status; to wait until any later in the stay is inadvisable. Ideally, if the medical provider is available when the patient arrives in the facility, he or she would initiate that discussion.

Have you ever thought about what cardiopulmonary resuscitation (CPR) actually IS? When people think of CPR, the latest episode of a favorite

TV drama may come to mind in which the paramedic or hospital staff is administering chest compressions. Unfortunately, many people consider media a valid source for medical information. While a bit dated, the classic study done in 1996 published in the *New England Journal of Medicine* found that the survival rate for people who received CPR in three popular medical shows was 65% for two and, believe it or not, 100% for a third! Not only did the patients survive this trauma, they were successfully and healthily discharged from the hospital. How encouraging – but how unrealistic!

Perhaps first we can establish something: when a person stops breathing (respiratory arrest) or their heart stops beating (cardiac arrest), the reality is, in an unwitnessed setting, the patient is dead. Dr. Jeffrey Nichols wrote a great article in the April 2016 *Caring for the Ages* newsletter called "When is CPR Futile?" He says, "For the overwhelming majority of unsuccessful resuscitations, the resident is already dead and the negative outcome is only the distress for the facility staff and the injuries sustained by the corpse." This reality would not likely garner good TV ratings.

So who in your facility is properly trained to discuss code status? Do not assume that a nurse inherently has this knowledge or quite frankly anyone on the interdisciplinary team, including the physician. Discussing code status is not complicated, but it's certainly not as easy as most would believe.

Let's talk about what CPR includes. It is actually a group of treatments including cardiac compression, possible endotracheal intubation, artificial ventilation, defibrillation and advanced cardiac life support drugs. Saying "yes" to CPR likely includes *all* of those interventions. Now, some states may offer a "menu" of sorts whereby a person can pick and choose what they want. For example, a person may

agree to cardiac compression but not intubation. No matter the state or options available, it is very important that the individual be skilled in how to properly explain these options in relation to the patient's condition, diagnoses and prognosis.

Of note is that the original intention for CPR was to treat sudden, reversible cardiac arrest due to three situations: 1) electrocution, 2) drowning, and 3) problems during surgery. And the most important caveat is that CPR was intended for those specific situations *in otherwise healthy persons*. That does not describe the typical nursing home or assisted living resident. Sadly, we have allowed CPR to be morphed into a treatment that was never intended in this patient population and which may potentially have undesirable consequences for the resident, the family and the staff. The other unintended but very real consequence is the impact it has on our health care system in general.

What about CPR success rate? Are we being forthright and telling people that as our bodies get older and more frail that the likelihood of successful resuscitation is less than 5%? The majority of residents in our nursing homes and assisted living facilities are older and have multiple co-morbid diagnoses which further complicate CPR attempts. When discussing code status, make sure that the person understands the risks associated with this group of treatments. Due to the forceful pressure exerted on the rib cage in an effort to stimulate the heart to contract, there's a good chance that ribs will be broken and that lungs could be punctured. Patients can be placed on breathing machines in an ICU for extended periods while decisions that should have been made earlier are discussed. The likelihood that patients undergoing these efforts will emerge cognitively intact is actually quite small. And, none of this adds to a person's quality of life. Be honest and direct with people about these very real "side effects" of cardiopulmonary resuscitation.

People need to understand that when they receive CPR, if they survive, it is likely they will not be ultimately better for the effort. Is that a quality of life they desire? Maybe. Maybe not. The point is that they have a right to make that choice *based on accurate and thorough information* explained by a compassionate and skilled communicator.

Paige Hector is a clinical educator, who gives workshops and seminars across the country on diverse topics including clinical operations for the inter-professional team, meaningful use of data, advance care planning, refusal of care, documentation and care plans. She is skilled at inspiring staff to critically evaluate their own organizations and then gives them the resources and guidance to make necessary changes. Contact Paige at 520-955-3387 or at paigehector@gmail.com plus you more discover more about her at www.paigeahead.com

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Litigation Stage. The audience was presented with the greatest challenge in litigating claims often overcoming "great" expectations of the perfect outcome. This session delved into realities that confront the industry when the expectations of what level of care or level of recovery do not correspond with the actual condition of the resident. This program provided the attendees with in-depth insight into the sometimes-unobtainable expectations of residents and family members in Assisted Living or Nursing Home settings.

Our final session was a free-for-all and proved to be an exciting end to the conference. This peer exchange of *Everything You Always Wanted to Know about Litigation Risk and Defense Strategies in LTC and ALF, but Were Too Afraid to Ask* included a panel of the hosting firms. New this year, the interactive Q&A session shared in discussion and explored solutions to real-world issues and various topics to risk management in long-term care industry. Attendees submitted their questions in advance as well as interacted with panelists and peers during the session. It was an excellent session that will be a standard in future

conferences.

We are already planning our fifth year anniversary event in New Orleans! We will be disclosing dates and details in the coming weeks, and send a Save the Date! Please plan to attend, as we will have some special events to celebrate our fifth conference, our special guests, and the long-term care industry! We hope to see you in the Big Easy in 2017!

Rebecca Adelman, PLLC, Esq. – Ms. Adelman is a founding shareholder of Hagwood Adelman Tipton, PC and practices in the firm's Memphis, TN office. She is the chair of the firm's Strategic Planning Committee and Women Rainmakers Mentoring Program. For over 25 years, Rebecca has concentrated her practice in insurance defense litigation representing national insurance carriers and self-insureds with a concentration in healthcare law. Please feel free to contact her at radelman@hatlawfirm.com



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