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 ADELMAN ADVANTAGE

by Rebecca Adelman

Another DRI LTC/AL Confernce Has Passed – An Overview

Happy Fall! September always delivers on its promise of change (including me gathering another year!). September is also the month where providers, insurers, and attorneys join together for a summit meeting on the not-so-easy critical issues affecting the management of risk and the litigation of aging services claims across the country. The Defense Research Institute (DRI) designs an annual Nursing Home and Assisted Living Litigation conference and this year, we met in New Orleans, September 13-14. Adelman Law Firm was a proud sponsor of the event and I've participated now for over a dozen years. This year was another exceptional event and included the inaugural Women in the Law Luncheon.

Here are the some of the takeaways from the DRI Long-Term Care/AL Litigation conference.

1. **Quality Defense Counsel** – Given the nature of long-term care litigation and the aggressive Plaintiff's attorneys and advancing theories (corporate liability, fraud, assault, wrongful death), long-term care companies need effective and quality defense counsel to be proactive in defending the claims and lawsuits against them. Not only is knowledge of the clinical issues critical, understanding corporate law, technology and risk mitigation are also key areas that defense counsel must master to provide the highest caliber legal and advisory services to a long-term care client.

2. **Well-Prepared Caregiver Witnesses** – Despite delivery quality care to a resident and developing a positive relationship with family members, caregivers are at the center of scrutiny and their credibility is scrutinized by Plaintiff's attorneys in long-term care litigation. Preparing caregiver witnesses thoroughly will increase the witness's confidence so the caregiver can tell the defense's story of a safe and supportive culture and environment and quality care delivered to a resident. There are several legal ways that the defense attorney can be proactive and protect the witness and the provider's story including objections to deposition questions and efforts by Plaintiff's attorneys to solicit expert testimony from a fact witness. Also, defense counsel can object to theories used by Plaintiff's attorneys related to a greater standard of care than the law requires. Preparing the witness for objectionable questions and theories will also create the proper record for a court determination on an objection or even an appeal. Making with witness comfortable discussing clinical judgments and treatment decisions will advance the defense strategy of focusing the jury on the resident's care and away from the irrelevant corporate matters that Plaintiff spotlights.

3. **Assisted Living Risk Management** – Emerging enterprise risks in Assisted Living include: 1. Systemic risk 2. Macroeconomic risk 3. Legal/regulatory risk 4. Credit risk 5. Environmental risk 6. Reimbursement reduction risk 7. Cyber/social media risk 8. Workforce risk 9. Community and workplace violence risk 10. Healthcare reform-related risk; and 11. Technology risk. The key elements to a comprehensive risk management program include Underwriting Assessment of Risk, Corporate In-House Risk Management, Management of Common Assisted Living Risks, and Incident Management.

4. **Home and Community-Based Providers** – Self-determination and care setting choices are being realized through delivery of care by Home and Community-Based Providers (HCBS). Many risk factors exist for HCBS providers including client profiles (a multitude of medical and co-morbid conditions), provider profiles (residential vs, outside providers) and client acuity and skill level of staff. HCBS claims are similar to those seen in skilled and assisted living lawsuits for negligence, medical negligence and negligence per se (violation of regulations). Liability defense of the HCBS claim will most often require expert testimony and creative defenses can be used to respond to challenging claims. Because incident reporting and record retention are less formalized for HCBS providers, litigation discovery and production of information are somewhat different than in skilled nursing cases. Damages in HCBS claims are often significant as claimants and decendants may be younger and have longer life-expectancies. Special damages and future care costs can also be significant and difficult to calculate due to existing disabilities and assistive services. Non-economic damages (pain and suffering, loss of companionship) can also be difficult to determine coupled with emotionally impacted family members who have little to lose if a case proceeds to trial.

5. **Effectively Managing Workplace Violence** – In considering the increased risk for senior living facilities with workplace violence, the need to proactively mitigate against the risks is critical. A comprehensive risk management solution will increase the defensibility of a lawsuit. Proactive risk strategies include 1) awareness of active shooter/workplace violence risk; 2) preparation for active shooter/workplace violence incidents; and 3) response after an active shooter/workplace violence event.

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6. **Payroll Based Journal Data (PBJD)** - In 2017, the Centers for Medicare & Medicaid Services ("CMS") began releasing downloadable data sets containing the PBJD files for every skilled nursing facility in the United States. The PBJ provides daily data on staffing levels, with each facility receiving one record for each day in the quarter. Those data, which can be downloaded by the public, have significant effects on nursing homes' legal and regulatory risks. In litigation, we defend against claims of under-staffing and corporate under-budgeting and Plaintiff's attorneys rely on the PBJD to support these claims. For the Five-Star Nursing Home Compare staffing data, the PBJD files were limited to specific types of staff yet in July 2018, the PBJD includes a variety of other staffing data that is not included in the Five-Star rating system creating inconsistencies and recognizing the positive effects on residents reflected in the data. Also, the PBJD underestimates the number of staff providing care to residents, it overestimates the number of residents resulting in miscalculations in staffing levels. This inaccurate data is being used by Plaintiff's attorneys to support the claims of under-staffing. For the providers and the defense counsel, PBJD can be used for risk and litigation management to offer data-driven positive and factual data about staffing including the types and numbers.

7. **The New CMS Regulations** – In litigation, the CMS regulations are often argued by Plaintiff's attorneys to establish the "standard of care" yet they are intended to promote safety and quality of care. A violation, however, of the regulations can result in liability against a provider thus understanding the recent changes and defense strategies are important. I've written about the rule changes in CMS in 2016 and the Phase 1 and 2 changes. They include changes in CFR 483.10 Resident Rights; CFR 483.12 Freedom from Abuse, Neglect and Exploitation; CFR 483.15 Admission, Transfer and Discharge; CFR 483.20 Resident Assessments; CFR 483.24 Quality of Life; and CFR 483.25 Quality of Care.

8. **Corporate Liability** – Corporate liability claims and exposure of multi-entity owners and operations are based on separate entities often providing support through operations, staffing, administrative and clinical support. Theories of liability include vicarious liability, alter ego and direct liability. In defending these claims, counsel develops evidence and strategies focused on the scope of the duty owed by a corporation, the lack of a breach of duty and causation. Changes to the Facility Assessment (42 C.F.R. §483.70(e): Facility Assessment), shifting the Facility Assessment focus back to the federal regulations, basing the sufficiency of staffing on acuity and individual patient needs, also presents increased risks for corporations and the decision-making expectations and budgetary considerations made by the managing entities.

The conference was filled with abundant learning and this article provides only an overview of the main topics covered. For more in-depth information on any of these areas, please contact me and we can further our discussions.

SAVE THE DATE!!!! The annual complimentary long term care conference I host along with Horne Rota and Kaufman Borgeest & Ryan is in its 7th year and not to be missed! Please save the dates April 3-4, 2019 for The National Long-Term Care Defense Summit (love our new conference name!) in Memphis! Education, networking, blues and BBQ! Please contact me for more information and stay tuned for details.

Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm, established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm's practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca's insurance defense practice includes representation of insurance companies and long-term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation.

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from the nearby television station to be a "guest" contestant. This was brilliant! Why so? Because, as I've long advised, bringing in local media personalities from TV, radio and/or newspapers to take part in your events and activities just about guarantees that your event/activity will receive some positive publicity. That's because the TV, radio, or newspaper will want to spotlight their person's involvement. The result: your facility comes along for the ride and gets prominently mentioned … as was the case with local TV covering the hog calling contest. Getting the mayor to take part was great as well because it helped to create community good-will and spread positive word-of-mouth advertising throughout the region and community. A nursing home + a hog calling contest= fun and excitement, and gives you the opportunity to go beyond the thinking that you're just a staid and boring healthcare center. Amazing!

Another great means to get the message out about the great people you serve and the staff who serves them is to partner with well-known entities that will bring people to your building and grounds and/or get staff (and perhaps get residents involved as well. Here are some suggestions for events on your grounds: partnering with a local car club to host an antique car show; joining forces with local health providers to hold a health fair; partner with a local art group to display members' works, plus have residents' paintings/drawings, etc. on display; host local clergy for a get together/meeting in your facility and make sure they receive a tour and get to meet residents and staff; host a major event on your grounds (perhaps partnering with a local civic club and/or church, etc.- this may include a 4th of July or a Veterans' Day celebration, or a revival, etc.; what about the earlier mentioned hog calling contest?

As for getting involved in events/activities that brings staff and potentially some residents out and about: taking part/partnering with local charitable fund raising and/or awareness events in the region ; helping to co-sponsor events at local churches or the seniors' center; partner with a major retailer in your region that's community minded to host a special fund raising event on their grounds; partner with a local entity to help host a fund raiser on their grounds (such as the local animal shelter); in general be on the lookout for town activities where you can sign-on as a contributing sponsor and participant. By the way, when I use the word "sponsor" I'm not necessarily suggesting that your building ante up any money (that's something you'll have to decide based on the event/activity and/or your budget); rather I'm looking for ways and means that you can increase your facility's profile in your community.

So there you have it. Becoming a great marketer takes work; however the rewards at worth it.

Chip Kessler provides his marketing/census building consultation services to a select few nursing and assisted living facilities nationwide. Space is limited. Discover more at ExtendedCareProducts.com

Getting on the Same Page by Paige Hector, LMSW

Biopsychosocial Elements of Pain Management

Last month, I introduced you to Dr. Robert Rosenbaum and his work with behavioral treatment of chronic pain. This month, I want to highlight one of the topics that was a foundation of the entire workshop, the biopsychosocial model of pain. He emphasized that given the onus of the opioid crisis, it is imperative that we be more inclusive and more creative than the simple exercise of writing another prescription.

First, think about a time, perhaps this very moment, when you were in pain. Are you having trouble sitting, standing, walking, breathing? Do you worry that the pain won't get better and, if it doesn't what that means for your life? Are you limiting your activities to accommodate the pain? Do you rely on other people (family, friends, co-workers) to do things for you? How do you feel about that – anxiety, gratefulness, worry, anger, hope, all of those?

We are not so different from the people we care for in our nursing homes and assisted living communities. The experience of pain is universal. Whether it's pain from an acute trauma, injury, or disease, how an individual perceives and experiences the pain within their life is why the biopsychosocial model is so important. Dr. Rosenbaum said, "Pain changes how we see ourselves as we are." It impacts most every facet of a person's life, not just the physical. It affects our self-image and the essence of our personhood.

The biopsychosocial model encompasses much more than just the biological components of pain. Dr. Rosenbaum discussed three different circles of pain and how they intersect: the psychological vicious circle, the physical vicious circle and the psycho-physical vicious circle. Perhaps you're wondering about the term *viscous*? Consider the physical viscous circle; the person experiences pain and may avoid activity (not necessarily a bad thing) which leads to progressive deconditioning, more pain related to decreasing activity, further activity avoidance and deconditioning.

In the psychological viscous circle, the person experiences pain which may be accompanied with anger, anxiety, fear, and distress which leads to an impoverished mood, possibly depression and an increased perception of pain. Now, toss in the psycho-physical viscous circle in which the pain initiates a cascade of events in which the person experiences pain, is unable to do some tasks, tasks pile up, pain gets a little better, the person may have anxiety regarding the tasks that have built up and overestimate their ability at the moment, they engage in too much activity and end up crashing and burning. And, the cycle begins again.

These circles coalesce into a cycle that can be difficult to interrupt. Perhaps viscous makes more sense now?

So, what can we, as members of the leadership and interdisciplinary teams, do?

First, let's turn to the Code of Federal Regulations, specifically F697 Pain Management. With the recent revision to the Rules of Participation, there was significant change within the pain management regulation. We see more emphasis on non-pharmacological interventions and the expectation that the resident-specific assessment is guided by the individual's preferences and choices. In the Assessment section of F697 where professional standards of practice are listed, it includes a section on Physical and Psychosocial Issues with the guidance that *staff include discussion of psychological or psychosocial concerns that may be causing or exacerbating the pain*. (Even CMS acknowledges the relationship between pain and the psychosocial aspects of personhood!)

Next, let's take this process a bit further and consider pain assessment tools used in long-term care settings. While most forms offer a typical approach that includes identifying the location of the pain, intensity, quality, duration, pattern, treatment and response, along with a smattering of queries such as what makes the pain better or worse, only two of the numerous forms I reviewed asked about the patient's goal. And, on both forms, the expected answer would only be numerical, e.g. "My goal is a 4." Important information? Yes. But, what is the context, that is, the biopsychosocial context, for that goal?

One form (from a well-known healthcare forms company) offers a section titled "Comments/Plans" and in parentheses suggests these areas for investigation: relief of side effects, improving pain management, pain barriers, family beliefs, and concerns. Interesting. Keep in mind that it is up to the interviewer to figure out how to investigate these areas. As I often remind staff, *consider the process*. If a nurse, social worker, or physical therapist was instructed to "assess pain barriers", how would they do that? What questions would they ask? I daresay if I simply asked a person, "What are the barriers to your pain treatment?" I would get a quizzical stare.

On yet another form titled "Comfort Self-Assessment Guide," there is a section on the back for the patient to rate the amount of interference the pain causes in areas such as general activity, mood, enjoyment of life and relationships. I suppose that's a good start. And of course, we can't forget the MDS. Section J asks a couple of questions regarding the effect of pain on the person's function. Again, a start.

Wow, you might be thinking, she's cynical today! Please, bear with me as I explain my thought process. Save for a couple bright spots, ask yourself *what's missing* on the most-used pain assessment tools.

Here's what's missing – a person-centered approach to pain assessment and management. Assessing pain within a biopsychosocial framework is not intuitive. It requires training and coaching. Pain assessment tools are a vital part of the process, but they are simply a tool within the larger process of pain management.

Consider the abbreviated list of questions below and how they begin to transform a traditional pain assessment

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into a person-centered experience. Once again, use your own experience of pain and imagine yourself being asked these questions.

- What does the pain mean to you?
- When is the problem *not* happening?
- When is it different?
- What has this been like for you?
- What has been the most difficult adjustment?
- What have you given up to accommodate the pain?
- If you had one wish or could change one thing, what would it be?
- What do you miss the most?
- What are you most afraid of?

I did further research and came across The Psychosocial Pain Assessment Form (PPAF)[1]. This tool explores the impact of pain in five domains: Economic, Social Support, Activities of Daily Living, Emotional Impact, and Coping Style. I encourage you to look at this tool and compare it to what you currently use in your facility. The in-depth nature of this particular assessment certainly would not be appropriate for someone with advanced cognitive impairment. The purpose isn't to persuade people to use this tool but to expand the understanding of pain and how it impacts a person's life, whether that person is in your facility for short-term rehab or long-term care.

Of course, once a more in-depth, comprehensive and person-centered assessment is initiated, staff must do something with the information. It is not useful sitting somewhere in an EMR or stagnant on a care plan.

Hmmm….I feel a QAPI Process Improvement Project coming on!

(Endnotes)

1 Otis-Green, S., & The City of Hope Pain/Palliative Resource Center. (2012) . The Psychosocial Pain Assessment Form (PPAF). . Measurement Instrument Database for the Social Science. Retrieved from www.midss.ie.

Registration is now open for Paige Hector's brand-new 60-minutes webinar "The Person-Centered Advance Care Plan Playbook." It is on Thursday, November 1st- two times to choose from. Discover more and respond at WebinarLTC.com or call 800-807-4553.

This educational offering has been reviewed by the National Continuing Education Review Service (NCERS) and the National Association of Long-Term Care Administrator Boards (NAB) and approved for 1.25 clock hours and 1.25 participant hours.

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Are You Cyber Ready?

By Ricky Smith

Editor's Note: *Nursing & Assisted Living Facility Professional* is pleased to welcome Ricky Smith as our newest columnist. Mr. Smith is President of Innovative Business Technologies, the nation's leader in specialized IT systems and Cyber Security and for the Nursing and Assisted Living sector.

The HIPAA Privacy rule simply put is a construct to enforce industry guidelines that help prevent unauthorized access to PHI (Protected Health Information). Regarding PII (Personally Identifiable Information), the rule establishes standards on removing identifiers from healthcare data, known as de-identification (45 CFR §164.514(a)-(b))[1]. The rule covers many areas involving the practices of healthcare providers with the general categories being Use and Disclosure, Administrative Safeguards, Patient Access, Data Security, and Breach Reporting. In terms of IT Security, the primary source of guidelines are established by the National Institute of Standards and Technology (NIST).

The rapid transition from paper based patient records to an EMR (Electronic Medical Record) system has increased the awareness of cyber threats and the importance to adhere to security guidelines defined by the privacy rule, NIST, FCC, and others.

Compliance ownership falls primarily on the healthcare provider itself. It is important when choosing an EMR software vendor to understand the mechanisms built into the product to safeguard sensitive information. Two common methods used by EMR software vendors to assist in this effort are data encryption and masking the associations of data elements to prevent the linking of information to an individual.

As a provider, the first step toward cyber security compliance is risk analysis. This process should identify areas of vulnerability and establish a plan to employ practices that prevent or mitigate the threat of a data breach. The general areas to be investigated are Network Design, Patch Management, User Education, and Business Continuity.

Network design refers to the communication infrastructure of any computer environment. These devices maintain the flow of data and have the ability to enforce access rules to ensure information is limited to allowed destinations. Proper network design is the primary defense against cyber threats within an organization.

All software applications have vulnerabilities. As these are discovered, software vendors address the risks by releasing security patches. This makes it critical to have a well implemented patch management process that includes computer operating system, anti-virus protection packages, and network equipment updates. In many cyber-attack instances, organizations fall victim to a known exploit for which a security patch has already been released.

Staff members that interact with your EMR system will often be the first to notice irregularities on their computer. For this reason, continued security awareness training for end-users is crucial to the safeguarding of patient data. Areas of education should, at a minimum, focus on email, web browsing, and general tips on identifying potential malicious activity. It is recommended that training be conducted on a semi-annual basis with the distribution of monthly updates. From a compliancy perspective, proof of participation in this training is required.

When data has been rendered inaccessible due to a cyber-attack, your ability to recover determines your susceptibility. A well implemented Business Continuity plan is the final defense against an exploit. The data protection portion of the plan should range from local file restoration to disaster recovery procedures. Defining your Recovery Time and Recovery Point Objectives are key components of the plan to ensure failover requirements are met. Inadequate and untested recovery procedures can be fatal to a healthcare organization.

When thinking in terms of Emergency Preparedness, understand the data security risks within your environment that can impede your ability to provide care. The guidelines set forth in the HIPAA Privacy Rule are designed to help mitigate these risks and ultimately protect the patient.

(Endnotes)

1 https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html#rationale

Extended Care Products is pleased to partner with Ricky Smith to present the new video series "Cyber Attack." Discover more and respond at ExtendedCareProducts.com or call 800-807-4553 for more information. This video series is available for a risk-free 30-day review.

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THE BACK PAGE

by Chip Kessler

How to Become a Marketing/Census Building Machine

I'm going to touch on some of the basics for our purposes here, because unless the basics of building a strong census are fully mastered, success will be that much tougher to come by on a consistent basis. Let's begin with the very foundation of becoming a "census building machine" and a cornerstone achievement for you to follow …

You Must Become a Great Marketer of Your Facility. The days of sitting back and waiting for new admissions to just come through your doors, or for local hospital discharge planners to send you a never-ending stream of new admissions are pretty much gone by the wayside. Oh sure people still come in, or will call you to discover more about your care and services; however you just can't expect them to do this because you have a sign out front telling folks you're a nursing or assisted living facility. Rather nowadays, you have to do everything possible to entice/attract individuals to take that next step. How to do this?

You must spotlight your facility "as the place to be in your region and community." This is achieved when you successfully portray your building as a place with loving, dedicated caregivers and a facility that takes great pride in making things fun and interesting for residents. A marketing mentor of mine coined this phrase years ago and it's just as appropriate today in 2018: *"A boring message is the #1 thing you must avoid in anything marketing/advertising related."* Makes sense, right? After all, if you can't be enthusiastic about what your facility provides, and deliver this fact to the general public, then why would you expect anyone reading, hearing or seeing your message to get excited about it? Now you might be thinking: *we're a nursing home or we're an assisted living facility; there just isn't the same level of excitement as someone marketing a new car or a vacation to Hawaii.* And yet, I'm here to say that the same basic principles still apply!

You must know the best avenues to get your message out to those you're wishing to reach. What is your relationship with your local media at the moment? Today, right now, do you know someone you can call at your local newspaper and/or regional TV station well enough so that she or he will come to cover an event of-interest or a special activity at your facility? That said, have you organized anything recently at your facility worth this kind of special coverage.

Example: a consulting client of mine recently held a HOG CALLING CONTEST on its grounds. I capitalized the letters so you didn't think you mis-read what I just wrote. Yes, a "hog call calling contest" on the grounds of a nursing home- imagine that! They had residents and staff as the contestants, along with some other local folks involved (more about that in a moment). They even got a local business to supply the pigs and the pens needed. They made it a real community event! Now as for those other "local folks" … the facility got the mayor to serve as the judge, and the weatherman

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