

ELDER LAW & LONG TERM CARE

Wroten & Associates, Inc.

Attorneys at Law



FIRM NEWS

THE DEFENSE WINS!

Elkins vs. DOE Skilled Nursing Facility

On January 5, 2009 an arbitration award in favor of our SNF client was issued, denying plaintiff's claims for elder abuse and negligence. The case was brought by a patient admitted to our client facility to rehabilitate from a fractured hip. The elderly patient was a former professional football player who was also diagnosed with Lou Gehrig's disease. The plaintiff became ventilator dependent after experiencing an aspiration event in our client's facility. Plaintiff claimed the aspiration was caused by the inappropriate use of medication, the failure of nursing staff to appropriately use a BiPAP machine, and a failure to maintain the patient's head of bed in an elevated position. The arbitration award stated: "I find there is no credible, competent evidence that the event of March 6, 2007 substantially was caused by the omission to use a BIPAP machine in conjunction with the Restoril or a low head of bed. I find the credible, competent evidence is that this event was spontaneous and due to the natural progression of the plaintiff's disease." Plaintiff placed the case value at nearly \$4 million.

10 Steps to Keep Your Quality Assurance Program Private

By Kippy Wroten with the Assistance of Cynthia Uptmore, R.N., J.D.



In this age of business transparency there are few areas in which the long term care operator can maintain business privacy when responding to licensing demands and civil litigation.

Quality assurance and peer review however, remain safe harbors wherein investigations designed to evaluate the quality of care can be shielded from review by both state surveyors and civil attorneys pursuing litigation against the long term care operator.¹ Assuring privacy in the quality assurance process is recognized as a critical element to foster an honest and effective internal review.

In civil litigation plaintiff attorneys routinely attack the protections afforded quality assurance programs as plaintiffs argue documents maintained by the committee provide evidence of a licensee's knowledge and ratification of employee misconduct. Failure to respect the formalities of the quality assurance program can expose your investigations to possible disclosure. Most long term care operators are familiar with the application of quality assurance regulations as they relate to the Department of Public Health survey process. When faced with civil litigation for personal injury however, the rules have a slightly different look. Here are 10 steps to assist you in providing your QA program the protection from disclosure it deserves while meeting the demands of regulatory compliance.

1. Designate a "Quality Assurance Committee" and affirmatively state the exclusive duty of this committee is to evaluate and improve quality of care.

2. The QA Committee must at the least consist of the following personnel:

- Director of Nursing.
- Medical Director (or other facility designated physician).
- Three other facility staff members. This may include the Administrator and key department chairs.

3. Create a policy and procedure that identifies the QA committee by name and purpose. Identify the committee members by title. Update the titles of committee members in your documented policy and procedure whenever changes occur. You will produce this document as evidence of your compliance with regulations and to support the existence of your privacy privilege.

4. Inform individuals assigned to serve on the QA Committee of their assignment. Emphasize the importance of strict confidentiality regarding all aspects of committee work. To be effective, committee members must understand their role and respect the confidential nature of all QA committee investigations.

5. Outline a simple but formal process for facility staff and ancillary care providers to bring quality concerns to the attention of the QA Committee. Educate staff on the QA process as part of their new employee orientation and review through in-service presentations. You will produce these

Continued on Page 3

¹ Records and proceedings of organized committees within a health care facility having the responsibility of evaluation and improvement of the quality of care rendered are immune. (California Evidence Code Section 1157)

ALTERNATIVE DISPUTE RESOLUTION

Negotiation, Mediation & Arbitration

By Regina Casey



Negotiation, mediation and arbitration are alternatives to litigation when disputes arise in the long term care setting.

Creative dispute resolution procedures are not new concepts.

Abraham Lincoln has been quoted as saying "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time." The advantages of dispute resolution over litigation are well known. It not only saves time and money, but gives the parties control over the outcome of the dispute.

Negotiation is a communication process which requires the cooperation of all parties and a willingness to compromise. Mediation is negotiation facilitated by a third party who assists parties to reach a resolution outside the courtroom.

Another technique for the resolution of disputes outside the courts is arbitration, wherein the parties to the dispute refer the matter to one or more persons, who then reach a decision to which the parties are bound. Arbitration can be either voluntary or mandatory and can be either binding or non-binding.

To increase the probability of resolving a dispute in a satisfactory manner, one must be able to determine which process is best under the circumstances: negotiation, mediation, arbitration or litigation.

How does one decide which process is more likely to produce the best possible outcome? This question will be answered over the upcoming months in our series of publications. Our next newsletter will address when negotiation may be the preferred process to resolve a dispute. ■

EXECUTIVE COACH

Successful Leadership Within the Culture of Your Business Community

By Marilyn Allemann, L.C.S.W.
Executive and Personal Coach



Community culture is comprised of an organization's mission, goals, core values, operating procedures and methods. In today's

turbulent economy this established culture is being challenged and tested. Management's leadership responsibilities include the assessment of these cultural components, possible modification or revision of these elements to assure that the community culture can survive and be maintained. A way of addressing this is for managers to increase their interaction with employees reaffirming the organization's goals, core values, operating procedures and methods. This process provides employees a sense of direction and expectations of individual performance and ethical behavior.

Successful leaders exhibit important interpersonal skills that involve more than just the knowledge of managing a business, department or staff. An effective leader works with employees to attain a common goal, inspires by example and deals with problems in a decisive but compassionate way. The qualities of successful leadership can be learned and mastered. Some effective leadership qualities include: clear, flexible communication with employees, clients and their families; the ability to make decisions quickly and follow through on those decisions instilling confidence in peers, employees and clients; and empathy for others so that you can understand their view. In the next newsletter we will address specific leadership skills and how to apply them.

Additional information can be found on Marilyn Allemann's website, www.MastersExecutiveCoaching.com. Please contact Marilyn Allemann directly at mwallemann@sbcglobal.net with any questions. ■

EMPLOYMENT LAW UPDATE

Discrimination Claims on the Rise

By Laura K. Sitar



The number of discrimination claims filed with the Equal Employment Opportunity Commission (EEOC) has risen at an alarming rate as the economy continues to worsen.

This past year saw a 15% increase in claims for race, age and sex discrimination and retaliation combined, resulting in the highest single year increase since the agency was formed in 1965. Experts predict the rising trend in discrimination claims will continue through the end of the year as the jobless rate increases. Given the 180 to 300 days individuals have to file such claims it is likely employers will feel the effects of the recession on discrimination claims well into next year.

While the sheer number of employees losing their jobs has presumably driven this alarming increase, it may also be exacerbated by employers who have simply failed to consider the effect of their downsizing decisions. For example, cutting all the highest paid employees in a job category may unintentionally run a company afoul of statutes against age discrimination, the category which saw the highest increase in discrimination claims last year. Similarly, reducing benefit costs by quietly eliminating those employees who have made the most medical insurance claims could easily implicate laws against disability discrimination.

If your company is contemplating a reduction in the workforce, it is important to step back and evaluate the criteria used to determine which positions are eliminated and which employees receive pink slips. The criteria may not be based on any protected category, i.e. age, sex, race, or marital status, to name a few. It is also important to evaluate the effect of the criteria used. If neutral appearing criteria results in the termination of a proportionally higher number of employees over age 40, of a particular race, or of any other protected category, it's time to step back and carefully re-evaluate your job reduction decisions. ■

"10 Steps" - Continued from the Cover

documents as evidence of your regulatory compliance during licensing surveys.²

6. Schedule formal QA meetings every quarter. You may meet more often as necessary but should not meet less often. Keep a record of meeting dates. This will confirm regulatory compliance and support your privacy privilege.

7. Create an agenda for every QA meeting that identifies broadly the areas you will review. Your agenda should be general in content and can include sections for skin integrity, falls, staffing, and other areas monitored for potential trends. Create an agenda item called "Corrective Plans of Action". The agenda should not contain any information that is more specific than these general areas as again, this is a document that may be disclosed to validate your privacy privilege.

8. Maintain meeting minutes that identify (a) specific quality issues addressed by the committee, (b) planned corrective action, (c) follow-up evaluation of the effectiveness of your corrective action, and (d) directives to individuals who are not routinely part of the QA Committee who will assist your QA investigation. This document should not be produced in either regulatory surveys or civil litigation.³ Note that surveyors may request

evidence to establish your QA process is effective. If requested, disclose only the minutes relating to a successful intervention where there was no patient harm. It is not necessary that you produce records that coincide with deficiencies identified by the surveyor.⁴

9. Mark every document, including photographs, related to the QA Committee evaluation as "Confidential Quality Assurance Investigation." ALWAYS!

10. Maintain QA Committee documents in a secure area for the current year and the prior 3 years. Secure means "locked".

Any documents or photographs gathered as part of a quality assurance investigation should be done specifically at the directive of the QA Committee. Documents and photographs gathered as part of the QA Committee investigation must be maintained by the QA Committee for their exclusive use and kept in a secured area separate from the patient chart.

It is important that the QA process be respected and followed in order to protect your privacy privilege. Lapses in these processes expose the long term care operator to potential piercing of the privilege and loss of privacy in your quality assurance program. ■

² 42 CFR § 483.75 (o)(3) provides that a State or the Secretary may not require disclosure of Quality Assurance Committee records except in so far as such disclosure evidences the existence of such a committee in accordance with regulatory requirements.

³ It is important to note there are additional state rules that apply to quality assurance audit logs that may be volunteered in the course of licensing reviews. (California Health & Safety Code Section 1424.1)

⁴ For more information regarding licensee surveys, see Survey Procedures for Long Term Care Facilities, Sub-Task 5F-Quality Assessment and Assurance Review and further information available at www.wrotenlaw.com.

SAVE THE DATE!

**WROTEN & ASSOCIATES
LONG TERM HEALTHCARE
CONFERENCE**

JUNE 4, 2009

**DISNEY'S GRAND
CALIFORNIAN HOTEL**

**EARN CONTINUING
EDUCATION CREDITS
(CEU CREDITS)**

Join us for an educational program on June 4, 2009 at the Grand Californian in Disneyland. This presentation is offered exclusively for those who work in the long term care industry, including owners, operators, administrators, nurses and other staff. Our seminar will address challenges facing providers as well as legal, regulatory and employment updates that impact the long term care industry. We will also host a series of interactive breakout sessions designed to promote the sharing of information and exchange of ideas between the participants, including dealing with difficult families, attracting and retaining employees, document management and managing discovery in litigation.

Continuing education credits, continental breakfast and lunch will be provided. Please check our website, www.wrotenlaw.com for updates on the upcoming seminar.

CALENDAR**APRIL**

15: Tax Deadline

MAY

10: Mother's Day

25: Memorial Day

JUNE4: Wroten & Associates
Long Term Healthcare
Conference

21: Father's Day

JULY

4: Independence Day

LEGAL UPDATE**Surveyors Not Subject to Discovery**

By Darryl A. Ross



At the end of President George W. Bush's term, President Bush signed into law a regulation that classifies state inspectors and Medicare and Medicaid contractors as federal employees. The new rule prohibits state health departments and contractors from participating in private lawsuits involving facilities that are in the federal assistance program without approval by the head of the Department of Health and Human Services. The rationale for the provision is that participation in private lawsuits diverts employees from their federal survey, certification and enforcement responsibilities.

Plaintiffs' attorneys typically seek to depose state inspectors to discover information about surveys and citations. The practical effect is that state inspectors will no longer be subject to deposition in private litigation involving claims against long term care providers. While this is generally regarded as good news for long term care providers, it does foreclose defense counsel from taking depositions in those instances where counsel needs to speak with state inspectors in an attempt to clarify survey results.

We will continue to monitor this regulation to determine whether there are any judicial challenges to it. ■

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