UNDERSTANDING LEGAL RISK IN POST-ACUTE CARE

San Diego Health Care Association
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Objectives

- Understanding the legal claims made
- Identifying risk situations in Operations
- Identifying risk situations in the Clinical Context

Legal Claims Asserted Against SNF's

Professional Negligence = "Breach in the Standard of Care" and Causation/Damages

- Recovery limited by MICRA

VS.

Elder Abuse/Neglect = "Reckless Neglect" with "Corporate Ratification" by "Clear and Convincing Evidence" and causation/damages

- Recovery includes the "Enhanced Remedies" – up to $250K pre-death pain and suffering damages for deceased plaintiff, uncapped pain and suffering damages for live plaintiff, attorney's fees and punitive damages

Ways Plaintiffs Prove "Corporate Ratification"

- Inadequate Staffing
- RN vs. LVN
- Inadequately Trained Staff
- Poor Regulatory History
- Fail to Follow Your Plans of Correction
- Resident Council Minutes/Satisfaction Surveys
- Failure to Intercede When Staff Member Commits Error
- Communications From "Management Company" to Administrator

Ways Plaintiffs Prove "Corporate Ratification"

- Inadequate Staffing per Title 22 & Title 42 – Administrator understaffs facility to increase profits.

  What to do:

  - Meet 3.2 NPPD Every Day
  - Start Preparing for 3.5/2.4 PPD Compliance NOW
  - Always Staff Sufficiently to Meet the Acuity of your Patients
    - Have a "system" in place that is followed daily
    - Know what CMS posts as your expected staffing levels per your MDS reporting
    - DON & DSD & Administrator must be easily able to recite their "system" to staff to comply with Title 42

Ways Plaintiffs Prove "Corporate Ratification"

RN vs. LVN – Scope of Practice – Administrator employs LVN's to do an RN's job to save money.

What to do:

- RN's Conduct all Nursing Assessments
  - Initial Assessment
  - Change of Condition Assessment
  - Discharge Assessment
- Have LVN's collect data, but always involve RN in completing the assessment
- RN's complete/sign off on all Care Plans

Ways Plaintiffs Prove "Corporate Ratification"

Inadequately Trained Staff – Administrator knows that in-service trainings are spotty and thus, there are inadequately trained nurses and CNA's on the floor.

What to do:

- Foster and support a robust orientation and in-service program
- Consult IDT/Risk Management/Attorney for topics to cover and training materials to use
- Ensure that 90%+ of care staff members attend trainings
- Meticulously ensure that Sign-In sheets are completed and records are maintained

Ways Plaintiffs Prove "Corporate Ratification"

Poor Regulatory History – Administrator is aware that facility has received multiple Deficiencies/Citations in a specific care area and facility fails to improve despite this "notice."

What to do:

- Know your Regulatory History
- If you have trends (falls, skin, decline, failure to follow Care Plan, neglect/dignity), then conduct in-services
- Utilize Mock Surveys
- Always strive to improve in this area

Ways Plaintiffs Prove "Corporate Ratification"

Fail to Follow Your Plans of Correction – Administrators do not ensure that the "promises" made to the DPH about how staff will correct deficiencies are fulfilled. This shows indifference to poor nursing practices that exist with no effort to improve on these practices.

What to do:

- Always do what you represent you will do in your POC
- Keep meticulous records showing that you fulfill your POC activities
- Administrator should always follow up with DON/DSD/IDT to ensure that POC's are followed

Ways Plaintiffs Prove "Corporate Ratification"

Resident Council Minutes/Satisfaction Surveys – Administrator is aware of complaints and/or areas of concern and there is no corresponding effort to address these issues despite this "notice."

What to do:

- Regular evaluation of these documents
- Respond to issues raised and follow up with specific families
- Keep written records of the response with continued follow up

Ways Plaintiffs Prove "Corporate Ratification"

Failure to Intercede When Staff Member Commits Error – Administrator knows that a staff member makes a mistake and does not intervene, thereby "ratifying" the conduct.

What to do:

- Conduct thorough investigation (isolated incident vs. systemic problem)
- Train transgressor & entire staff
- Suspend/fire transgressor
- Report to authorities when indicated
- Meet with family and address situation
- Document written and/or verbal warnings and counseling

Ways Plaintiffs Prove "Corporate Ratification"

- Communications From "Management Company" to Administrator – The management company is "pressing" the Administrator (usually financially) to operate the facility in a manner that supports the theme of "profits over patients."

  What to do:

  - Focus on "helping" instead of "exerting pressure"
  - Empower the leaders of the facility
  - Allow care decisions to be made at the facility level
  - Bonus structure includes clinical excellence
  - Beware of how you communicate and what you say (always assume a plaintiff's attorney will read your emails)

Three Common Fact Patterns Creating the Majority of Claims

- Skin breakdown
- Falls with injuries
- Deterioration of condition with negative outcome and alleged failure to respond appropriately

Pressure Sores are "Unavoidable" Per F 686 and NPUAP When:

(1) There is a proper Skin Care Plan based on an evaluation of the clinical condition and risk factors;

(2) All interventions/orders are carried out and documented;

(3) There is a regular assessment of the effectiveness of the Skin Care Plan and orders; i.e., Weekly Summaries.

(4) There is Nursing Action upon the worsening of pressure sore; i.e., physician notification with new orders, Care Plan updates, wound consult, etc.;

(5) Then, steps (1) through (4) are repeated as necessary.

Falls are "Unavoidable" Per F 689 When:

The facility must ensure that the resident's environment remains as free of accident hazards as possible, and each resident receives adequate supervision and assistive devices to prevent accidents.

- Identify hazards and risks;
- Evaluate and analyze hazards and risks;
- Implement interventions to reduce hazards and risks; and
- Monitor the safety plan and resident awareness for effectiveness, **modifying** interventions/update Care Plan.

Decline is "Unavoidable" Per F 684 When The Facility:

- Ensures the resident obtains optimal improvement or does not deteriorate within the limits of a resident's right to refuse treatment and within the limits of recognized pathology and the normal aging process.
- Recognizes and assesses factors placing the resident at risk for specific conditions, causes and/or problems; assessment;
- Defines and implements interventions in accordance with resident needs, goals, and recognized standards of practice; care planning;
- Monitors and evaluates the resident's response to preventive efforts and treatment;
- Revises the approaches as appropriate upon changes of condition; and
- Repeats the "nursing process."

"Unavoidable" Requires Strict Adherence to the "Nursing Process"

(1) Assessment;

(2) Care Planning;

(3) Carrying Out Interventions and Orders;

(4) Continuing Assessment for Change of Conditions;

(5) Physician Notification Upon a Change of Condition with Updating Care Plans and Orders; and

(6) Repetition of Steps (1) through (5).

Chart All of the Nursing Process

Charting Best Practices

- Most critical piece of evidence
- Must be complete and accurate
- If not reliable, difficult to defend
- It is the "script" of what happened
- If you do not chart it, it did not happen

Charting "Do's and Don'ts"

Do

- Write legibly and use complete and concise statements
- Chart chronologically and promptly
- Document resident's refusals
- Be objective
- Chart physician notification thoroughly – time, method, substance
- Sign name using first initial and title (RN/LVN)
- Follow proper "late entry" procedures: used to add an entry not made at the expected time of recording or observation; omissions.

Don't

- Falsify the record
- Enter biased statements in charts
- Criticize others
- Chart "summaries" or "assumptions"
  - Chart facts only – not "what you think it is"
- Chart professional disagreements
- Omit sections/leave blanks
  - Fill out forms completely.

Miscellaneous Issues

- Know the Residents and their families and chart accordingly
- Involve DPH and/or Ombudsman, where applicable
- Maintain good IDT practices – Review and update Care Plans
- Document all Changes of Condition timely and accurately
- Work closely with other healthcare providers (wound care, home health, etc.)

Questions?

Thank You