

Long-Term Care Survey Alert

LITIGATION TRENDS: Recent LTC Prosecutions Include Candid Cameras, Jail Time For 'Worthless Services'

Take the high road away from this nightmare scenario.

The specter of nursing home staff being arrested for neglect or fraud can trigger a dangerous "this only happens to the other guy" denial.

Instead: Analyze trends in criminal litigation involving long-term care providers to identify vulnerabilities that could give prosecutors an opportunity to charge your staff or facility with wrongdoing.

A case in point: The New York attorney general's office recently charged several nursing home employees with resident neglect and falsifying documents.

The "smoking gun" in the case: A hidden camera placed by law enforcement officials in a patient's room that allegedly showed caregivers weren't providing services they documented as provided.

This prosecution represents the latest in a series of recent cases in which New York officials have used secret cameras to record alleged care deficiencies in facilities in that state. In the latest prosecution, according to media reports, the camera showed staff didn't provide range-of-motion and pressure ulcer care or total assistance with feeding, as dictated by the plan of care. Neither did the patient receive ordered medications in all cases. The medical director allegedly didn't provide services documented in the record.

In one of the other hidden camera cases in a New York facility, the attorney general got "gobs of camera footage of residents not turned, nebulizers not given or given wrong --and the like," says **Joseph Bianculli**, an attorney in private practice in Arlington, VA. And staff in that case were charged with falsifying documentation but not neglect. New York requires "CNAs to sign 'accountability sheets' after each shift that basically say 'I did what I was supposed to do,'" notes Bianculli, which the attorney general can use as proof of falsifying documents.

Take Steps to Shore Up Care

Hearing about the prosecutions can be a powerful wake up-call for front-line staff about the "potential consequences" of not caring for residents like they should, says Bianculli.

To detect care problems, facilities can also use an "array of audits" as part of their quality assurance efforts. You can audit everything from observing nurses passing meds to staff handing out meals during meal pass, says **Nancy Tucker**, director of nursing facility policy for the **New York Association of Homes & Services for the Aging**. If you do audits routinely and obtain a large enough sample size across shifts, "you get a bigger picture of what's going on," says Tucker.

"You can also use QMs/QIs to monitor outcomes," adds Tucker. NYAHS has a Web-based quality improvement software system, EQUIP for Quality, that takes the QM/QI data a step further, separating it by units and providing individualized risk profiles to identify residents at high risk for adverse events, such as falls or pressure ulcers. The program includes evidence-based information about what steps to take to prevent the negative outcomes.

"The software also audits resident data to alert facilities to gaps or inconsistencies in care," relays Tucker. Any provider can preview and order the software from www.equipforquality.com. As an additional quality check, Tucker suggests facilities "develop active forums to determine resident/family satisfaction with care."

Beware This Legal Theory

As if secret cameras recording staff's every move (or lack of moves) isn't bad enough, some facilities and their higher-ups are getting hit with criminal charges under the "worthless services" theory. That theory holds that if the services provided are so worthless as to be tantamount to no services at all -- then the submission of any reimbursement claim for the services is, by definition, "false ... ," says **Harvey Tettlebaum**, partner, **Husch & Eppenberger** in Jefferson City, MO. The **United States Department of Justice** is "actively encouraging" local U.S. Attorneys to seek criminal indictments under the "worthless services" theory. "While no criminal case using the theory has gone to trial, several have been settled," Tettlebaum says -- most recently one where the CEO of a small nursing home chain agreed to an 18-month sentence, five years probation and a \$1.25 million dollar criminal fine, says Tettlebaum. So what should nursing facilities do?

Be "on guard" for any situation with "particularly bad outcomes -- especially death," advises Tettlebaum. In such cases, "delay billing for any services provided to that resident," he advises. If the facility already billed for care prior to the resident's death, cancel the billing or refund the payment, he counsels. Avoiding billing for the services "negates the elements of intent necessary for the government to bring a successful false claims action civilly or criminally," he says.

Staffing is at issue: Tettlebaum notes that federal prosecutors seem to be looking for cases where there is question about sufficient staffing to take care of residents when bad outcomes occur. So document your staffing very carefully.

Handle IJ citations with kid gloves: Before a facility agrees with an IJ citation, it should review all factors and interview everyone involved to prevent a "later attempt by a federal or state prosecutor" to turn the incident into a false claims case, advises Tettlebaum.