

Long-Term Care Survey Alert

Litigation Trends: TAKE HEED OF THESE NURSING HOME PROSECUTION TRENDS

No doubt you have wondered how to ensure federal prosecutors don't target your facility with a False Claims Act lawsuit for poor quality outcomes or you personally with criminal charges.

Assistant U.S. Attorney **David Hoffman**, known for carrying the banner on such cases, recently shed some light on how he chooses to investigate and prosecute certain facilities and individuals.

The hallmarks of cases that rise to the level of criminal culpability include falsification of records and failure to report resident harm to the appropriate authorities, according to a presentation by Hoffman and private defense attorney **Michael Kogut** at last month's **American Health Lawyers'** "Long-Term Care and the Law" conference in Phoenix.

In that regard, Hoffman pointed to his recent successful criminal prosecution of **Lisa Taibi**, an LPN who falsified a resident's record to cover up her failure to comply with a physician's phone order to lower a resident's Coumadin dosage.

Hoffman charged Taibi under 18 U.S.C. 1035, which makes it a crime to falsify statements in connection with the delivery of or payment for health care services or benefits. "Under the criminal statute, the falsification of records has to be material," Hoffman noted. "And in the Taibi case, it was, because it led to no one but Taibi knowing what was going on with the resident," who subsequently died from an internal hemorrhage due to Coumadin.

While the Taibi case involves clearcut wrong doing on the nurse's part, state criminal actions against facility nursing staff and administrators for adverse clinical outcomes have been much more muddied, Kogut tells **Eli** (see stories in article 2).

Level of Harm a Factor

When deciding to investigate cases in the civil or criminal arena, Hoffman does look at the level of harm to the resident. "I can confidently say that a resident's toenails not being trimmed won't be a federal case," he reassured providers. "And it's not a federal case if the patient with cancer is losing weight." Further, an unshaven resident without his dentures wouldn't be cause for investigators to come pounding on your door. But it would be a different story if that same resident had been losing weight, the flowsheets documented that he'd eaten 75 percent of his diet and the chart noted that he needed dentures and none had been provided.

That type of scenario is getting into FCA territory because Medicare and Medicaid pay for facilities to provide appropriate nutrition and services to meet the resident's needs, Hoffman emphasized. "And if any part of the claim is false, then the entire claim is false," he noted.

Surveyors are acting on behalf of the federal government, so telling them falsehoods or changing documents to mislead them can land you in federal court Assistant U.S.

Attorney David Hoffman.

Yet surveyors also address those types of quality of care issues. So as Kogut pressed Hoffman to answer: When is the survey process, which includes civil monetary penalties and decertification, not enough?

Hoffman dodged the question by noting he's never based a fraud case solely on survey findings. In such cases, Hoffman said he'd investigate a longer time frame and also look at the facility's plan of correction to see if it was truthful. Investigators might also look to see if the facility is still following the same clinical protocol that led to poor outcomes.



As for cases blipping across the federal government's radar screen in the future, watch out for "wholesale changes in the MDS records that don't match the resident and grossly deficient care," Hoffman cautioned attendees.