

Long-Term Care Survey Alert

State Legal Trends: UNFASTENED LAP RESTRAINT COULD MEAN A CRIMINAL CASE

How common place are state criminal prosecutions of nursing home administrators, DONs and CNAs? Although the exact statistics are difficult to nail down, "many states do prosecute such individuals for either neglect or abuse, depending on the language of the state statutes, for isolated incidents or patterns involving resident injuries or deaths," reports **Richard Kiefer**, attorney with **Kiefer & McGoff** in Indianapolis. "Neglect and abuse statutes typically make it a crime to place a dependent person (a resident) in a situation that endangers, or may endanger, the person."

And that would include an instance, for example, where a caregiver placed a nursing home resident in a wheelchair and forgot to put on the lap buddy or restraint. "If the resident falls out of the wheelchair, hits his head and dies, some prosecutors will file that as a criminal case," Kiefer says.

In Kiefer's view, these cases should not be filed as criminal prosecutions unless they involve malice or gross neglect. "But it happens," he cautions, "especially where cases get a lot of press or where there is a very vocal family member." Kiefer reports, for example, that he currently represents a nurse in Southern Indiana charged with neglect in a case involving dehydration of a resident who died.

The good news: "Juries are often unwilling to convict a hardworking, caring healthcare provider who simply made a mistake," Kiefer observes.

Risk Management Strategy

Even so, no one wants to be dragged through an indictment with all the negative press and angst not to mention legal costs and damage to reputation.

If investigators approach you or your facility following an unavoidable adverse event, don't assume you can just explain what happened and that will be the end of it.

"Nurses sometimes believe if they can just explain the situation clinically, the investigators will understand," warns **Michael Kogut**, an attorney with **Murtha Cullina LLP** in Hartford, CT.

"What happens instead is the nurses don't understand how the information can be used against them, especially if they admit any errors," he explains. And prosecutors aren't always that savvy about putting information in a clinical context.

Thus, the more prudent tack is for the facility to ask outside clinical and legal experts to review the situation to decide whether staff need legal counsel present when they talk to investigators. Individuals targeted for questioning might also consider seeking their own legal consultation along the same lines.