

# **Assisted Living Risk Management and Social Media Concerns**

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## Disclaimer

The content of this presentation is for educational purposes only and is not legal advice without the express written engagement with counsel.

# Assisted Living Claim Overview

- **Allegations**
  - Resident Fall: 46%
  - Abuse: 10%
  - Pressure Ulcer: 8%
  - Elopement: 7%
  - Improper Care: 7%
- **Average Total Paid**
  - Gross Improper Care: \$542K
  - Elopement: \$378K
  - Failure to follow Physician Orders: \$361K
  - Delay in Seeking Medical Treatment: \$256K
  - Pressure Ulcer: \$251K

# Mistakes That Lead to Lawsuits

- Rubber stamp” physician orders
- Lack of communication during transfers between facilities; i.e. hospital to ALF or nursing home
- Not documenting discussions with staff/physicians and residents/families
- Not documenting that lab results are sent and reviewed
- Poor documentation on MARs and TARs
- Records alteration/destruction issues
- Poor interviewing and background checks on direct caregivers
- Failure to update Care Plans/Service Plans

# Alzheimer's Residents

- Does the family understand the natural progression of the disease?
- Is the family prepared for the behaviors that often occur with the disease?
- Are educational materials provided?
- Did we document having the conversations/providing the information provided to the families?
  - Doctor has the conversation, but its not documented

# Documentation

- Patient's medical record is a legal document.
  - One record – many purposes
  - Tells a story
    - Serves as a communication device between caregivers.
  - Most credible evidence in a lawsuit.

# Documentation

- If it's not in the chart, it didn't happen
- If it's not documented, its not done
  - Staff will rely upon the chart to show that adequate care was provided.
  - A well documented and complete chart can be a nursing facility's best defense against a resident's claim.
- “and when the chart can be shown to be false, that argument is undermined, as is the credibility of the witnesses involved in the false chart entries”

## Defense Counsel's "Investigation Wish List"

- One Person Responsible for Investigation
- Evidence Preservation
- Complete and Accurate Incident Report
  - Date
  - Time
  - Complaints of resident
  - Statements of resident
  - List of Witnesses (RN, LPN, CNA, family)
  - Employee schedules



## Defense Counsel's "Investigation Wish List"

- Witness Statements
  - From all with information
  - Residents?
- Consistent Reporting
  - Incident Report/Nursing Notes
  - No opinions (only facts)
  - Use "direct quotes" from resident and family
- Pictures?

## Defense Counsel's "Investigation Wish List"

- Reporting to State (if necessary)
- Phone Calls
  - Physician
  - Family
- Communication with Hospital
  - Send out what's needed
  - Call for update
- Speak with Family as if Conversation is Being Recorded (because it may be.....)
- Say sorry?

# Common Mistakes in Investigations:

## Uncorrected Mistakes

### FACILITY ACTION: PHYSICIAN NOTIFICATION

Was physician notified? ☒ Yes ☒ No If yes: Date: 7 / 9 / 06 Time: 1050 ☒ A.M. ☐ P.M.

Physician Name: Dr. Sharma By Whom Notified: [REDACTED]

## Must be clear when error is made

### COMMENTS (include environmental obstacles or factors)

and finger mittens error Bed bolsters bilaterally  
ordered w/ error

# Common Mistakes in Investigations: Inconsistent Reporting

## FALL INVESTIGATION TOOL

### ENVIRONMENTAL FACTORS

Floor:	<input type="checkbox"/> wet	<input checked="" type="checkbox"/> dry	
Wheelchair brakes:	<input type="checkbox"/> on	<input type="checkbox"/> off	
Bed wheel locks:	<input checked="" type="checkbox"/> on	<input type="checkbox"/> off	
Call light:	<input type="checkbox"/> in reach	<input type="checkbox"/> activated	
Side rails:	<input type="checkbox"/> up	<input type="checkbox"/> down	<input checked="" type="checkbox"/> N/A
Lift used:	<input type="checkbox"/> yes	<input checked="" type="checkbox"/> no	type: _____ condition: _____
Footwear on:	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> no	
Glasses on:	<input type="checkbox"/> yes	<input checked="" type="checkbox"/> no	
Hearing aid in place:	<input type="checkbox"/> yes	<input type="checkbox"/> no	
Type of Fall:	<input checked="" type="checkbox"/> Accidental	<input type="checkbox"/> Anticipated Physiological	
		<input checked="" type="checkbox"/> Unanticipated	

### COMMENTS (include environmental obstacles or factors):

Ambulance crew Return Resident Ground  
up transfer Resident In bed, bed was  
sound unlocked.

## Common Mistakes in Investigations: Progress Notes

### Avoid speculation

possible cause of incident may be due to confusion  
he got out of the bed. He told me same happened

### Stick to the facts; don't include opinion

quickly. I expressed to                      that I wish I could have done something sooner. I did  
not want to over step                      during the initial assessment. She is more experienced than  
I, and she has never given me reason to doubt her professional nursing judgement before.

## Common Mistakes in Investigations: Progress Notes

### Quote Resident when possible

INCIDENT DESCRIPTION AND INVESTIGATION	
Date of Incident: <u>5 / 1 / 05</u>	Time of Incident: <u>11:50</u> <input type="checkbox"/> A.M. <input checked="" type="checkbox"/> P.M.
Location of Incident: <input type="checkbox"/> Resident's Room <input type="checkbox"/> Hallway <input type="checkbox"/> Bathroom <input checked="" type="checkbox"/> Other (please describe): <u>Dayroom</u>	
Description of Incident: <u>Resident said (R) lives in a home and</u> <u>net towel applied flames involved. Resident states "no</u> <u>if I wanted to take the dressing off."</u> <u>BP140/80 - 96 - 20 SpO2 96 / 21A</u>	

**Resident states, "I'm ok –  
I wanted to take my  
dressing off."**

# Common Mistakes in Investigations

Possible Causes:

may be the pt confused at the time of incident. Resident did not have on proper foot wear and has a history of falls. Resident also did not use adaptive equip when attempting to ambulate.

Actions Taken to Prevent Further Incidents:

Resident transferred to hospital for evaluation.

ROM to all Extremities +/- Pain c/o @ hip pain + unable to lift @ leg.

Vital Signs: BP 111/62, Temp 96.7, Pulse 64, Resp 20

Comments:

Resident admitted to hospital. To be evaluated for further safety interventions upon return and re-admission.

Investigation Completed by:

Two  
authors

Report  
must be  
signed

Answer must  
correspond  
to requested  
information



# Defendant's Litigation Model

- Recruiting, training and keeping of quality staff directly correlates to improved quality care of residents
- Documentation - capture the clinical picture
  - Evidence of conditions and diseases to require long term care.
  - Communication with residents/families.
- Overcoming prejudice through personalization
  - Nickname to resident or regular activity the resident enjoyed.
- Compelling witness testimony



# Defendant's Litigation Model

- Emphasis on the medicine
- What are reasonable, fact and peer based medical explanations for the alleged harm
- Capturing the family dynamic
  - Visitations – did family visit?
  - Unreasonable expectations
    - Jury less likely to give money

## Incident Investigation: Points to Remember

- Chart v. Investigation Documents
- Are Witness Statements Signed and Dated?
- Statements confused as Progress Notes
- Late Entries
- Emails and E-discovery
- Assuming Something is Attorney-Client Privilege



**IDAHO SUPREME COURT REJECTS  
APPEAL FOR BUHL NURSE FIRED  
FOR FACEBOOK RANT**  
Twin Falls Time-News, June 24, 2014

**PROBATION FOR TEENS IN  
ST. CHARLES NURSING  
HOME ABUSE CASE**  
Daily Herald, January 9, 2015

**SEVIER COUNTY NURSING HOME  
EMPLOYEE FIRED AFTER  
INAPPROPRIATE PICTURE  
SURFACES**

<http://wate.membercenter.worldnow.com>, February 27, 2014

**COLLETON COUNTY RESCUE  
WORKER LOSES JOB OVER  
FACEBOOK POST**

[Live5news.com](http://Live5news.com), Feb 25, 2010

# What is Social Media?

- Social Networks - Connect with other people of similar interests and background. Facebook and LinkedIn.
- Media Sharing - Upload and share media such as pictures and video. YouTube, Pinterest, Instagram and Flickr.
- Microblogging - Short updates that are pushed out to anyone subscribed to receive the updates. Twitter, Tumblr.
- Blogs, Comments and Forums
- Websites – Traditional websites sharing information. CaringBridge.org, PatientsLikeMe.com, OurParents.com, Caring.com, Care.com, etc.
- Texts and Instant Messaging

# What to Understand About Social Media?

- Generational differences at work:
  - Those who've grown up using social media vs. those who have not
  - Instant communication
  - Connected 24/7
  - Sharing personal information with the world, including photos, videos
  - Complaining to the world wide web community
  - Reliance on electronic communication rather than face-to-face
- Importance of educating yourself about social media

# Legal Issues Implicated by Social Media

- Resident / Family
  - Privacy
    - Protected Health Information / HIPAA
    - Physical/personal privacy
- Employee
  - Privacy
  - Free speech rights
  - NLRB protections
- Facility
  - Reputation
  - Proprietary information
  - Potential liability



# Social Media Policies



# What Policies are Necessary?

- Social Media Policies / Guidelines
  - Address use of social media products, particularly the more popular sites such as Facebook, Twitter, LinkedIn, etc.
  - Address other types of internet usage such as blogs and posting comments.
  - Define personal usage vs. professional usage.
- Personal Electronic Device (“Device”) Policy
  - Address use of cell phones, smartphones, other digital audio and video recording devices.
    - In the workplace
      - Staff caught on Granny or Nanny Cams utilizing a smart phone
    - Outside the workplace (whether personal or professional)
    - Driving

# Considerations When Drafting Policies

- To whom do the policies apply?
- What are the policies purposes?
- How does social media / Device usage integrate into the job?
- What professional personal boundaries make sense?
- How will compliance be monitored?

## To Whom Do the Policies Apply?

- All Employees, regardless of level in organization
  - Policies must be consistent
  - Differentiation between employees who use social media / Devices for professional purposes
  - May create more specific policies for certain groups of employees / positions (e.g. IT professionals, Privacy Officer, Sales, etc.)
- Residents/Families
  - Use of Devices or other recording equipment in Facility

## What Are the Policies Purposes?

- Define the Facility's position on social media and Device use
- Protect private health information of residents
- Protect facility's confidential and proprietary information
- Strike a balance between employee privacy interests and facility's interests in protecting its reputation and operating safely and productively
- Allow for "protected, concerted activity" in compliance with NLRB's guidelines

# National Labor Relations Board Rulings on Social Media

- Examples
  - Hispanics United of Buffalo
    - Facebook discussion: “[co-worker] feels that we don’t help our clients enough ... I about had it! My fellow co-workers how do you feel?” Termination overturned.
  - Costco
    - Policy prohibited “statements posted electronically (such as online message boards or discussion groups) that damage the company, defame any individual or damage any person’s reputation...” Policy was found too broad.
  - Karl Knauz Motors
    - Facebook post mocking quality of food served at employer car dealership public event found protected.
    - Facebook posting of wrecked dealership vehicle with snarky comment not protected.

# New Jersey Social Media Privacy Law

- Employers prohibited from requiring usernames and/or passwords of private accounts or requiring access to those accounts in any other way from current or prospective employees.
  - Original draft:
    - prohibited employers from even asking if a current or prospective employee had a personal social media account or used social media in any way.
    - Included a private cause of action permitting the employee to sue the employer for requesting the information or access and to seek damages and attorneys fees.
  - Governor Christie vetoed original draft suggesting the above provisions be removed
  - New version ready to be made into law.

# **Relationship Between Employer and Employee and Social Media**

# Social Media in Employee's Work

- Social Media as part of assigned duties
  - Marketing
  - Sales
  - Interacting with families
  - Researching Facility reputation
- Policies must allow for “officially sanctioned” use of Social Media
  - Facebook, Twitter, etc.
  - LinkedIn
- What about non-sanctioned employees?
  - Speaking for themselves only



# Boundaries Between Professional and Personal

- Need for boundaries
  - Multiple constituents
    - Residents
    - Families
    - Government regulators
  - Highly confidential and personal information
- Limitations on Social Media/Devices usage at work.
  - Cameras
  - Interference with productivity
- Limitations on Social Media/Device usage outside.
  - Personal rights of employees vs. Facility concerns

# Monitoring Employee Social Media/Device Use

- Use of Facility computers, networks, other property.
  - Limit any expectation of privacy using Facility equipment.
- Managers responsible/accountable for monitoring and enforcing policies.
  - Actively monitor use vs. relying on “hearing about” use.
- Focus on conduct not medium.
- Require reporting of known violations
  - Employees are those who will witness violations
  - Include no retaliation agreement for good faith reporting.
- Policies should spell out extent of monitoring and disciplinary action.
  - Build in discretion based upon circumstances

# Monitoring Employee Social Media/Device Use

- Monitoring use outside of the workplace.
  - Privacy expectation of employee vs. interest of Facility.
- New Jersey cases
  - NJ Health Care Company
    - Critical remarks about company on Facebook to FB friends only.
    - (Non-FB friend) supervisor used another (FB friend) employee's FB access to review comments.
    - Court found possible privacy violation - employee may have reasonable expectation of privacy in posting to FB friends only.
  - Board of Education
    - Teacher fired for FB post calling students "future criminals" and herself "warden."
    - Firing upheld for conduct that has a "tendency to destroy public respect for government employees and confidence in the operation of public services."

# Resident / Family Use of Social Media

## Control over Resident/ Family Use Limited

- Public Computer Terminals.
  - Can place restrictions on Facility owned equipment
- Use of photography/video taken in Facility.
  - Photographs
  - Videos
  - “Granny Cams”
- Monitor Internet
  - Google Alerts
  - Facility Reviews
- Publically Available Wi-Fi.
  - HIPAA security

# Communication and Implementation

- Communicate with Residents, Families and Employees.
  - Employees review and sign new policies
  - Families given copies of policies as relates to them
  - Revise Facility handbook
- Ensure as much specificity in policies as possible.
- Don't assume that residents, families or employees will understand/appreciate the issues.

**Questions?**

**Thank you.**