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## Litigation in Assisted Living – Case Studies for Risk Management

By Rebecca Adelman in collaboration with the NCAL Risk Management Work Group

As assisted living communities continue to grow in popularity and accept residents with higher levels of disability and health needs, resident care litigation has been more frequent and poses a greater risk to providers. Many communities say that allowing residents to “age in place” is a central aim. Whether due to this philosophical goal or simply pressure from residents who wish to remain where they live, acuity levels of residents are increasing. As in nursing homes, accidents or clinical problems at assisted living centers can translate into liabilities.

Across the country, we have been experiencing an increase in lawsuits against assisted living communities including against individual assisted living nurses. Plaintiffs’ attorneys are now targeting assisted living communities after decades of focusing attention on nursing homes. Plaintiffs’ attorneys have a “nursing home lawsuit” playbook in hand that they are using on the field against assisted living communities. In light of these increasing legal risks, key questions arise: What do you and your facility need to know? How can you be proactive with risk management and quality assurance? In this article, we will evaluate legal and risk issues presented by some of the recent lawsuits and rulings that involved assisted living communities. We will identify emerging litigation risks and present a few considerations for proactive risk prevention. Corporate liability for staffing and policies and procedures as well as the basis for the standards of care used in assisted living communities are emerging risk issues seen in litigation.<sup>1</sup>

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<sup>1</sup> Recent examples of increasing legal risk include the following two cases. In *Wilson v. Americare Systems, Inc.*, Tennessee Supreme Court, February 25, 2013, the appeal concerned only the jury verdict and judgment finding the management company directly liable for failure to provide adequate staff at the assisted living facility. The appellate court found no material evidence to support a conclusion that any staffing deficiency proximately caused the decedent's death. The Tennessee Supreme Court reversed the judgment finding direct liability on the part of the management company for providing insufficient staffing. In *Boice v. Emeritus*, Sacramento Superior Court, California Jury Verdict: March 8, 2013 – Appeal Pending, the Superior Court Judge upheld the jury’s decision awarding the Boice family for pain and suffering and punitive damages related to claims that included insufficient staffing and corporate negligence.

## **Issues Assisted Living Providers Need To Consider To Mitigate Legal Liability Risks**

**Increased Acuity Levels** – Long term care facility entry has become increasingly delayed due to factors including expanded options for in-home health and health care technologies. Continuous evaluation of management and staff experience to provide the level of care necessary along the continuum should be part of an overall risk prevention program.

**Increased Numbers of Residents with Alzheimer’s Dementia, Mental Illness and Developmental Disabilities** – Staff may need additional training and development to address special needs. There may be a need for increased staffing support, social services and mental health support, as well as accommodation for residents with Alzheimer’s disease or related dementia and other special needs.

Corporate liability claims are one of the central claims advanced by plaintiffs’ attorneys against assisted living and skilled facilities. It is important to understand that the state assisted living regulations serve only as a minimum for establishing standards and, as the recent Tennessee and California cases demonstrate (see footnote 1), in court the standard of care will be established by expert witnesses, not the regulations. These cases highlight several critical areas that leading industry attorneys have been discussing regarding the need to evaluate staffing levels in relationship to acuity and develop the risk management programs for staff education and training. The need to evaluate corporate structures and management agreements to determine the levels of decision-making and control of each entity has never been more important. With the plaintiff's focus on assisted living, we'll be encouraging more dialogue about best practices, standards and risk prevention and reduction strategies. The *Wilson* and *Boice* cases highlight several of the areas relevant to litigation risk management including:

- Proper placement in assisted living based on initial assessments;
- Evaluating staffing levels including physician services in relationship to acuity;
- Developing the risk management programs for staff education and training; and
- Evaluating corporate structures and management agreements to determine the levels of decision-making and control.

There are at least two major operating themes to consider with emerging assisted living litigation: 1) staffing levels and the management strategy of encouraging "aging in place"; and 2) the natural pressure on assisted living acuity levels because the resident wishes and chooses to remain in one community. The resident’s desire to age in place combined with operational policies to retain residents longer is an important focus for risk management and will continue to be one of the plaintiffs’ key strategies in liability claims and lawsuits against assisted living owners, operators and managers.

### **Litigation Risk Reduction Strategies**

Litigation risk management and risk reduction should be included in a community’s overall quality assurance and risk management programming. It is recommended that policies and procedures as well as admissions procedures and criteria be scrutinized and any necessary changes for compliance with

state regulations and community practices be implemented. Below are some additional considerations for communities to include in proactive risk management and quality improvement plans.

### **Formal Expectations Management Programs**

Most residents and families do not know what to expect at an assisted living facility and, therefore, may have unrealistic expectations. At the same time, residents and families may be experiencing emotions such as grief, guilt, fear and anger, which can set the stage for conflict. Setting realistic expectations with residents and families through formal programs at admission and continuing management of the expectations through the residency will significantly reduce the chances and opportunities of a resident or family member filing a formal lawsuit against the community. This strategy should include communicating program objectives including quality of care and a sense of well-being in partnership with the family. It is important that families fully understand the realities of assisted living life including the risk. It is also important to educate staff to recognize and communicate illness trajectories and changes in condition for continued assessment related to placement.

### **Consistent and Complete Documentation**

The first action a plaintiff's attorney takes prior to filing a lawsuit is requesting and reviewing the resident's assisted living record, the administrative file and admission contract. What he/she is hoping to find are inconsistencies between the admission assessments and level of care the resident received, the resident's conditions and any changes and continued assessments (care plans) to evaluate continued suitable placement. In addition to accurately documenting care and services in a timely fashion, it is important to document discussions with staff, physicians, residents and families. Record audits should be regularly conducted for compliance with state regulations and policies and procedures.

### **Continuing Assessments To Evaluate Suitability for Placement and/or Increased Need for Services**

Liability risks are compounded when residents remain in an assisted living facility that cannot provide appropriate care. Admission criteria should be consistently applied, with resident needs reassessed regularly and documented prominently in the record along with recommendations for home care, physical therapy and other ancillary services along with implementation of the action plan to obtain the services for the resident. Involuntary transfer of a resident to a skilled nursing facility may otherwise result in unnecessary operational, legal and risk management problems.

### **Assess and Address Changing Staffing Levels**

Most staffing levels established in state regulations are only a minimum requirement. Plaintiffs' attorneys are focusing on issues including understaffing to create budgetary savings. They tend to characterize lack of staffing as evidence of corporate greed. Employing staff in sufficient number, with ability and training to provide the resident care, assistance, and supervision required, based on the assessment of the residents' acuity levels and needs is the best defense to these claims. It is important to monitor the adequacy of staffing ratios based on residents' needs at regular intervals.

### **Analyze Marketing Materials including Internet Advertising**

Analyze marketing materials to determine if they are consistent with the level of services provided. Be certain that information on the Internet is current and accurate and that organizations are accurately identified. A legal review should be completed on all marketing materials including services or statements that could present exposure.

### **Review Admissions Agreements, House Rules and Resident Handbooks**

Review resident contracts for consistency of terms. Focus on areas such as discharge and retention policies. Expectations management programs should include analysis of the admissions agreements as well as house rules.

### **Review and Revise Policies and Procedures as Necessary**

Policies and procedures should address operational, business and clinical issues to promote consistency in actual practices by the staff and compliance with state regulations. Such measures will increase the defensibility of the policies in the event they are ever challenged. Monitor the staff for compliance with established policies and include outcomes in annual competency and performance evaluations.

### **Assessment of Residents' Rights**

Liability can also arise through a violation of resident rights, as established in state resident rights statutes. Ongoing assessment of a facility's compliance with residents' rights standards should be an integral part of the risk management program. Document the monitoring and evaluation of a resident rights compliance program to create a strong defense. Violations related to protection of resident funds and financial matters, receipt of mail, security of personal property, and abusive staff behavior may be subject to heightened scrutiny and made part of a lawsuit.

### **Implement an Arbitration Agreement and Training Program**

While not all states recognize pre-dispute arbitration agreements in healthcare settings, the agreements tend to reduce the value of a case in the plaintiff's estimation. An arbitration agreement is a contract that requires disputes between a resident and an assisted living facility to be resolved through binding arbitration before a neutral arbitrator as opposed to a judicial forum. Properly executed by the resident or legal representative, the agreement is enforceable and reduces significantly the cost and expense of a lawsuit and the reward to a plaintiff. Arbitration agreements typically are not desirable for a plaintiff's attorney as history shows that recovery in arbitration is nearly 30%-35% less. We have successfully rolled out arbitration programs for many assisted living providers and have seen a reduction in claims. They should be considered if allowable by specific state law.

### **Conclusion**

Understanding emerging litigation risks and the new strategies being implemented by plaintiffs' attorneys to create fear in the jurors can help assisted living providers enhance risk prevention programs. By incorporating "litigation risk prevention" into existing quality improvement and assurance programs, assisted living communities can create a better chance of litigation avoidance and improved

quality of care in an industry being targeted by plaintiffs' attorneys. By examining current policies and procedures and admissions protocols and other risk management programming, a community can be better prepared for all events.

**Rebecca Adelman, Esq.** – Ms. Adelman is a founding Shareholder of Hagwood Tipton Adelman, PC and practices in the Memphis, Tennessee office. She is a member of the Board of Directors and serves as the firm's President. For over 20 years, Rebecca has concentrated her legal practice in healthcare, aging services, and medical malpractice defense litigation. Her expertise and scope of practice involve all insurance defense litigation areas. She also has a litigation risk management practice and is a national speaker on issues related to healthcare law. Please visit the firm's website at [www.hatlawfirm.com](http://www.hatlawfirm.com) or contact her at [radelman@hatlawfirm.com](mailto:radelman@hatlawfirm.com).