

# PUBLICATION

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## Tips for Long Term Care Providers' Prevention of and Defending Against Quality of Care Allegations

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**Quality of care allegations against long term care providers are a focus for the Biden administration, the Department of Justice (DOJ), and the HHS-OIG – all of whom are targeting providers whom they deem to be providing grossly substandard care to their residents.**

For example, in June 2022, [the DOJ filed](#) a high-stakes lawsuit under the False Claims Act against nursing homes for allegedly providing grossly substandard skilled nursing services to residents. Similarly, in May 2021, the DOJ reached an \$11.2 million settlement with a nursing home provider to resolve allegations that the company provided grossly substandard nursing care in violation of the False Claims Act.

Quality of care allegations also remain a central focus in civil tort litigation. Lawsuits alleging poor quality of care for nursing home residents are resulting in significant jury verdicts and settlements, such as a 2017 North Carolina jury verdict of \$5.2 million in [a case against](#) a skilled nursing facility accused of neglecting and failing to sufficiently monitor residents, who died after removing their own breathing tubes. Additionally, in January 2023, a Florida jury awarded \$12.5 million against an assisted living facility in a wrongful death lawsuit based on allegations of substandard care. The Florida [complaint](#) alleged that the facility was understaffed and negligent in caring for a resident, who consequently developed preventable injuries (a severe decubitus ulcer) that led to the resident's death.

This article offers tips and key strategies that long term care providers can implement to help mitigate the risk of and defend against allegations involving quality of care.

### 1. Communication with the resident and the resident's family is critical.

If family members feel disconnected from the resident's care or do not understand the resident's condition (including the deterioration of the resident's condition), needs, or care plan, they may be more likely to become dissatisfied with the care provided. A facility's routine and effective communication and involvement with the family can help prevent post-incident or post-death allegations about quality of care issues.

### 2. Documentation.

When facilities have conversations or meetings with family members about a resident, they should document the details, including the identity of the family members involved, the reason for the call or meeting, specific concerns discussed, and the family's response to them. In the event of future enforcement action or litigation, such documentation is helpful to substantiate any events or conversations that transpired regarding the resident's condition or a change therein.

### 3. Document with the correct terminology and vocabulary.

Words mean different things to different people, and the use of incorrect medical terminology can cause enforcement and litigation risks.

For example, if a resident has a venous ulcer, the facility's staff should not document that the resident has a "decubitus ulcer." The two conditions are very different. The use of incorrect terminology can cause confusion about the underlying cause of the condition and can create the appearance that staff do not understand or have an awareness about the conditions for which they are providing care.

#### 4. Train administrators and staff to promptly recognize when a potential liability issue has arisen.

Not all incidents that occur are because of staff negligence or will result in liability. However, the identification of issues that may give rise to liability presents an opportunity for facilities to promptly end any noncompliance and implement corrective action to help mitigate risk.

Typical issues that may give rise to allegations of liability include: a fall that results in significant injury; an elopement; a resident on resident altercation or an incident that may constitute resident on resident abuse; or when a family member makes a complaint about care or alleged abuse.

#### 5. Implement and maintain an effective compliance program.

The HHS-OIG has issued for establishing an effective compliance program for nursing facilities.<sup>1</sup> The OIG's compliance guidance for nursing facilities identifies seven elements that it has determined "to be fundamental to an effective compliance program."<sup>2</sup> The seven elements are:

- Implementing written policies, procedures, and standards of conduct
- Designating a compliance officer and compliance committee
- Conducting effective training and education
- Developing effective lines of communication
- Enforcing standards through well-publicized disciplinary guidelines
- Conducting internal monitoring and auditing
- Responding promptly to detected offenses and developing corrective action

While the OIG takes the position that these seven criteria are not mandatory, it maintains that a compliance program that adopts these seven elements may help facilities to establish effective internal controls and prevent fraud.

Furthermore, a facility's compliance team can help mitigate against quality of care risks by: reviewing and updating policies and procedures; helping to conduct internal audits to identify trouble spots and areas that present risk and where improvement and change are needed (before significant exposure exists); helping to investigate and remediate issues; and identifying when potential liability, enforcement, or litigation risk exists.

#### 6. When a potential quality of care liability issue arises, substantively investigate as soon as possible.

A substantive investigation may include, but is not limited to:

- Interviewing witnesses and/or obtaining statements or affidavits closely following events
- Gathering all relevant documents and storing them together in a designated spot or with a designated person
- Maintaining evidence, including but not limited to, bed alarm histories, call alarm histories, surveillance videos, and any equipment at issue

- Considering retention of counsel to conduct an internal investigation. Not only can counsel substantively help with the investigation, but he or she may help the investigation be protected under the attorney-client privilege and/or work product doctrine
- Identifying the strengths and weaknesses of potential mitigating factors and defenses
- Promptly correcting deficiencies and implementing a corrective action plan

## 7. Evaluate a record request, audit request, or subpoena, and quickly develop a strategy for responding to the same.

Facilities should understand what is being requested and how to appropriately respond. Facilities should ensure that they are providing the entire set of records as they are maintained in the ordinary course of business; maintain a copy of what is provided; and consider investigating the issues surrounding the request.

## 8. Analyze whether there is an opportunity to resolve a potential liability issue before a complaint or a lawsuit is filed.

Facilities should evaluate the risks and benefits of early resolution. There may be the potential to resolve the matter quickly, efficiently, and in a cost-effective manner without exposing the facility to additional risk or liability.

While it is impossible to eliminate the risk of liability from alleged quality of care issues, there are many steps long term care facilities can take to help reduce their exposure. The above are just a few examples and each situation is unique.

If you have any questions about this topic, please contact [Alissa D. Fleming](#), [Catherine F. Wrenn](#), or other members of Baker Donelson's [Health Law Team](#).

<sup>1</sup> 65 Fed. Reg. 14288-14289 (March 16, 2000).

<sup>2</sup> Id.