

# Nursing & Assisted Living Facility Professional

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“NEWS AND VIEWS YOU CAN REALLY USE”

## THE HAT ADVANTAGE by Rebecca Adelman

### WHAT JURIES HAVE TO SAY ABOUT ASSISTED LIVING - PART 2



In Part 1 of this series, we reviewed parts of the model that Plaintiff's attorneys are using in their pursuit of verdicts against Assisted Living communities including individual administrators and caregivers, management and owners. The model is familiar and we have been defending against it with

strong offensive strategies in the Long Term Care industry for many years. Having provided an overview of Assisted Living provider and resident care litigation risks, specific clinical and event risks associated with Assisted Living providers; and the causes leading to litigation, we will explore strategies for enhancing defensibility in an Assisted Living lawsuit and encourage proactivity in risk prevention.

#### The Legal Duties Imposed on Assisted Living that Create Potential Liabilities – Are These Standards of Care?

As a foundation for discussing defense strategies in Assisted Living lawsuits, below are the sources that Plaintiff's attorneys use to establish legal duties imposed on Assisted Living providers. As the defense, we argue that these sources are not standards of care but serve as guidelines for providers.

**State Health Care and Malpractice Act** – Most all states

have legislation that governs medical malpractice or healthcare liability and establish the elements that a Plaintiff must prove in order to support a claim including the burden of proof and standard of care presented by qualified experts. These healthcare legislative acts normally go well beyond what the state regulations require for Assisted Living providers.

**Statutes and Regulations** – Statutes and Regulations governing the rights of residents, Assisted Living operations and protection of vulnerable adults are used by Plaintiff's attorneys to establish liability for violation of specific statutes particularly related to admissions, on-going assessments, and transfers.

**Contracts** – Admission Agreements and other admission contracts as well as Resident Handbooks and marketing materials are used as the basis for liability related to levels of care and representations by the operator that have been allegedly breached.

**Policies and Procedures** – Failure of the community to comply with its Policies and Procedures also forms the basis of liability. Policies and Procedures are used by Plaintiff's attorneys to establish standards of care for the community. If the policies are unrealistic or set unreasonably high guidelines, Plaintiff's attorneys can support claims that the facility breached the standard of care by violating its own policies.

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## KESSLER'S CORNER

by Chip Kessler

### “Stuck in the Mud”

We are all creatures of habit. It's part of human nature that we get into routines, partly because they make our life more comfortable, and in the case of doing business if something has worked well in the past then why change?

However that's the rub. What if something which has paid dividends for years begins to show signs of age, and you don't either consciously recognize it, or are afraid to move on, then what?

*Continued on page 3*



## Pathway to Rehabilitation Excellence

By Gina Henthorne, LPTA, RAC-CT

# Reasonable and Necessary Therapy Services

We have been hearing for years that therapy services must be reasonable and necessary. Now, with all Medicare Part B claims over \$3,700 being reviewed by RACs, MACs conducting focused Probe audits, and don't forget about the ZPIC audits, it is even more important that therapy documentation supports medical necessity through justification of reasonable and necessary therapy services.

Did you ever look up 'Reasonable and Necessary' in any of the CMS manuals? Did you find a clear explanation of 'Reasonable and Necessary'? If you answered 'yes' then you are one of the lucky ones.

Let's break down 'Reasonable' and 'Necessary' by definition and see if that will give us more clarity.

The definition of '**Reasonable**' is: **logical, moderate**, not expensive, rational. Agreeable to reason or sound judgment; logical; **not exceeding the limit prescribed; not excessive**

The definition of '**Necessary**' is: **being essential**, indispensable, or requisite; happening or existing by necessity; **something necessary-required, essential, something vital**

Since defining each word helps somewhat, let's now take a look at the Medicare Benefit Policy Manual, Chapter 15 section 220.2(B) where it talks about '**Reasonable and Necessary Therapy**'. In order for therapy to be Reasonable and Necessary, there are conditions to be met. These conditions are:

1. The services shall be considered under accepted standards of medical practice to be a specific & effective treatment for the patient's condition
2. The services shall be of a level of complexity & sophistication or the condition of the patient shall be such that the services required can be safely & effectively performed **ONLY** by a therapist; or under the supervision of a therapist (LPTA, COTA/L)
3. Services furnished were of a type that could have been safely & effectively performed only by or under supervision of a qualified professional, it shall presume that such services were properly supervised when required
4. The skills of a therapist are needed to treat the illness or injury
5. There must be an expectation that the patient's condition will improve significantly in a reasonable (and generally predictable) period of time, or the services must be necessary for the establishment of a safe & effective maintenance program required in connection with a specific disease state. Progressive degenerative disease cases- service may be intermittently necessary to determine the need for assisted equipment and/or establish a program to maximize function

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### 6. The amount, frequency, & duration of the services must be reasonable under accepted standards of practice

So, how do we justify medical necessity in our documentation to prove that our treatment interventions are reasonable and necessary therapy services?

**GET SPECIFIC! DOCUMENT DETAILS! USE MEDICAL TERMINOLOGY! DOCUMENT MUSCLES TARGETED! DOCUMENT WHY YOU ARE DOING THE INTERVENTION—WHAT IS THE FUNCTIONAL REASON WHY?**

In addition, you will want to make sure:

- the services are consistent with the nature & severity of the illness, injury, and medical needs
- the services are specific, safe, & effective according to accepted medical practice
- there is a reasonable expectation that observable & measurable improvement in functional ability will occur
- the intervention can only be performed by a therapist
- the service doesn't just promote wellness

Documenting at the time the service is provided is essential for ensuring all components of the treatment intervention are specifically documented to support the minutes billed.

*Gina Henthorne LPTA, RAC-CT is Director of Compliance for Functional Pathways, the leader in contract rehabilitation and therapy services. For more information please call 865-474-8418 or visit [www.functionalpathways.com](http://www.functionalpathways.com)*

*Kessler's Corner continued from page 1*

For our purposes here, I'm talking about the way nursing and assisted living facilities go about marketing the care and services they provide. In the past, a building's marketing and admissions staff could successfully rely on the process of staying in regular contact (in-person visits, faxes, telephone calls) with hospital discharge planners or local physicians and do very well with the old "referral system." Now don't misunderstand, there's nothing wrong with this process, and it still must be done. However in this day and age, keeping your beds filled just based on the number of referrals you're receiving and leaving other avenues ignored, is a recipe for disaster. Nursing facilities are especially vulnerable here, depending on referrals, since certain folks when they leave the hospital can't go home. However, even assisted living venues can fall into the trap of counting too heavily on the old referral network, at the expense of their own proactive marketing and advertising initiatives.

I first observed the tide turning back in 2011 and take a more dramatic shift in 2012, what with the advent of at-home healthcare options getting a real push from the federal (and in many cases) state governments. In my own state of Tennessee, there is the "Choices" program which promotes home based healthcare options at the expense of nursing facilities. Here Medicaid dollars which could be going to the nursing home are diverted to supplement/pay for home-based care options. The result: both nursing and assisted living facilities are faced with a real threat to getting more new residents through their doors.

It was here that I went to work in putting together a system, which I've labeled *Results Based Marketing*. It's a means for caregiving facilities to become proactive in a number of different ways and take the initiative on their own to successfully keep a strong census. If you'd like to discover more about *Results Based Marketing* for nursing facilities, I invite you to visit [www.extendedcareproducts.com](http://www.extendedcareproducts.com) and review the very first program at the top of the homepage. And for those of you in the assisted living environment please check out [www.assistedadvantage.com](http://www.assistedadvantage.com) and here at the very top is exciting news for your particular environment.

Let me though take a moment, and give you the cornerstones of what every nursing and assisted living facility must strive to achieve, which I go into much more greater detail on the web sites I shared in the preceding paragraph. Successful *Results Based Marketing* means:

- **Positioning** you nursing or assisted living facility as not just another healthcare venue but as a destination spot (ever think of your building as a destination rather than just a "place" folks have to go to because they need some sort of caregiving help). Here you take certain steps to position your facility as something special in the hearts and minds of prospective new residents and families
- **Exploring and carrying out** specific marketing and advertising objectives that cause people to look at you and your fellow staff members as "the healthcare experts in your region and community." I've spoken about this before in some other contexts however this specific *Results Based Marketing Strategy* more than any other will pay census building dividends in the future. Do this one thing better than your competition and your census will explode ... plus this is the one *Results Based Marketing* strategy that home healthcare cannot compete against successfully.

- **Holding** your marketing and advertising accountable. As its name implies, *Results Based Marketing* means just this- "results." In other words, holding all that you do with your marketing and advertising accountable as in it must produce new residents over a reasonable period of time. You'll be surprised how many folks fall into the trap of feeling good about their facility's radio commercials, for example, because people say "I heard your ad." Whoopee! Did the advertisement produce new residents? That's the bottom line; the only thing of interest (hint: folks in the business of selling advertising put a lot of stock in the "heard your ad" ... "went to your web site" ... "our circulation is 50,000" jargon). The sales people don't want you to measure your results. I do. I don't care if the newspaper's circulation is 10 if 9 people saw your advertisement and placed a loved one in your care. That's a percentage (90%) worth shouting about! What's the difference if every single person in your town or city saw your television commercial on the 6 p.m. news last night and today you got no new residents? "Seeing" doesn't pay your bills; *Results Based Marketing* does.

In closing let me say that it's very easy to get stuck in the mud with your approach to advertising and marketing. You may feel trapped, thinking that because what you market isn't glamorous you're severely limited in what you can say or do. I'm here to tell you this isn't the case. It's not even a matter of working harder, just working smarter in the messages you're sending out to get new families and residents to come in.

*Chip Kessler is the author of two books on marketing. His latest "The No B.S. Guide to Marketing to Boomers and Leading-Edge Seniors (Entrepreneur Press) co-written with marketing legend Dan S. Kennedy is available at leading book sellers nationwide, plus is available as a free bonus gifts as part of his "Marketing Magic" DVD System at [www.extendedcareproducts.com](http://www.extendedcareproducts.com) for nursing facilities and [www.assistedadvantage.com](http://www.assistedadvantage.com) for assisted living communities.*

## Coming in The June Issue of *Nursing & Assisted Living Facility Professional:*

- Chip Kessler's "The Customer Service Secret"
- Rebecca Adelman's "HAT Advantage"
- Pathway to Rehabilitation Excellence
- And More

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It's time for some spring cleaning. CMS has been busy throughout the Winter and this Spring. Get a clean sweep of all of the this recent activity into usable information that will help your facility stay current with recent OIG and MedPAC reports and up to date and compliant with recent and impending revisions that will affect the RAI process.

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- Upcoming May 2013 updates to the MDS Inactivation Modification process
- Look ahead to the October 2013 changes to the MDS 3.0

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In addition to serving as Extended Care Product’s MDS 3.0 education coordinator and program developer, Joel VanEaton personally consults for several nursing facilities, and has delivered webinar and seminar presentations for the Georgia Health Care Association along with Extended Care Products, Inc.

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### **Strategies to Increase Defensibility: Proactive Approaches to Litigation Risk Management**

Litigation risk management and reduction is part of a community's overall Quality Assurance and risk management programming. By addressing potential litigation weaknesses, general counsel, with support from the community, can develop strategies to increase defensibility in the event of a lawsuit.

It is recommended that policies and procedures, admission agreements, resident handbooks and procedures and criteria are scrutinized then the necessary changes for compliance with state regulations and community practices be implemented. These ongoing audits are the minimum level of litigation risk management. Below are some additional considerations for your community to include in proactive risk management and quality improvement plans.

*Formal Expectations Management Programs* - Most residents and families and individuals who should be identified as having standing to file a Complaint do not know what to expect at an assisted living facility and have expectations that may be unrealistic. Residents and families may be experiencing emotions such as grief, guilt, fear and anger which 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. Programs for our assisted living community providers that are easy and cost-effective and suggest you consider program objectives to be on quality of care and a sense of well being through communication and family partnerships, ensuring that families fully understand the realities of assisted living life including the risk, educating 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 contracts. What he/she is hoping to find are inconsistencies between the admission assessments and level of care the resident is to receive, the resident's conditions and any changes and continued assessments (care plans) to evaluate continued suitable placement. In addition, to timely and accurately documenting care and services, it is important to document discussions with staff, physicians, residents and families. Document that labs were gathered, that results were sent timely and any new orders properly placed in the record and compliance noted. Often we are faced with incomplete MARs and TARs which makes defending the record and care more difficult. 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 for Aging in Place* - Liability risks are compounded when residents remain in an assisted living facility that cannot provide the appropriate care. Admission criteria should be consistently applied, with resident needs reassessed regularly and documented prominently in the record and recommendations for home care, physical therapy and other ancillary services noted. 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 Needs* – Most staffing levels established in state regulations are minimum only. Plaintiff's attorneys focus on understaffing for budgetary savings and lack of staffing to support corporate liability and greed. Employing staff in sufficient number, with ability and training to provide the basic resident care, assistance, and supervision required, based on the

assessment of the acuity levels and residents needs is the best defense to these claims. 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, accurate and that organizations are properly 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 be included in the Admissions Agreements as well as House Rules.

*Review and Revise Policies and Procedures as Necessary* - Draft policies and procedures that address operational, business and clinical issues to promote consistency in actual practices by the staff and compliance with state regulations and "best practices". Monitor the staff for compliance of 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 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* – An arbitration agreement is a contract that requires all 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 are not desirable for a Plaintiff's attorney as history shows that recovery in arbitration is nearly 30%-35% less.

### **Summary and Conclusion**

Recognizing litigation risks and common weaknesses of the defense will create opportunities to design strategies for increased defensibility and enhanced litigation risk prevention and management. The need for proactivity in risk management, prevention and enhanced quality assurance is accelerating in the assisted living industry with increased claims and lawsuits facing providers. The changing landscape, mission and vision of assisted living requires risk identification and awareness of problems or potential problems that may result in loss. Timely identification is the cornerstone of a successful risk management program. Hopefully understanding more about the strategies employed by Plaintiff's attorneys will help with the continued design and implementation of your community's programs.

*Rebecca Adelman, Esq. – Ms. Adelman is a 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 practice in healthcare law, long-term care assisted living and medical malpractice defense litigation. Her expertise and her scope of practice involve all insurance defense litigation areas including premises and product liability as well as employment law. Please feel free to contact her at radelman@hatlawfirm.com.*

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