

July 31, 2009

Contributors:

- Rod Confer
- Jeanelle Lust
- Kevin McManaman
- Tammy Schroeder
- Shirley Williams
- Michael Khalili
- Laura Troshynski
- **Special Guest Contributor—Annie O'Campo, BSN, RN, CWOCN, DAPWCA**

Inside this issue:

- | | |
|---|---|
| Wound Ostomy
Continence
Nursing | 1 |
| Three Recent Legal
Developments
You Don't Want
to Miss | 1 |
| Five-Star: How
Will You Deal
With a Com-
plaint? | 2 |
| What Does Your
Advertising Say
About You? | 3 |
| 47,000 Elderly
Hurt Each Year in
Walker and Cane
Accidents | 4 |

For More
Information
Call Us at:
800-714-3439

Long-Term Care Newsletter

Wound Ostomy Continence Nursing

By Annie A. O'Campo, BSN, RN, CWOCN, DAPWCA

Annie O'Campo is a Certified Wound Ostomy Continence ("WOC") Nurse and is a current member of the National Wound Ostomy Continence Nurses Society, serving as a member of the Marketing Sub-committee. She currently works as a full-time WOC Nurse and as an independent WOC Nurse Consultant. She can be contacted through her e-mail address: WoundOstomyRN@gmail.com.

Wound Ostomy Continence (WOCN) Nursing is a field of nursing specialty where nurses provide expertise to enhance the quality of life of individuals with non-healing wounds, ostomies

and continence disorders. This field has always played a vital role in the acute care setting and is increasing in the demand for these services to outpatient, home health and long term care settings as well.

The WOC Nursing profession traces its roots to 1968. It was formerly known as Enterostomal Therapy (ET Nursing) and the role of these nurses providing cares has evolved from providing services to patients with ostomies to providing acute and long term support to patients with fecal and urinary incontinence, to providing treatment to patients with pressure ulcers, surgical incisions, traumatic wounds, fistulas and tube manage-

ment.

As the elderly population continues to grow, healthcare costs for treatment of wounds, ostomies and incontinence will continue to rise, thus increasing the burden on the health care delivery system. One of the ways to address this is to prepare and encourage nurses to specialize in Wound, Ostomy and Continence Nursing.

What are the benefits of a WOC Nurse in the provision of cares to patients with pressure ulcers, leg ulcers, urinary and fecal incontinence and ostomies?

According to the National Pressure Ulcer Advisory Panel, pressure (continued pg. 2)

Three Recent Legal Developments You Don't Want to Miss

By Kevin R. McManaman

Red Flags Rule

After a three-month delay, the "Red Flags Rule" is again scheduled to go into effect, this time on August 1, 2009. In our April 30, 2009 issue of the Long Term Care Newsletter, we noted that the FTC's Red Flags Rule was at that time about to be implemented, and enforced. A last-minute reprieve put our newsletter out of date immediately after mailing, so we sent out an update to let you know the new date of August 1, 2009. Be prepared. Another delay is unlikely.

New Basis for Suing County Nursing Facilities

A June 30, 2009 landmark decision from the Third Circuit U.S. Court of Appeals recognized a new basis for suing county-run nursing facilities.

The Federal Nursing Home Reform Amendments (FNHRA)

state specific rights for residents, such as the right not to be restrained without a doctor's order. Never before has FNHRA been recognized as "rights-creating," giving residents a right to sue county-run facilities for violations of civil rights ("FNHRA" is part of the 1987 OBRA, and the specific section is found at 42 U.S. Code § 1396r, et seq. Chapter 42 U.S.C.A. § 1983 is the legal vehicle for imposing liability against anyone who, under color of state law, deprives a person of "rights, privileges, or immunities secured by the Constitution and laws.") The 3rd Circuit court has now held FNHRA was definitely intended to create rights that could be enforced under that civil rights section.

While there is no such binding precedent in our Eighth Circuit, the result is of grave concern and

may have significant impact on nursing homes and facilities that provide such care and treatment. The bottom line is that government-run nursing homes may be at risk for civil rights lawsuits alleging federal violations, and the development of similar cases should be monitored.

The Final Word on "Sick Time" in Nebraska (we hope)

Finally, this month the Nebraska Supreme Court issued another opinion regarding "sick time."

The Court had determined in October of 2006 that *vacation* time counted as "accrued wages", and therefore had to be paid out upon termination of employment under the Wage Payment Collection Act. Since then, numerous attempts have been made to claim the same for sick time.

(continued pg. 3)



Preparing the Way
Forward

On August 19,
1988, President
Ronald Reagan
declared August
21st Senior
Citizen's Day



WOC Nursing (continued from pg. 1)

ulcer prevalence in long term care facilities is at 28%, home care at 29% and acute care hospitals at 17%. It costs as much as \$50,000 to heal or repair a pressure ulcer. It has been reported that there are at least 60,000 deaths each year that are associated with pressure ulcers. A facility that has access to a WOC Nurse can benefit from the specialized education and clinical skills that can be provided in preventing and reducing pressure ulcers. WOC nurses develop plans of care to address patient, family and facility staff education, where treatment recommendations are research-based, cost effective and individualized.

The WOCN Society reported that 50% of the 1.5 million residents of nursing home facilities are incontinent of urine, with 30% incontinent both of urine and stool. It is estimated that 27% of residents that are continent upon

admission to a long term care facility will become incontinent in one year. Incontinence management is estimated at \$3,600 annually per individual. WOC Nurses play a vital role in eliminating premature admission to long term care facilities by providing low cost, non-invasive treatment modalities and restoration of continence through patient and family education regarding measures to effectively manage incontinence in a home care or an outpatient setting.

The United Ostomy Association reported that there are 750,000 to 1 million individuals in the US and Canada with an ostomy. It has been reported that there are 70,000 new ostomy surgeries performed every year. WOC nurses' involvement in the care of ostomy patients starts even before their ostomy surgeries. WOC nurses help prepare individuals undergo-

ing surgery thru stoma site marking. After surgery, they promote independence in self cares and efficient utilization of ostomy products, assisting in control of odor, and containment of urine or stool and promote quality of life by protecting against skin breakdown. Follow up care to promote rehabilitation and problem identification regarding ostomy cares is addressed. Patient and family education is incorporated into the individual's lifestyle.

WOC Nurses play an important role in the medical field. The National Wound Ostomy and Continence Nurses Week will be on April 12th to April 18th which is an ideal time for members of the health care industry to learn about WOC Nursing. For more information, visit www.wocn.org.

Five-Star: How Will You Deal with a Complaint Now?

By Tammy Schroeder

The Center for Medicare & Medicaid Services (CMS) touts the Five-Star Quality Rating System as a great source for the public to gather information on nursing homes. But there are some experts out there that believe that the system could soon be used in considering licensure or certificate-of-need determinations, maybe even affecting the availability and affordability of liability insurance.

For the most part, professional medical societies support incentive programs to improve the quality of care. Many, though, have concerns over the validity of the Five-Star system's quality indicators. Why? Because Five-Star for the most part relies on the survey and certification system which has its own flaws. How so? For one, facilities may end up with a survey team that doesn't have adequate knowledge of the regulations and thus will give a subjective interpretation which

can often result in false determinations. Other times, facilities may have surveyors who lack adequate skills and/or character traits that are necessary to be objective when examining facts and searching for the truth in order to bring about the right results.

It is also possible that a complaint comes about due to the less than conscionable motives of the complainant or others involved, which can be hard to detect unless you are trained and skilled at interrogation. And finally, it is not uncommon for a surveyor to approach the situation with the mindset that they are judge and jury, leading to bias or prejudice which taints their perspective and leads to conclusions about what actually happened and whether discipline is warranted.

All of this is amplified in the complaint investigation when ambiguous terms such as "neglect" and "abuse" are irresponsibly thrown

around. It is little wonder then, that when you combine regulatory ambiguities with the limitations of our survey system many facilities and their staffs are wrongly accused and improperly disciplined. These false determinations lead to poor ratings, disciplinary actions that can be anything from warnings to license revocation, long-term care and corporate negligence claims, employee lawsuits and even in some cases, criminal indictments.

Yes, a facility can appeal the Five-Star rating it receives but there is no guarantee that the state survey agency will reconsider, and there is no process to ensure the state survey agency will review the ratings and offer an unbiased assessment. A deficiency finding that is appealed will remain a part of the rating until it is reversed, which could take months or in some cases, years and by then the damage is done. To
(continued pg. 3)

Five-Star (continued from pg. 2)

make things worse, facilities initially weren't allowed to view or dispute the inaccurate information prior to it being published and given to news outlets.

So what does this mean for you? Well, probably you've already become more aware of and placed greater emphasis on your state survey. It will be necessary to take a pro-active approach to ensuring you are not a victim of a flawed system. Facility administrators should determine if they are equipped with the necessary skills to investigate and examine sources of facts when it comes to complaint investigations, that way they can make sure that the truth is stressed to the surveyors and correctly applied to the regulations.

It is also important to be able to identify and navigate through the possible conflicts of interest that can arise between staff, administration and the facility directors

and officers. In order to mitigate their risk, facility administrators may want to consider bringing in experienced litigators to take the lead on complaint investigations



What Does Your Advertising Say About You?

By Jeanelle R. Lust

One of the hottest trends in nursing home litigation has been changing poor-care negligence cases into commercial, large-scale consumer fraud cases. The bases of these claims all hinge on marketing material produced by the nursing home. This series of articles will discuss various claims that may be possible based on false, misleading or inaccurate statements made about a particular facility.

First, some marketing professionals are under the misimpression that statements made as an opinion or as "puffery" cannot be actionable; statements like "in my opinion this facility offers the best wound care in the county" could result in liability under the right cir-

cumstances.

An example of vague statements being actionable was decided by the Nebraska Supreme Court in *Henderson v. Forman*, 231 Neb. 440, 436 N.W.2d 526 (1989). The case arose out of the purchase of the Candlelight Inn in Scottsbluff. The buyer contended the seller had told him the roof was "in good shape," "there were no problems" and a drainage system would keep moisture out of the basement, but after the purchase, design defects in the roof and the drainage system resulted in serious water problems. The Nebraska Supreme Court held that the seller's statements that the roof was "in good shape" and the drains would keep the basement dry could be actionable. The court stated:

Legal Developments (continued from pg. 1)

The Nebraska Unicameral even responded with an amendment to the Wage Payment Collection Act specifying that all types of time-off, other than vacation time, need not be paid out upon termination unless there was an agreement otherwise.

Two claimants have been to the Supreme Court seeking, in the first case, to be paid out for sick leave after 47 years of employment with an insurance company, and in the second case to be paid out sick leave time after 32 years with the State of Nebraska. See, *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008), modified 277 Neb. 359 (March 2009), and *Sack v. Castillo*, 278 Neb. 156, ___ N.W.2d ___ (July 17, 2009). Both times the Supreme Court denied relief to the employees, with the conclusion that the Wage Payment Collection Act, before or after amendment, does not prohibit an employer from providing

a sick benefit which may be used only in the event of illness or injury and which has no monetary value upon termination of employment. Moreover, public employees have no property interest in accrued sick time

In both cases, the employment policies clearly expressed this fact about sick time, in the first case via the private employer's employee handbook, and in the second case via state statute.

The lesson is clear: both public and private employers should examine and verify that their rules and policies all express that sick time benefits may only be used in the event of sickness or injury and have no monetary value upon termination of employment.

[I]n this case the statement was more than a guess. Forman said the roof "was in good shape [and] there were no problems," and this in the face of his knowledge that one of the roofing experts had said that the roof needed replacing. (Emphasis supplied.)

Id. at 448, 436 N.W.2d at 432. The court found the seller's statements about the drainage system keeping water out of the basement were in a "similar category"; he had said the drainage system would protect the basement from excessive moisture, which was false. Under these circumstances, the statements could be actionable.

National Assisted Living Week is September 13—19



Knudsen, Berkheimer, Richardson & Endacott, LLP
3800 VerMaas Place, Suite 200
Lincoln, NE 68502

Toll Free: 800-714-3439
Phone: 402-475-7011
Fax: 402-475-8912
E-mail: tschroeder@knudsenlaw.com

Visit our website

www.knudsenlaw.com

Michael W. Khalili



Michael W. Khalili serves as an active member of the Knudsen law Firm Healthcare Committee. He is licensed to practice law in the U.S. District Court of Nebraska and is a member of the Washington State Bar Association.

Michael grew up in Del Rio, Texas. He graduated, cum laude, from the University of California Los Angeles in 2003 with a Bachelor of Arts degree in psychology.

He received his J.D. degree from Seattle University School of Law in 2008, attaining the highest grade for overall achievement and best performance for Housing Law and Pol-

icy, and he was the recipient of the prestigious CALI award. He received the Washington State Hispanic Bar Association Scholarship in 2007 and the Deans Diversity Scholarship in 2005. Michael is also bilingual, and was actively involved in the Hispanic Organization for Legal Advancement, South Asian Law Student Association, Jewish Legal Society, and the Intellectual Property Law Society.

At Seattle University School of Law, Michael was awarded the Laurel Rubin Farm Worker Justice Fellowship and interned with Columbia Legal Services in Yakima, Washington. While interning, he provided legal advice to farm workers regarding their rights, as well as minimum wage issues. During a radio interview he disseminated information in Spanish for individuals thinking about entering the legal profession. This experience was the basis for an article Michael wrote, "How I Spent My Summer Vacation: Internship Opens Eyes on Farm Workers' World", which was published by the King County Bar Bulletin.

Michael is actively involved in his community as member and legal advisor of the Little White Dog Rescue Organization and the Omaha Food bank. Michael enjoys traveling, attending sporting events, and spending time with his girlfriend Sarah, dog Sadie, and his family.

47,000 Elderly Hurt Each Year in Walker and Cane Accidents

By Michael Khalili

Each year, more than 47,000 elderly Americans are treated at hospital emergency rooms for injuries from falls that involve walkers and canes, according to a recent release from the Centers for Disease Control and Prevention (CDC). That works out to an average of 129 injuries daily.

CDC researchers analyzed emergency room records from 2001 to 2006. They found that most of the falls involve walkers (87%), and that people 65 and older are seven times more likely to be injured in a walker-related fall than in a cane-related fall.

Women sustain 78% of walker-related injuries and 66% of cane-related injuries. The risk of falling while using a walker or a cane increases with age, with the highest injury rate among those ages 85 and older.

Fractures are the most common type of injury suffered while using canes (40%) and walkers (38%). About a third of walker or cane-related injuries were to the lower trunk, such as the hip or pelvis. Most injuries associated with walkers and canes occur at home—60% and

56%, respectively. One in three people who had a walker-related fall and 28% of those who had a cane-related fall had to be hospitalized. Up to 42% of nursing home admissions are the result of a fall, according to some reports.

