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Long-Term Care Newsletter

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- Shirley Williams

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Help Me Help You

(The first part of this two-part article focused on creating and maintaining legally defensible content in chart entries.)

Documentation Principles

Timeliness and Chronology Entries

As noted in the first part of this article, proper charting and maintenance of charts are essential to the defense of any case. A plaintiff's attorney will seize upon any defect in the record and will inevitably claim that an incomplete or tardy chart reflects incomplete nursing care. Timely, well labeled record keeping helps the attorney help you.

Timeliness of an entry is critical. Entries should be made as soon as possible after an event occurs or observation is made. A lack of timeliness can adversely effect an entry's admissibility in court, as well as its credibility. Obviously, entries should not be made in advance of actually providing care. (Maye v. The Inspector General, Docket No. C-02-880 decision No. CR 1028 April 16, 2003).

Sometimes it is necessary to summarize events that occurred over a period of time (such as a shift). When that is done, the notation should indicate the actual time the entry was made, with the narrative documentation identifying the time during which the events occurred.

Chronology is also important. Anyone reviewing the records will better understand the care if it appears in chronological order. Electronic health records now offer the ability to sort and view entries in a myriad of ways, including, chronologically. This is especially helpful to the legal professional who may otherwise have a difficult time tracking care through the records.

Block charting of time (e.g., 7 a.m. –3 p.m.) is generally not advised, especially for narrative notes. Narrative documentation should reflect the actual time the entry was made. However, certain types of flow sheets, such as a treatment record recording time as a block may be acceptable. For example, a treatment that can be delivered any time during a shift could have a block of time identified on the treatment record with staff signing that they delivered the treatment during that shift. (cont'd page 2)

The Elder Justice Act

By Tammy Schroeder

After five consecutive years of failure, the Elder Justice Act received unanimous approval by the U.S. Senate Finance Committee on September 10, 2008, recommending consideration by the Senate as a whole The bill, introduced by Senators Blanche Lincoln, D-Ark, and Orrin Hatch, R-Utah, proposes a comprehensive set of policies and programs aimed at protecting the elderly.

The bill sets out to provide $777 million in federal money to government agencies and community programs that deal with elder abuse issues. The money would also go to establishing a forensic investigation improvement program related to crimes involving elder abuse, and would impose stricter requirements for reporting criminal violations by long-term care facilities and their staffs.

The Elder Justice Act would create a council to coordinate the responses of federal, state and local agencies to reports of elder abuse. It would also establish an advisory board of experts who would be given the task of developing a multidisciplinary plan to prevent crimes against the elderly.

Finally, the Act would set up a national institute that would train investigators who inspect long-term care facilities, as well as enhance the skills of facility staff through the creation of an incentive plan aimed at helping people to train for, seek and maintain employment in the industry.

Both Senators Lincoln and Hatch praised the Committee for approving this legislation, stating that it is necessary to protect our nation's seniors whether they are living in their homes, assisted living facilities or nursing homes.

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Preparing the Way Forward

Patient Safety & Abuse Act One Step Closer to Passing Into Law

by Tammy Schroeder

The U.S. Senate Finance Committee gave unanimous approval to the Patient Safety & Abuse Prevention Act on September 10, 2008. Chairman of the Senate Special Committee on Aging, Herb Kohl, D-Wis., introduced the legislation on June 7, 2007. Senator Kohl urged swift action by the full Senate before it adjourns again.

The sponsors of the bill state it will address issues related to background checks, as employers are not always able to find out if an applicant has a history of patient abuse or violent crime. It would also expand a pilot program that was initially started in 2003 in seven states and create a background check system that screens job applicants at long-term care facilities.

Nebraska already requires screening, but in going nationwide, the system would coordinate abuse and neglect registries and law enforcement records from each state with the FBI's national database of criminal history records. If the bill passes, a nursing home would be required to screen all persons applying for positions that have direct contact with patients and presumably negative findings from other states would be easily identified. Anyone with a conviction for a violent crime or substantiated findings of abuse would be disqualified from holding such a job.

If a nursing home fails to perform the screening or if it knowingly employed a disqualified person in a direct care position, it could face penalties, including exclusion from the federal Medicare and Medicaid programs.

A budget amendment setting aside $160 million over 3 years will fund the background screening. Senator Pete Domenici, R-N.M. and co-sponsor of the bill, stated that this piece of legislation is important in providing safeguards to protect our elderly and disabled.

Help Me Help You (cont'd. from page 1)

For assessment forms where multiple individuals are completing sections, the date and time of completion should be indicated as well as who completed each section (time is not required on standardized data sets such as the MDS and OASIS).

Late Entries and Addenda

Entries made some time after the facts being recorded are a particularly sensitive issue in litigation. Making entries correctly can prevent unjustified criticism of the caregiver's credibility. When a pertinent entry was entirely missed or not written in a timely manner, a late entry should be used to record the information in the health record. When making a late entry:

- Identify the new entry as "late entry."
- Enter the current date and time. Do not try to give the appearance that the entry was made on a previous date or time.
- Identify or refer to the date and incident for which the late entry is written.
- If the late entry is used to document an omission, validate the source of additional information as much as possible (e.g., where you obtained the information to write the late entry).
- When using late entries, document as soon as possible. There is no time limit for writing a late entry; however, the more time that passes, the less reliable the entry appears.

An addendum is similar to a late entry, but it is used to provide additional information in conjunction with a previous entry that was timely made. With this type of entry, a previous note has been made and the addendum provides additional information to address a specific situation or incident. When making an addendum;

- Document the current date and time.
- Write "addendum" and state the reason for the addendum, referring back to the original entry.
- Identify any sources of information used to support the addendum.
- When writing an addendum, complete it as soon after the original note as possible.
- In an electronic system, it is recommended that organizations have a link to the original entry or a symbol by the original entry to indicate the amendment. ASTM and HL7 have standards related to amendments.

When charting is deficient, the best nursing care can nevertheless be difficult to defend. Effective and transparent record keeping helps the attorney help you.

For Maintaining Proper and Adequate Records, Additional Resources include:

- "Update: Maintaining a Legally Sound Health Record—Paper and Electronic." Journal of AHIMA 76, No. 10 (November-December 2005): 64A-L.
- "Update: Guidelines for Defining the Legal Health Record for Disclosure Purposes." Journal of AHIMA 76, No. 8 (2005): 64A-G.

What to Do When an Employee Reports an Injury

By Shirley Williams

Sooner or later just about every employer will deal with a workers' compensation injury: in other words, an injury that is alleged to be within the course and scope of employment.

The following are ten suggestions for handling workers' compensation claims:

1. The employee is under a statutory obligation to give notice of any claimed injury "as soon as practicable." However, that is loosely interpreted. For example, if an employer is aware that an employee needs time off to go to a doctor for a particular condition, and it is a condition that could potentially be work related, that is likely sufficient notice even though the employee has not made a specific statement the condition is work related. If there is any potential that a condition is work related, it behooves the employer to inquire further.

2. Train all employees that they must notify their immediate supervisor if they have any type of injury while working. Supervisors should make it a practice to document all information in one central location so that if the question of notice becomes an issue, they can verify whether or not a report was made without having to rely solely on memory.

3. Have one person designated as the individual that supervisors or employees should notify. If an injury may potentially require a doctor's visit or medical treatment, there are various documents to fill out and notifications to be made, so it is difficult for numerous supervisors who rarely handle such matters to be fully trained on what needs to be done.

4. The person designated to receive this type of notification should ascertain whether immediate medical care is needed and obtain it if necessary. They should interview the employee and find out the following information: what happened, when did it happen, the names of all witnesses, the precise symptoms, and the precise area of the body involved. The last fact is important since injuries to the head and torso are compensated differently than injuries to an extremity.

5. An accident report should be filled out by the designated person receiving the report (after talking to the injured employee), and it should be signed by the injured employee.

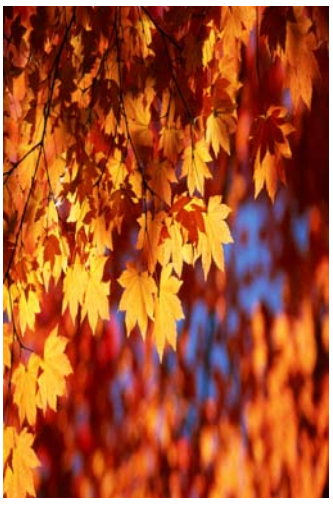
6. A Rule 50 choice of physician form needs to be presented to the employee before medical treatment is sought, if possible. If not done, the employee is free to choose any physician, whether or not they have previously seen that doctor.

7. Notice of the injury should be given to the workers' compensation insurer in accordance with the insurance policy.

8. Once notified, the insurer will then be in a position to give guidance as to whether the employer or the insurer will fill out the required First Report of Alleged Occupational Injury or Illness. This Report must be filed with the Workers' Compensation Court within ten days of the date of the notice of injury. The injured employee is not responsible for filing this report.

9. It is best to keep an injured employee working within the physical restrictions given by the doctor, even if only at part-time light duty. The temporary disability benefits that must be paid under workers' compensation are less if this is done, but more importantly, it keeps the employee engaged with co-workers and their work and generally makes return to their regular job more likely.

10. Finally, if it appears the employee will not be able to return to work after a workers' compensation claim, the employer must proceed with caution before terminating or demoting the employee. Nebraska is an "at will" state, which means that the employment relationship only lasts as long as both the employer and the employee want it to continue and either is free to end it for any reason as long as it is not due to an improper reason such as age, gender, etc. However, the Nebraska Supreme Court has determined an employee can sue if terminated or demoted because of the employee filed a workers' compensation claim. *Jackson v. Morris Communication Corp.*, 265 Neb. 423, 657 NW 2d 634 (2003); *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 NW 2d 704 (2007). Therefore, employers must be absolutely sure to document that any adverse employment action is for legitimate reasons other than the filing of a claim. If the employer cannot accommodate permanent restrictions, there is no requirement under this retaliation case law to continue the employee on the payroll, but it should be clearly documented that this is the reason for the termination. Litigation may well arise whenever an injured employee suffers an adverse employment action, even though the employer knows it was not done in retaliation. There will need to be sufficient evidence to convince the judge and jury of that fact.



Senate Set to Consider the Fairness in Nursing Home Arbitration Act by Tammy Schroeder

The U.S. Senate Judiciary Committee held a voice vote on September 11, 2008 approving their version of the Fairness in Nursing Home Arbitration Act of 2008, two months after the House Judiciary Committee passed their companion bill. The bill would ban mandatory arbitration clauses in nursing home contracts.

Nebraska courts have been enforcing valid pre-dispute arbitration agreements under the Federal Arbitration Act.

The Fairness in Nursing Home Arbitration Act proposes to void and make unenforceable such agreements between residents and facilities. It would require that any arbitration agreement be entered into after the dispute has already arisen, not at the time of the resident's admission.

The Leadership Council of Aging Organizations, which includes AARP, supports the legislation and believes it will put the consumer on a level playing field with the health care providers. Conversely, a coalition of health care and tax payer advocacy groups, like the American Health Care Association, opposes the bill, stating it sets a dangerous precedent for all of the U.S. business community by eliminating the reasonable, intelligent use of arbitration agreements.

At this time, the bill is up for consideration by the full Senate but no debate is scheduled.

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Jocelyn W. Golden was born and raised in Omaha, Nebraska. She completed her undergraduate education at the University of Nebraska-Lincoln, graduating with distinction in 2001 with majors in psychology and political science.

Jocelyn attended Creighton University School of Law in Omaha, Nebraska, where she was involved in several activities. Her advanced trial practice team was a regional champion of the National Trial Competition in 2004. She received her juris doctorate degree, *magna cum laude* in 2004.

Jocelyn joined the Knudsen Law Firm in 2004, where she has focused on health care, litigation, bankruptcy and commercial law. She is licensed to practice in Nebraska, Iowa, and federal courts. She is a member of the Lincoln Bar Association and a board member of the Foundation for the Lincoln City Libraries.

Jocelyn and her husband, Brian enjoy hiking, biking, and endless home improvement projects on their 100 year old farmhouse.

We Want Your Feedback!

Knudsen Law Firm is privileged to bring you this newsletter, and our goal is to provide you timely information that will help you navigate the legal aspects of your work. We rely on your input to do that.

Please copy this form and fax your questions or comments to us (402-475-8912) or e-mail us at tschroeder@knudsenlaw.com. We promise to respond within 24 hours. We appreciate your ideas about future articles or feedback you may have for us!

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