

PUBLICATION

Top Ten Ways to Avoid Litigation in Long Term Care

Authors: Craig Creighton Conley, Jean Cooper Bertas
July 26, 2018

Litigation against long term care facilities has reached a fever pitch in recent years. Plaintiff attorneys have been capitalizing on the sympathies of jurors by painting the picture of an elderly, innocent, and helpless victim versus a big business with over-worked and under-staffed caregivers. It has proven time and time again to be a successful equation for a plaintiff in jury trials. There has also been an increasing number of television and radio commercials asking viewers and listeners to contact their firm "if you or a loved one have been mistreated or abused" while under the care of a nursing facility.

Although long term care facilities seem to be a sitting target, there are ways to minimize the risk of a lawsuit. Baker Donelson's Long Term Care Team has created this top ten list of steps your facility can take to avoid litigation.

1. Conduct Background Checks on ALL Employees and Prospective Residents

While it seems like a no-brainer, a surprising number of employees' criminal backgrounds can and do slip through the proverbial cracks. Although federal and state regulations require an initial background check on employees, a periodic background check every few years could help avoid embarrassing and unnecessary surprises during litigation. It is also smart to run a background check on all prospective residents before admission.

2. Show Care Following a Resident's Discharge

Residents are treated and cared for during their stay at a facility, and this should not end when they are discharged. Caregivers or facility representatives could attend the funeral of a resident or send a card or gift to the family to show that their loved one was truly cared for and will be remembered. Families find comfort in knowing that their loved one was special to the facility. This reassurance not only allows the staff an opportunity to express care for the resident, but may also encourage families to engage in a direct dialogue with the facility about any concerns they may have.

3. Train the Staff

A thorough training program for all staff members, including training on customer relations and appropriate activities for residents, is key to getting the employees off on the right foot. Staff should also be trained in proper communication and to refrain from using foul or rude language, casting blame on the facility or another staff member, admitting fault, or making excuses for not getting a job done because the facility is "under-staffed." The facility should also schedule periodic refresher courses to keep the staff on the right path. Every member of the staff should be able to respond appropriately to inquiries from residents and guests, or at least be helpful and find the correct staff member to respond.

4. Set Realistic Expectations

Many residents and their families do not understand the resident's diagnoses nor the resident's prognosis for the future. Often, it is learned through the discovery process during litigation, mainly in family member depositions, that the family members were blind-sided by a death. Families often testify that they believed their loved ones would eventually return home after receiving rehabilitation or after recuperating from a surgery. Compassionately educating the family members (through marketing materials, educational seminars, care plan

meetings and phone call updates) about their loved ones' current and future needs will keep surprises at bay and could help to avoid litigation.

5. Use an Arbitration Agreement

The use of arbitration agreements can help to avoid costly litigation and unpredictable juries. Arbitration agreements can also ensure a quicker resolution of a case that would otherwise drag on for years in the court system. It is very important that the staff take care to properly execute the agreements for every resident. It is also important to remember that an arbitration agreement goes both ways. If the facility needs to bring a lawsuit against a resident, such as a debt collection action, the facility will be bound by the arbitration agreement as well. Not all jurisdictions will enforce arbitration agreements, so it is important to speak with an attorney familiar with the facility's jurisdiction to determine whether an arbitration agreement is even an option.

6. Communicate with Residents and Their Families

Communication with residents and their families should be done often and accurately. When there is a change in a resident's condition, it should be communicated to the responsible party as soon as possible. The responsible party should also be made aware of the treatment options and possible outcomes of a change in condition as well. Quarterly resident care questionnaires are a helpful and effective communication tool to solicit feedback, concerns, and suggestions of residents and their loved ones. It also offers the facility a chance to react and resolve any questions or concerns. Communication should be limited in certain circumstances and always remain appropriate.

7. Set Policies and Follow Them

If the facility puts a policy in place, follow it. The facility should maintain and update its policies on a yearly basis. If a policy is dated and not in use anymore, edit it out. It is easier to remove a policy than to explain to a jury why it was not followed. A common theme in a plaintiff's lawsuit is that if a policy was not followed, the facility is at fault.

8. Document Appropriately

Records are subject to discovery requests. Frustration with a resident or other staff members should not be documented in a resident's chart. There are other ways to confidentially and privately express frustrations.

9. Document Accurately

Caregivers should be trained to document well, and there should be a system in place so that it can be done often to ensure accuracy. If a resident is in the hospital, document it to ensure there is not a blank space in the record. A jury will assume something was not done if it is not documented. Improper documentation opens up an opportunity to doubt a facility's care and a caregiver's credibility.

10. Always Provide Quality Care

When a facility's staff is well trained, follows policies and procedures, and provides quality care to its residents, there will be no room for complaints and far fewer lawsuits. Providing quality care will result in a happier environment for residents and caregivers, as well as family members and friends of residents.