

A D I F F E R E N T A P P R O A C H

The Intersection Between Adverse Surveys and Litigation: Ways to Avoid Being Caught in the Middle

PACAH 2024 Spring Conference

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Practice Areas

- ▶ Senior Care Services
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Education


- ▶ University of Pittsburgh School of Law, J.D., with a Certificate in Health Law
- ▶ University of Texas at Austin, Bachelor of Journalism

- Advises long-term care providers on various regulatory and compliance matters, and she has extensive experience in survey and enforcement appeals pertaining to a wide range of federal and state regulatory agencies
- Assists in appealing sanctions and remedies from the Pennsylvania Department of Health, the Pennsylvania Department of Human Services and the Centers for Medicare and Medicaid Services
- Handles regulatory and licensure matters, survey and enforcement, end of life issues, admission agreements and fair housing compliance matters
- Counsels on legal implications that arise when addressing powers of attorney, advance health care directives, and end-of-life decisions



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Practice Areas

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- ▶ Commercial Litigation
- ▶ Litigation

Education


- ▶ Dickinson School of Law of the Pennsylvania State University, J.D., magna cum laude, 2004
- ▶ Dickinson College, B.A., summa cum laude, 2001

- Kimberly A. Selemba, Esq. is an established healthcare litigator. In the firm's Healthcare Litigation Group, she defends healthcare systems, hospitals, physicians, physician practices and medical professionals in medical malpractice cases. Kimberly assists in finding and vetting experts, witness preparation, courtroom testimony, case negotiations and all aspects of courtroom trials.
- She advises long-term care facilities and senior living communities on developing risk mitigation strategies, tools and policies to reduce adverse events and claims. When litigation cannot be avoided, Kimberly provides her clients with representation and has successfully defended healthcare providers and facilities in trials and arbitrations throughout Pennsylvania.



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Practice Areas

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Education

- ▶ York College, Nursing Home Administrator Courses for NHA License, 2002
- ▶ Southern California University for Professional Studies, Ph.D., summa cum laude, 2000
- ▶ Southern California University for Professional Studies, MBA, 1994
- ▶ Harford Community College, RN, 1982
- ▶ Cecil Community College, A.A., 1982

- Over 14 years of work experience in legal consulting and over 30 years in the healthcare field with expertise in organizational psychology, clinical care, clinical research, managed care, and administration
- Provides management communication, leadership excellence, and service excellence coaching
- Coaching focuses on conflict resolution, understanding the emotional influence on patient safety, respectful crisis management, teamwork, and leadership strategies that facilitate increased staff productivity
- Also serves as Interim CEO for facilities needing coverage during extended leave of absence and/or during CEO searches



Learning Objectives

- ▶ Formulate strategies and best practices to ensure regulatory compliance and avoid cited deficiencies
- ▶ Discuss common pitfalls to avoid during the survey process as well as tips to successfully challenge cited deficiencies
- ▶ Examine the impact of an adverse survey on medical professional liability claims and proactive steps a provider can take to avoid adverse claims

CMS Enforcement Actions in Pennsylvania

	# of Providers	Total Enforcement Actions	State Monitoring	Directed POC	Temporary Management	Discretionary DPNA	Mand. DPNA	Directed Inservice	CMP	CMS - Approved Alt. or Add'l	Mandatory Termination
CY 2023	222	513	2	51	1	7	25	9	415	2	1
CY 2024 (as of 4/7/2024)	32	45	0	0	0	1	0	2	42	0	0

Source: S&C Quality, Certification & Oversight Reports (QCOR)

CMS Imposition of Civil Money Penalties (Pennsylvania)

Calendar Year	Total Number of CMPs		Total Dollar Amount	
	Per Diem	Per Instance	Per Diem	Per Instance
2023	269	146	\$7,149,548.18	\$1,459,113.05
2024 (as of 4/7/2024)	33	9	\$1,323,152.80	\$124,256.75

Source: S&C QCOR

PA DOH Enforcement Actions (2023)

Provisional License	# of CMPs	Ban on Admissions
P1 - 19	248	3
P2 - 2		
P3 - 0		
P4 - 0		

Source: Pennsylvania Department of Health

Most Frequently Cited F-Tags (in PA)

CY 2023

- 1) F884 – NHSN reporting
- 2) F684 – Quality of care
- 3) F689 – Free of accident hazard / supervision / devices
- 4) F812 – Food procurement
- 5) F656 – Develop / implement comprehensive care plan
- 6) F584 – Safe / clean / comfortable environment
- 7) F880 – Infection prevention and control
- 8) F761 – Label/store drugs and biologicals
- 9) F641 – Accuracy of Assessments
- 10) F686 – Treatment / services to prevent / heal pressure ulcers

CY 2024 (As of 4/07/24)

- 1) F884 – NHSN reporting
- 2) F684 – Quality of care
- 3) F812 – Food procurement
- 4) F689 – Free of accident hazard / supervision / devices
- 5) F656 – Develop / implement comprehensive care plan
- 6) F880 – Infection prevention and control
- 7) F584 – Safe / clean / comfortable environment
- 8) F761 – Label/ store drugs and biologicals
- 9) F695 – Respiratory / Tracheostomy care and suctioning
- 10) F641 – Accuracy of Assessments

Nurse Staffing Standards

DOH

- ▶ Effective 7/1/2023 → 2.87 hours of direct resident care for each resident
- ▶ Effective 7/1/2024 → 3.2 hours of direct resident care for each resident

CMS Proposed Nurse Staffing:

- ▶ Standard would require 24/7 RN coverage
- ▶ Standard would require a minimum of .55 hours per resident per day for RNs and 2.45 (HPRD) for nurse aides
- ▶ Mandates would take effect on a staggered basis:
 - 24/7 RN requirement (effective 2 years after publication of final rule)
 - RN/NA minimums (effective 3 years after publication of final rule)
- ▶ Rural areas subject to extended implementation timeline:
 - 24/7 RN requirement (3 years after publication of final rule)
 - RN/NA minimums (5 years after publication of final rule)



Ensuring Regulatory Compliance

- ▶ Review the federal and state regulatory provisions governing long term care facilities
- ▶ Review interpretive guidance under Appendix PP of the State Operations Manual
- ▶ Ensure policies/procedures comply with regulatory requirements
- ▶ Educate/train staff regarding policies/procedures
- ▶ Utilize Critical Element Pathway tools
- ▶ Conduct mock surveys



Survey ready at all times!

How do we make this happen?



Culture of survey ready at all times!

- Every day practices
- Reinforce on rounds, nursing meetings, competency days
- Monitor QA/PI



Resident Engagement

- Resident involvement helps elevate the voice of the resident
- Resident education



Know your North Star

Defining Our Mission

- ▶ Quality of Life
- ▶ Quality of Care
- ▶ Resident Rights
- ▶ System Performance



Staff Role

- ▶ Educate on Compliance
- ▶ Staff involvement in QAPI monitoring
- ▶ Rounds – Ask questions (Practice!)



Staff Education

- ▶ Orientation
- ▶ Monthly Education
- ▶ Competency Training



Key

A= High Risk/Life Safety Level

B= Moderate Risk/No Injury but repeat issue/incident (Pattern of 2 or more incidents in same category)

C= Low Risk, No Patterns. Identified safety risk.

D= No Risk



Categories	Severity			
	A	B	C	D
Administrative				
Clinical/Social Service				
Consulting Services				
Dietary				
Ethics				
Finance				
Housekeeping/Laundry				
Infection Control				
Medical				
Medical Records				
Nursing				
Home Care				
SNF				
Plant Operations/Maintenance				
Personal Care				
Public Relations/Marketing				
Recreation				
Safety				
Staff Development				
Assisted Living				
Other:				
TOTAL				

QAPI Monitoring Tool

Contractor

Year/Qtr. _____

Volunteer

Other (specify) _____

Element of Performance	Yes	No	N/A	Qtr. Score
------------------------	-----	----	-----	------------

1. Any complaint during quarter about services provided?
2. Services provided are within accordance of contracted/volunteer agreement?
3. Quality measures reflect acceptable scores in area where contracted services are provided (i.e., pain, wounds, etc...)
4. Random resident/POA feedback about contracted services
5. Annual Education/Training completed?

Contractor

Year/Qtr. _____

Volunteer

Other (specify) _____

Element of Performance	Yes	No	N/A	Qtr. Score
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Action

- ▶ Praise if compliant
- ▶ Re-educate if not compliant

QAPI Action

- ▶ Plan for performance improvement
- ▶ Monitor the interventions
- ▶ Sustain the outcome



Survey Tips

- ▶ Survey ready at all times
- ▶ Surveys are a time to demonstrate what makes your facility special
- ▶ Surveys are a partnership with your state survey team and your facility team members



Survey success will be yours!

Celebrate
The
Win!



Resource Examples

GG QA/PI Checklist Functional Abilities and Goals

Competency/Element	Yes	No	N/A	Comments	Follow-up Action
Admission Self-care – coded the resident’s need for assistance with bathing, dressing, toileting and eating prior to this illness/injury.					
Indoor mobility – coded the resident’s need for assistance with walking with and without an assistive device prior to this illness/exacerbation/injury.					
Stairs – coded the resident’s need for assistance with internal/external stairs with and without an assistive device prior to this illness/exacerbation/injury.					
Functional cognition – coded the resident’s need for assistance with planning regular tasks [i.e., shopping, taking meds] prior to this illness/exacerbation/injury.					
Indicated assistive devices that were used by the resident prior to this illness/exacerbation/injury.					
Coded for limitations in upper/lower extremities that interfered with daily functions or placed resident at injury risk in last 7 days.					
Checked with resident on all mobility devices normally used in the last 7 days.					
<i>Assessed in the first 3 days of stay - coded the resident’s usual performance for each activity using the 6-point scale. If activity was not attempted at admission, coded the reason. Coded the resident’s end of SNF PPS stay [discharge] goal(s) used the 6-point scale. Use of codes 07, 09, 10, or 88 is permissible to code end of SNF PPS stay [discharge] goal(s).</i>					
Eating: Assessed the resident’s ability to use suitable utensils to eat/swallow food and/or liquid when meal placed before the resident. Admission Performance.					
Oral Hygiene: Assessed the resident’s ability to use suitable items to clean teeth. If applicable, inserting/removing dentures, soaking/rinsing of same. Admission Performance.					
Toileting Hygiene: Assessed the resident’s ability to maintain perineal hygiene. If managing an ostomy, included wiping the opening, but not managing the equipment. Admission Performance.					

Do's and Don'ts During the Survey Process

Do:

- ▶ Prepare your staff for surveys
- ▶ Think before you speak
- ▶ Offer documentation at exit interview to avoid a potential deficiency

Don't:

- ▶ Admit fault/liability
- ▶ Be intimidated by surveyors
- ▶ Guess or speculate



Responding to an Adverse Survey

Plan of Correction

- ▶ What corrective action(s) will be accomplished for those residents found to have been affected by the deficient practice?
- ▶ How will you identify other residents having the potential to be affected by the same deficient practice and what corrective action will be taken?
- ▶ What measures will be put in place or what system changes will you make to ensure that the deficient practice does not recur?
- ▶ How the corrective action will be monitored to ensure that the deficient practice will not recur; i.e., What quality assurance programs will be established?
- ▶ Dates of when the corrective action will be completed.

Responding to an Adverse Survey

Plan of Correction Cont.

- ▶ Include Disclaimer language:
 - Preparation and submission of this plan of correction is required by state and federal law. This plan of correction does not constitute an admission for purposes of general liability, professional malpractice, administrative proceedings or other court proceedings.

Responding to an Adverse Survey

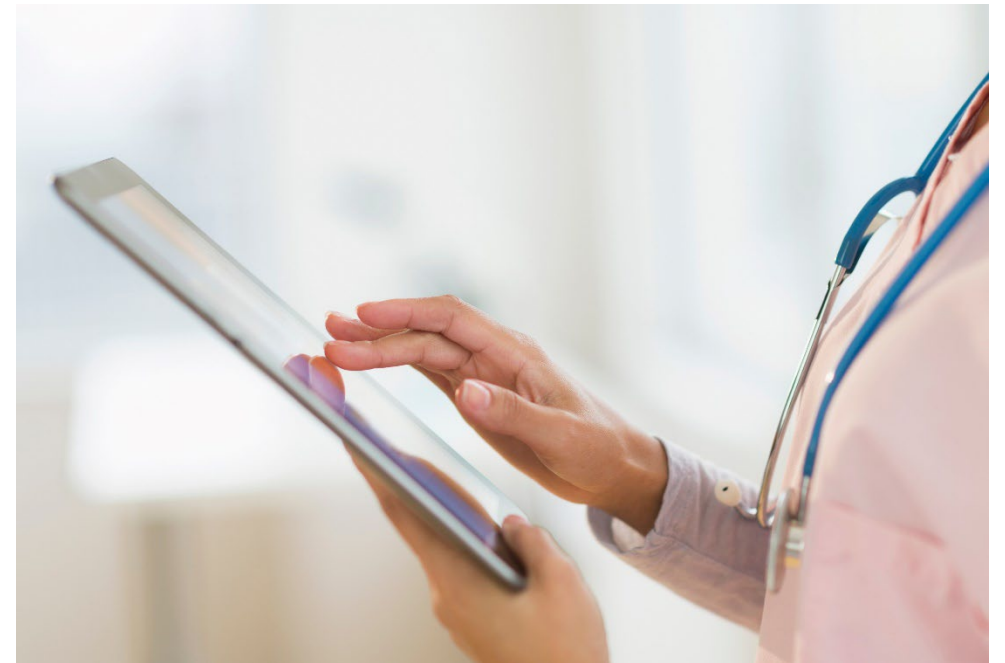
Past Noncompliance Criteria

- ▶ The facility was not in compliance with the specific regulatory requirement(s) at the time the situation occurred;
- ▶ The noncompliance occurred after the exit date of the last standard (recertification) survey and before the survey (standard, complaint, or revisit) currently being conducted; and
- ▶ There is sufficient evidence that the facility corrected the noncompliance and is in substantial compliance at the time of the current survey for the specific regulatory requirements.

Responding to an Adverse Survey

Past Noncompliance Criteria

- ▶ No POC required
- ▶ Pursuant to the State Operation Manual, the determination to impose a federal remedy for past noncompliance is not mandatory, but discretionary on the part of CMS
- ▶ Strategies to evidence past noncompliance



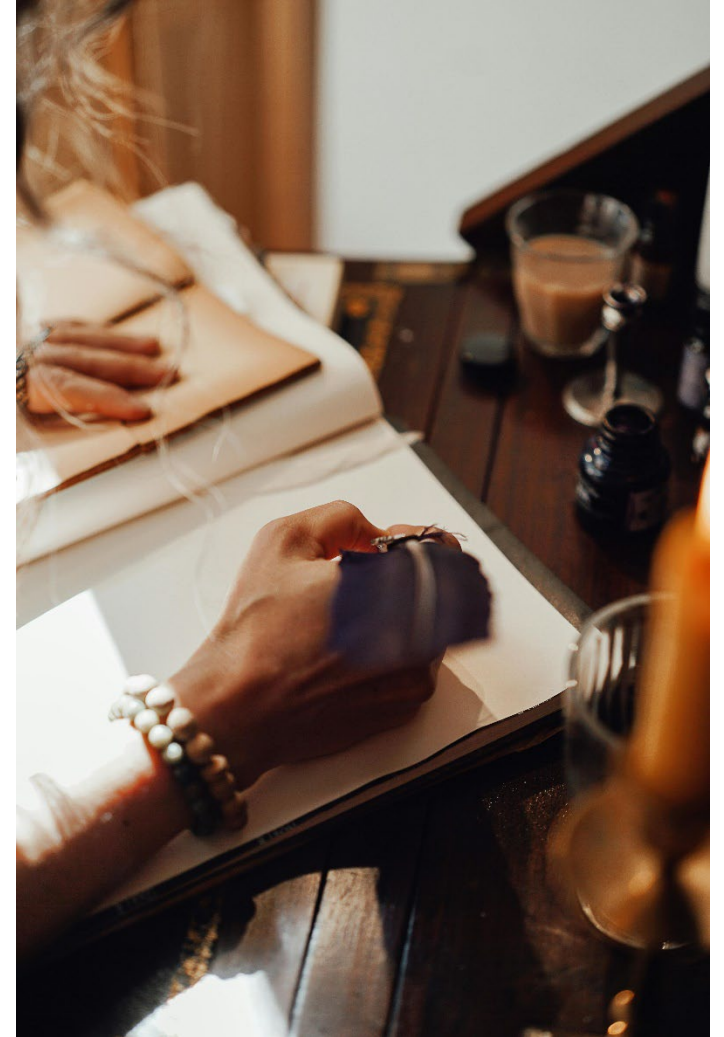
Challenging Cited Deficiencies

- ▶ IDR
- ▶ State IDR
- ▶ Federal IDR



Challenging Cited Deficiencies

- ▶ Informal Dispute Resolution
 - Submit within the same 10-calendar day period the facility has for submitting a plan of correction
 - Can dispute federally cited deficiencies
 - Documentation to support IDR
 - Nurses' notes, physician progress notes, orders, etc.
 - Policies/procedures
 - Written statements
 - Other?



Challenging Cited Deficiencies

State Independent Informal Dispute Resolution (IIDR)

- ▶ Submit within the same 10-calendar day period the facility has for submitting a plan of correction
- ▶ IIDR Agent (Quality Insights) reviews IIDR
- ▶ Can dispute state and federally cited deficiencies
- ▶ Can request a desk review, telephone review or an in-person review
- ▶ State IIDR process conducted on a fee-for-service basis
- ▶ Submit supporting documentation to dispute deficiency
- ▶ Note: If Quality Insights reverses a deficiency and DOH disagrees, DOH has authority to nullify Quality Insights' decision

Challenging Cited Deficiencies

Federal IDR

- ▶ A provider may pursue a federal IDR if CMS imposes civil money penalties against the nursing facility; and
- ▶ The penalties are subject to being collected and placed in an escrow account pending a final administrative decision
- ▶ Must submit request for Federal IDR within 10 calendar days of receipt of the letter from CMS regarding the imposition of CMPs
- ▶ Note: If a facility utilizes the IDR or state IDR process to challenge the survey findings, the facility cannot also utilize the Federal IDR process for the same survey unless the IDR or state IDR process (whatever is applicable) was completed prior to the imposition of the CMP

Challenging Cited Deficiencies

Federal IIDR Cont.

- ▶ What must the request for a Federal IIDR include:
 - Copy of CMS letter
 - Written IIDR request that identifies the deficiencies disputed and reasons for the IIDR request
 - Supporting documentation
 - Name & contact information for residents involved in the deficiencies for which the facility seeks an IIDR review or the appropriate resident representative(s)
- ▶ State must notify the involved resident/resident representative, as well as the LTC Ombudsman, that they have an opportunity to submit a written comment
- ▶ If state survey agency disagrees with decision of IIDR entity, then the applicable CMS Regional Office will review and render a final decision

Appeal of Sanctions/Remedies Imposed by DOH/CMS

DOH Appeal

- ▶ Possible sanctions:
 - CMP
 - Provisional license
 - Ban on admissions
 - Revocation

- ▶ File appeal within 30 days of the date of mailing of the adverse order
- ▶ Appeal of sanction does not act as an automatic supersedeas
- ▶ Must specifically deny the allegations
- ▶ Practical considerations
 - Possible admissions
 - Likelihood of success



Appeal of Sanctions/Remedies Imposed by DOH/CMS

CMS Appeal

- ▶ Possible sanctions:
 - CMP
 - DPNA
 - Loss of NATCEP
 - Termination
- ▶ File appeal within 60 days of receipt of notice of imposition of remedies from CMS
- ▶ Practical considerations
 - Likelihood of success?
 - Any pending civil litigation?
 - Waiver of appeal in exchange for 35% reduction of CMP



Proactive Steps to Avoid Adverse Claims

- ▶ Compliance
- ▶ Documentation
- ▶ Communication
- ▶ Risk Management

Impact of an Adverse Survey on Medical Professional Liability Claims

- ▶ Litigation against Skilled Nursing Facilities continues to be a growing area in Healthcare Litigation
- ▶ Falls, pressure injuries and wounds, malnutrition, etc.



CMS-2567 will be Exhibit #1 in Litigation

- ▶ Potentially Damaging Evidence if Admissible at Trial
 - Highly Inflammatory
 - Emotion-Based Verdicts or Awards
- ▶ Plaintiffs: Evidence of a Breach in the Standard of Care
- ▶ Defendants: Preclude its Admissibility
 - Not Evidence of Compliance with the Standard of Care or Admission of Wrongdoing

Preclusion from Evidence

- ▶ Relevancy?
- ▶ Does the Deficiency/Plan of Correction Pertain Directly to the Resident who is the Subject of the Pending Litigation?
- ▶ Prior Bad Acts?
- ▶ Habit/Routine/Practice?
- ▶ Discretionary with the Trial Judge



Always Keep the Future in Mind

- ▶ Be Strategic in your Plan of Correction
- ▶ Can Still Remain Compliant
- ▶ Impact of Unintentionally Admitted Liability in Future Litigation when reporting to the State?
- ▶ Use your Counsel!!
- ▶ Be Strategic in your Actions in Response to Adverse Events
- ▶ Where will that potential witness be in 4-5 years?



QA

Questions?



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