FHCA 2019 Annual Conference & Trade Show

CE Session #6 – Current Legal Issues in Assisted Living Facilities

Monday, August 5 – 8:00 to 9:30 a.m.

Celebration 9-10 – Assisted Living

Upon completion of this presentation, the learner will be able to:

- Review current legal issues in assisted living facilities
- Discuss the legal challenges concerning being a part of decreasing resospitalizations goals
- Define best practices that address legal issues

Seminar Description:

In this session, attendees will learn about legal issues that concern assisted living facilities, which include how the assisted living facility plays a role in the continuum of care to reduce residents returning to the hospital and other legal concerns that can arise.

Presenter Bio(s):

Karen Goldsmith currently serves as Florida Health Care Association's Regulatory Counsel and previously served as the association's Legal Counsel since 1980. She is on the American Health Care Association's Legal Subcommittee and served as its Chair for three years. She is active in the American Health Lawyers Association and served as Chair of their Long Term Care subgroup for two years. She has been published in several books produced by AHLA. She practices primarily in long term care.

CURRENT LEGAL ISSUES IN ASSISTED LIVING FACILITIES

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- Presented by:
  Karen L. Goldsmith
  Goldsmith & Grout, P.A.
  P.O. Box 2011
  Winter Park, Fl 32790
  407.312.4938 (direct and text)
  klgoldsmith@ggfllawfirm.com

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I. Medical Marijuana and CBD Oil

Marijuana

- Illegal under federal law:
  - Treated as a Schedule I drug
  - Means the government does not recognize a medical value
  - Ability to create a "high" in persons is the primary reason
  - If you do not take Medicaid money the risk of the impact may be lower than on a Medicaid facility

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- Under state law medical marijuana is strictly controlled
- Patient must be certified
- Doctor must be authorized to certify need
- Marketing facility must be approved by the state
- If patient cannot administer to self, caregiver must be approved
- Smoking recently approved by the Legislature

- What are your risks as an alf:
  - Federal government not likely to prosecute you for allowing it on your premises, however, this has gone back and forth with federal government
  - Even if prosecutors can prosecute will they?
  - They are really after those illegally selling and distributing the drug
  - Criminal prosecutions not the only risk

- Civil risks also significant:
  - Forfeiture
  - HUD financing
  - Insurance issues – liability
  - Mortgaging through banks
  - Lawsuit for liability relative to injury

- There are synthetic forms:
  - Marinol
  - Cesamet – used to treat nausea and vomiting in cancer patient

  Can alter mental state

- CBD Oil has been in the news lately
  - Hemp derivative
  - Great grandmother arrested at Orlando theme park for possession
  - The 2018 federal Farm Bill recognized hemp as a legal substance
  - It was still illegal in Florida thus the arrest – because included in definition of illegal drugs under Florida criminal statute
  - This year's legislature approved the growing, processing and distribution of hemp products

- What is hemp:
  - Cousin to marijuana
  - If grown properly does not have hallucinogenic effects – low THC
  - Regulations in process to ensure safety and proper growth
  - What is now on market not regulated so at risk of being more marijuana than hemp or have other foreign substances
  - Helps with depression, pain, anxiety and other similar disorders
  - Has been some research but not enough
  - Is ingested or applied topically (CBD Oil)

- While our great grandmother was arrested she was not prosecuted
- Likelihood of prosecution slim
- Still until regulations are passed proceed with caution
- Even when regulations passed it may take some time for approved CBD Oil to be available

Back to Medical Marijuana

Can you prohibit smoking marijuana on your premises even if you allow medical marijuana use?

the likely answer is “yes” because the smoke impacts others

the presence of lighting materials in the facility could be a danger depending on your resident population

- What you should not do regarding medical marijuana in the near future to be safe from governmental issues:
  - Do not distribute or purchase
  - Do not store
  - Do not assist residents in administration
  - Do not grow or allow others to grow on the premise
  - Get advice from your own attorney as to what you should or should not do

- What you should do:
  - If you know resident is using medical marijuana take that into account in your assessment of that resident – for example, if the resident is driving a car but you are concerned of danger take action
  - Give the resident locked container to maintain the medical marijuana
  - Develop policies and procedures
  - Again get specific legal advice from your attorney

- About those policies and procedures:
  - Should address that facility does not handle any marijuana products
  - Make sure your policies and procedures are not written to circumvent the law but to protect your residents (users and non users)
  - The presence of lock boxes to protect other residents
  - Like any medication it cannot be shared with others
  - That residents will report any side effects so you can protect staff and residents

- Finally what about employee use:
  - Division of opinion on this
  - Some labor attorneys says it is medicinal and so long as it does not affect employee safety and job performance not a problem
  - Other attorneys say as long as it is illegal under federal law you can have a policy which does not allow it
  - Insurance companies will want a say in your policy
  - No smoking means no smoking

- Medical Marijuana is a changing landscape and if the federal government makes a decision to treat it other than as a Schedule I drug we will see states take control
- As to CBD Oil the federal government is not directly involved and the state has passed the right legislation. It must go through a process, which includes federal approval of the regs, but we will soon be able to safely purchase and use CBD Oil and other hemp derivatives

II. The Role of the Administrator on Admission and Continuing Stay

- In the continuum of care, we expect to see sicker residents moving to assisted living
- As this occurs, rehospitalization will take on new significance
- Likely, many residents will go from the hospital to the alf
- This will place a heavy burden on the assisted living facility to assess residents before admission

- By law it is the role of the administrator (or owner) of an assisted living facility to review incoming residents and to monitor their condition to determine if continuing stay is appropriate
- What is this based on:
  - An assessment of the strengths, needs and preferences of the resident
  - The care and services offered or arranged by the facility in accordance with the **facility's policies**
  - Facility's admission policies
  - Facility's ability to meet fire safety standards
  - A medical practitioner with no interest in the facility must do an initial examination

- Must have monthly nursing assessments by those receiving nursing services who shall document assessment including substantial changes in status which may necessitate relocation to a nursing home
- 60 or 60+ day examination required
- Licensed physician must be notified within 30 days when resident shows signs of dementia, mental impairment or change in condition

- Terminally ill resident:
  - Who no longer meets criteria
  - May remain if mutually agree (resident and facility)
  - Licensed hospice renders care
  - Resident's physician agrees that physical needs are being met
  - Presence of hospice does not give any authority for facility staff to act beyond the scope of the facility's license

- Facilities with ECC license must determine appropriateness of the resident's placement based on:
  - Comprehensive review of the resident's physical and functional status
  - Ability of facility in conjunction with family, friends or others and agencies to provide care
  - Documentation that a written service plan consistent with facility's policies is prepared and implemented to ensure resident's needs are met

- Role of the Administrator vis a vis property of the resident:
  - May not act as guardian, trustee, or conservator of resident's property
  - Guardian is appointed by a court
  - Trustee requires that their be an underlying trust
  - Conservator is appointed by a court to handle only financial affairs
  - Can be resident's payee on social security if competent resident agrees
  - Facility must file a surety bond if administrator (or others employed by facility) are representative payees
  - Can be POA but must give monthly report to resident
  - This runs to all representatives of the facility
  - Doesn't affect facility having resident trust funds

- Administrator must maintain accurate business records
- Must maintain personnel records:
  - Background screening
  - Proof of training
  - Licenses or certifications
  - Application
  - References
  - Record that employee free from signs and symptoms of communicable disease

- Job Description
- Proof of participation in elopement drills
- Not necessary for outside contract staff but must have copy of contract
- Must keep schedules and timesheets for 6 months – not necessary to be in employee file

III. Discharging a Resident

- Contractual Agreement important
- Must comply with regulations and statute
- Resident rights require 45 days notice of relocation or termination unless, for medical reasons, resident certified by a physician to require an emergency relocation to a facility providing a more skilled level of care of conduct that is harmful or offensive to other residents
- If adjudicated incapacitated guardian will be given 45 days notice of nonemergency
- Reasons must be set forth in writing

- To terminate without notice must show good cause in a court of competent jurisdiction

- Must maintain discharge log:
  - Date of discharge
  - Reason
  - Where discharged to if home or facility
  - Not required to be on log if intent to return

- In ECC must discharge if:
  - Can't agree on a service plan
  - Facility can't meet resident's needs
  - Or if resident no longer meets the criteria for continued stay

IV. Environment

The purpose of the assisted living laws are to promote the availability of appropriate services for elderly persons and disabled adults and to provide for the health, **safety** and welfare of residents of assisted living facilities.

Safety starts with a safe environment

ALF's should be operated as "residential environments with supportive services and not as … nursing facilities."

- Safe environment starts with an assessment of your facility:
  - Who are your residents?
  - How much staff do you have to care for them?
  - How is your building set up?
  - Where are your danger zones?
  - What are you doing to protect residents from those danger zones?
  - What more can you do?
  - Is there something you can do to your environment to encourage resident independence while keeping them safe?

- Concept of managed risk:
  - Recognized in statute
  - Means the process by which facility staff discuss the service plan and need of the resident
  - Included discussion of consequences of a decision
  - Includes inherent risk
  - Reviewed periodically in conjunction with the service plan
  - Takes into account resident's status and how facility will respond
  - Physical environment often plays a significant role

- Managed Risk is not:
  - An opportunity to practice a laissez faire attitude toward residents
  - Does not get facility off the hook regarding liability
  - Does not relieve staff of having to be diligent about protecting residents from dangers such as slippery floors

- Environment includes:
  - Your building
  - The resident's private space
  - The common areas
  - Weather
  - Intruders
  - The area around you
  - The neighborhood

- Security:
  - The level of security you have will vary based upon your facility and the residents you serve
  - Security should make residents feel safe but independent
  - Often facilities have no idea about the effectiveness of their security system until it fails
  - Security cameras can be used in common areas but signage should indicate that they are in use
  - Audio is generally not permissible in living areas
  - Granny cams in rooms are by mutual agreement of the facility and the resident

- Modern technology:
  - Has made the granny cam practically obsolete
  - At any time a resident may have a gadget such as Alexa turned on and running
  - Telephone cameras are always a potential for trouble
  - Social media in general is problematic

- What can you do?
  - Have a policy on picture taking of residents by staff and always require written permission – remember placing an unflattering or embarrassing picture of an elderly or disabled person on social media can be resident abuse
  - As the provider you are responsible for abuse by your staff
  - Relative and friends of residents may want to take pictures and residents have the right to refuse
  - You should not allow anyone to take pictures of residents in the common areas without that resident's permission – not only staff can be responsible for resident abuse

- While it may be hard to prevent residents from having "Alexa's" in their rooms or apartments you should have a policy that you are made aware of them and they are visible to staff who may be working with the resident or in the resident's room
- Staff have rights too

- How much security do you need?
  - Again that depends on all the outside factors mentioned previously
  - If you are in a neighborhood with identified crime you will need more than if you are not
  - If a crackhouse has moved in next store you will need more
  - If you take on the role of security you must do whatever is reasonable given your circumstances
  - Do not advertise more than you can give
  - If you have lights around the perimeter you must be sure they are maintained

- Active Shooter
  - While not required it is a good idea for your staff to have active shooter training
  - There are many police departments that will come into your facility and perform this training
  - There are video programs
  - An active shooter program should be part of your emergency training program

- Liability for the environment:
  - There are four elements of negligence:
    - A duty
    - A breach of that duty
    - A causal relationship between the duty and the incident
    - Harm that results – may be physical or psychological

- Duty
  - You are caring for vulnerable adults and disabled persons
  - If they could, they would still be in their own homes so most have some form of disability which makes them vulnerable
  - When you assess a new resident or a change in an existing resident you are establishing the needs of that resident for protection
  - If you can't protect them then they may be inappropriately placed
  - You don't guarantee that nothing will happen to them but that you will take reasonable steps to protect them

- Breaching that Duty:
  - For example, staff does not lock the front door and an intruder comes in at midnight
  - It would be prudent and logical to lock doors at night so this may be a breach of the duty to lock the door.
  - What amounts to a breach also is based on the assessment of your facilty and residents

- Causation:
  - There must be a nexus between the breach of the duty and the injury
  - Without a nexus there is no liability on the facility

- Harm
  - There must be harm
  - In some cases, emotional harm is sufficient
  - Usually however there has to be physical or psychological harm
  - Damages range from minimal to punitive depending on the harm and the degree of causation

V. Elopement

- Related to environment is the idea of elopement
- Elopement is defined in the regulations as an occurrence in which a resident leaves a facility without following facility policy and procedure
- So we start with the concept of policies and procedures

- Always remember that a policy and/or procedure can create a deficiency in the survey process even when the policy puts requirements on you that are above and beyond the regulation
- Why is this? Likely because you have assessed your facility and the needs of the resident's you serve and determined that the policy as you have written it is necessary to meet their needs

- On the other hand, you cannot used your policies and procedures to protect you from your own liability
- They are required

- Know your building's weaknesses - what areas provide a potential for elopement or harm:
  - Windows that residents can fall or climb out of
  - Receptionist area
  - Areas where families come and go
  - Where staff members smoke or go outside to use their phones
  - Where a lot of activity occurs
  - Where construction or other activity may attract a resident

- If you have a personal alarm system make sure your staff knows not to turn the alarms or alarm readers or face discipline
- Place alarms on all doors – even a single door negates the effectiveness of the system
- If you have a door you cannot monitor with an alarm staff should monitor it
- Visitors should understand the significance of the alarm system and alert someone if they are taking a resident outside the system
- All staff should be required to look around even if they think it is a false alarm

- Alarm systems should be properly maintained and know their quirks:
  - Some have batteries that run out faster if exposed to certain devices, materials or chemicals
  - Some systems only read at a particular height and the resident must wear the monitor at that height
  - Some will not work if on the wheelchair or shielded by an item like a purse
  - Alarm systems are one element of an effective system not the whole system
  - Must know the manufacturer's recommendation for maintenance

- Best Practices:
- Are not required but have been helpful to others
- Make sure you have an all inclusive training program and train all employees, volunteers and where you can outside contractors
- Maintenance schedules should be followed carefully and kept in a prominent place
- Staff beyond just the maintenance person should know how system works so that they can recognize issues between scheduled maintenance

- Make families and frequent visitors aware of the quirks of your system and your policies and procedures
- Have a system in place for generally knowing where your residents are at all times
- Give copy of your elopement response plan to volunteers who are in your facility

- Some things to put in your policies and procedures:
  - Written
  - Address response to resident elopement unique to your facility and your residents
  - Require immediate search of the facility and premises
  - Identify staff responsible for each part of the response plan including specific duties and responsibilities
  - Identify who calls law enforcement, the resident's family, legal representative and case manager, if applicable
  - How other residents will receive care in the event of an elopement

- Elopement drills at least 2 a year and how they will be conducted
- Sign out procedures – be cautious – look at definition of elopement
- What will you do if the resident doesn't follow these procedures

- Ideas to assist you in developing your plans:
  - Are you near a busy highway
  - Is there construction nearby
  - Is there a temptation across a busy highway that might attract a resident
  - Is the terrain rough
  - Are there water features
  - What is fenced
  - What else should be fenced
  - Is the fence itself a hazard

- Your population
  - What are their habits which might cause them to elope
  - What is their cognitive ability to recognize and react to danger
  - Have they exhibited exit-seeking behavior
  - Are they crafty and quick to develop exit plans

- Some ideas to help your in developing your response plan:
  - Identify significant areas of danger and assign someone to go there
  - Thoroughly search the grounds including stairwells, locked closets and any hideaways that a resident might locate
  - Do a sweep of residents rooms to see if her went in the wrong room to nap
  - Contact family and visitors early on
  - Quickly determine last known location and who saw him there
  - What was resident wearing
  - Ask other residents if they saw him
  - Had resident said anything to anyone about wanting to leave
  - Check security cameras if you have them

VI. Drug Diversion

FHCA has a webinar on line which goes into a great deal of information on this subject. This is a recap of much of that information

Drug diversion is a timely topic because it is growing at lightning speed and nurses and others are getting very clever about how they do this

Although med pass is much different in ALF than in hospital or nursing home, residents take many of the same medications and the safeguards for drugs not as extensive

- Drugs that are prone to being diverted:
- Hydrocodone (Vicodin, Lortab, Lorcet)
- Oxycodone
- Percocet, Percodan, Tylox
- Oxycontin
- Acetaminophen with Codeine
- Diazepam (Valium)

- Carisoprodol (Soma)
- Morphine (MS Contin)
- Alprazolam (Xanax)
- Meperidine (Demerol)
- Methylphenidate (Ritalin)
- Hydromorphone (Dilaudid)

- Should have policies and procedures for:
  - Storing drugs
  - Storing drugs in residents' rooms
  - If your facility administers medications how they are administered
  - Record keeping re drugs
  - Counting drugs
  - Destroying or otherwise getting rid of outdated or discontinued drugs

- What to do is you suspect a drug diversion:
  - Review facility policy and follow it if it is comprehensive
  - If no specific policy as to what to do go to your supervisor
  - If you are the administrator you will need to take command
  - If you are not the administrator get instructions as to how to proceed
  - If you are a licensed professional or a certified nursing aide you will need to file a report with the Board of Nursing if you know who the culprit is

- If a particular person is suspected:
  - Suspend that person immediately or as soon as practicable
  - If there is a suspicion of abuse, neglect or exploitation (Stealing a resident's drugs for example) report it to DCF
  - Contact your HR Department if you have one
  - Conduct a focused audit of drugs and drug records, beginning with those related to that person

- Meanwhile ensure that the resident involved is watched for signs related to missing their drug and ensure that the drug is available to them
- Determine if the drug diversion resulted in an adverse incident and, if so, file the report

- If you confirm a drug diversion notify at least the following:
  - Law enforcement
  - If you have a pharmacy or pharmacy consultant notify them
  - Notify the resident or their representative
  - Possibly the Agency for Health Care Administration if the facts warrant it
  - DCF if it amounts to an allegation of a,n,e

- Board of Nursing should be contacted if there is knowledge of a violation
- If you have a high suspicion you might also report it
- Whenever you report do not give your opinion – tell them the facts which support your belief
- Recognize that some nurse are in the program for impaired nurses so their counselor should be contacted

- ALF in unique position for drug diversion – you are an easier mark
  - Many residents control their drugs – but if they have narcotics make sure they are safeguarded
  - Need to be made aware of the dangers of leaving drugs where they can be taken by others
  - Residents should be encouraged to report to management if they suspect a drug diversion
  - With medical marijuana the risk for diversion can be significant because of the various means of delivery of the medication

- Counting narcotics
  - Not required in alf's
  - Doesn't mean you can't do it
  - Should be done with the same formalities as in a nursing home – 2 counting together and both signing off
  - Discrepancies should be reported immediately and promptly investigated

- Another difficulty in alf:
  - Resident or family may supply drugs
  - If so, they should be counted to ensure an adequate supply is available and to be sure there is no diversion – better to know up front if there is a potential that a family member diverted the drug rather than finding out later and looking for a staff member
  - If you can get blister packs that is better but not always available
  - Residents who administer their own medications should advise if they took more or less than prescribed

- Hints to avoid diversion:
  - Have strong policies which will deter diversion
  - Follow them
  - Frequently monitor or audit the drug process so when a problem arises you find out fast
  - Fully report any suspected or confirmed diversion
  - Facility's Code of Conduct should spell out exactly what happens if a person is suspected of diversion and/or it is confirmed
  - Be consistent in imposing discipline

- Education is critical:
  - If staff doesn't know policies and procedures they will not follow them
  - Staff should be aware of the latest methods of diversion and how to avoid them
  - They should be aware of the reporting requirements
  - They should know what symptoms to look for in the residents if they have not taken their medications

- Staff should be aware of the signs of drug usage in their fellow staff members
- Some are:
  - Deteriorating personal hygiene
  - Changes in language patterns or slurring words
  - Multiple physical complaints
  - Tremors/shakes
  - Changes in skin
  - Changes in weight
  - Constricted pupils

- Unsteady gait
- Diaphoresis
- Runny nose with no cold symptoms
- Suddenly accident prone
- Emotional or mental change
- Inappropriate responses
- Decline in alertness
- Falling asleep on the job
- Confusion/memory loss

- Withdrawl or isolation
- Wearing long sleeve all of a sudden
- Poor work quality
- Spending more time on med pass
- Spending time in resident's room who has medications available
- Suddenly wanting to be involved in medication pass or assistance
- Any thing unusual about that person's appearance or behavior
- Poor recordkeeping
- Tardiness/absenteesim
- Request for unusual schedule change
- Chemical smell on breath

- This presentation is for general use only and is not specific legal advice. Ideas and best practices are not necessarily required by law but are a compilation of things that have worked for others.