



Role Of Policies And Procedures

Plaintiffs' attorneys are incorrectly attempting to repurpose nursing facilities' policies and procedures into the standard of care.

IT'S SIMPLE, REALLY—HE WHO WRITES the rules, wins! If a lawyer wants to claim someone did something wrong, he or she will define “wrong” in as many narrow, technical, and rigid ways as possible. That’s what plaintiffs’ attorneys are doing in nursing facility cases when they try to turn lengthy, detailed standard policies and procedures into the “standard of care.” It’s wrong on the law, it’s wrong on the facts, and it’s just plain wrong.

Guidelines, Not Gospel

The definition of standard of care is too broad and too flexible to make plaintiff lawyers’ lives easy, so they are searching for other things to replace it. And they look longingly at those thick, detailed policies and procedures manuals. It even seems logical at first glance that a nursing facility’s clinical policies and procedures be the same thing as the standard of care. However, the reality is that nursing facility policies and procedures are entirely separate from that standard. They are guidelines, not gospel.

The true standard of care, to the extent judges or juries are willing to follow it, is extraordinarily broad and general, and rightfully so. The majority of jurisdictions define the standard of care simply as that degree of care and skill expected of a reasonably competent nursing facility acting under the same or similar circumstances.

This concept should be distilled down so that every caregiver in a long term care setting, including registered nurses, licensed practical nurses, and certified nurse assistants, can under-

stand the concept. A good, concise definition is “reasonable care under the circumstances.” A minority of jurisdictions use a similar but modified definition for standard of care: the degree of care and skill expected of a reasonably competent nursing facility in that jurisdiction or in a similar locality.

■ The court said that it was improper to rely on such regulations.

Plaintiffs’ attorneys do not and cannot presume to set the standard of care, because that standard by its nature is not fixed and written. It is fluid, depending on all the circumstances. Good health care is not mechanical or rigid, and good health care providers are not robots carrying out processes. The bottom line is simple: No policy or procedure ever cared for a patient or is a substitute for a clinician’s judgment.

Case Law Backs It Up

There is surprisingly little existing law on this, and what there is focuses more on government regulations than facility policies and procedures. But that may be a helpful analogy.

In *Makas vs. Hillhaven* (1984), the plaintiff’s theory of liability was negligence *per se* based on the facility’s failure to comply with the North Carolina Nursing Home Patients’ Bill of Rights. The plaintiff contended that the law established the minimum stan-

dard of care. But the court held that “to hold that the Nursing Home Patients’ Bill of Rights sets the standard to which nursing homes are held accountable in negligence damage actions would ignore the purpose of the negligence *per se* doctrine and the malpractice law of this state. It would permit the trier of fact to set its own standard of care for health care providers and speculate virtually without limits on the culpability of their conduct.”

In *Banger vs. Magnolia* (2002), the court noted that the plaintiffs argued that the defendant administrator held duties arising out of federal and/or state nursing facility regulations. The court said that it was improper for the plaintiffs to rely on such regulations to create a cause of action where none existed—“such regulations exist to provide guidelines and procedures, not to create a legal standard of care for purposes of creating civil litigation.”

Reviewing Is Important

The first thing nursing facilities need to do is to get serious about regularly auditing and reviewing their policies and procedures. Make sure they are current, flexible, and realistic. At the same time, be sure to make clear what they are and are not. Long term care facili-

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ties should, at a minimum, utilize an omnibus provision at the front of their policies and procedures manuals explicitly stating that the protocols, policies, and procedures are not intended as a statement of the minimum standard of care and that the health care providers may, at their own discretion, vary from the policies and procedures set forth in the manual.

The following preamble is a good

example of how to accomplish this preemptive strategy as a statement of purpose: "These procedures are offered as a resource for use by the staff at the facilities as they attempt to determine how best to achieve the goal of providing each resident with appropriate health care. They are not intended to replace the informed judgment and professional discretion of individual nurses, physicians, and other clinicians.

They are not intended as a statement of the minimum standard of care applicable to the assessment or treatment of any particular condition. They are not intended to supersede the standards of practice prevailing in the community in which the facility is located. They are not intended as a statement of a mandatory policy.

"These procedures are one of many available resources, chief among which

Addressing Policies And Procedures In Litigation

During a deposition, the plaintiff's counsel will attempt to obtain admissions from nursing facility employees that the facilities' policies and procedures and/or applicable state and federal regulations establish the minimum standards of care. Following are some typical deposition questions and how to respond:

1. Question: You would agree that the policies and procedures in place at your facility were supposed to constitute at least the minimum standard of care with regard to the topics addressed in each?

Answer: No.

Discussion: Policies and procedures are merely guidance and do not establish the minimum standard of care. It is not possible for policies and procedures to encompass all clinical scenarios, and the clinicians must have the flexibility to exercise their clinical judgment on how to care for each resident depending on the circumstances. Even more pointed questions addressing whether specific acts or omissions constitute a breach of the standard of care can be deflected by the caregiver/deponent by responding that it is not possible to answer the hypothetical because it "depends upon the circumstances."

Under no circumstances should a nursing facility employee agree that

policies and procedures set the standard of care.

2. Question: You would certainly agree that you were expected to provide care that was consistent with the nursing facility regulations in your state?

Answer: The state regulations do not establish the minimum standard of care.

Discussion: State and federal regulations say nothing about the specific care that is required to meet the minimum standard of care in any given situation.

3. Question: In keeping with the regulatory requirement for complete and accurate documentation in your state, you would agree that if there is not complete and adequate documentation that that is a breach of the standard of care?

Answer: No.

Discussion: Again, state and federal regulations do not establish the minimum standard of care. More importantly, documentation is not the provision of care to a resident.

No document or piece of paper has ever provided wound care, changed a dressing, administered medications, or performed any clinical service in a nursing facility setting. Documentation is an after-the-fact record of some of the things that may have

transpired with respect to a particular resident. It is common to hear directors of nursing state that many of their best clinicians are their worst record keepers, because they are more focused on providing patient care.

4. Question: You would agree with the federal regulation that based on the comprehensive assessment of a resident, your facility must ensure that a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable?

Answer: I would agree that a facility should use reasonable care to try to prevent the development of pressure sores, although that is not possible in many circumstances. We are in the striving business, not the "ensuring" business.

Discussion: This provision in the federal regulation is not a statement of the standard of care. Rather, it suggests that the facility is a guarantor of the patient's outcome. The common law in most jurisdictions clearly states that a health care provider is not a guarantor of the patient's outcome. A facility is only required to exercise reasonable care under the circumstance. Thus, there are many frail and debilitated nursing facility residents that can and will develop pressure sores despite appropriate care.

is the individual clinician's own training, experience, and judgment that may be considered in the assessment and treatment of the needs of each resident.

"Facilities and health care providers may, in their own practice, vary from the policies and procedures set forth in this manual. In some instances, the standards of practice in the local community or the informed judgment of the individual clinician may warrant a method, technique, or frequency of assessment or treatment other than what is suggested in this manual.

"Even when facilities undertake to follow the procedures set forth in this manual, the unique circumstances and needs of each resident and the vary-

■ **Make sure policies and procedures are current, flexible, and realistic.**

ing demands on the time, attention and skill of each member of the facility staff may not, despite the exercise of reasonable diligence and skill, permit the facility or any given member of the staff to follow these procedures with perfection. The procedures set forth in this manual offer suggested methods and techniques for achieving optimal health care, not a minimum standard below which residents necessarily would be placed at risk."

Educate Staff

When staff are trained on policies and procedures, is the nature and role of such policies and procedures being adequately explained? Granted, this is a tough challenge, because although they are not the gospel for the provision of care, they may play an important role in training and discipline. Therefore, educating staff on policies and procedures needs to strike a difficult balance.

Plaintiff's lawyers love to talk about caregivers "violating" the policies and procedures, much like one might violate the speed limit. But that is a misnomer. One cannot violate a guideline—one can choose to follow it or not. Clinical policies and procedures are a resource, not hard and fast rules.

If they are helpful fine, but if not, it is the caregiver's judgment and experience that prevail.

Every witness in a long term care case needs to understand that policies and procedures are not the standard of care, and they should not allow plaintiffs to pursue that distortion. ■

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