REDUCE LAWSUIT RISK
A QAPI Approach for Long-Term Care

Carol Marshall, MA
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Foreword

In my legal practice, I focus primarily on postacute care and senior living. I am general counsel to LeadingAge Texas and LeadingAge Kansas, statewide trade associations comprised of senior services providers. But I represent other healthcare provider types as well, and because of this I know that the challenges in aging services rival or exceed those faced in any area of healthcare. These challenges include an unmatched intensity of government oversight that includes frequent, unannounced surveys, aggressive billing scrutiny, and the seemingly constant addition of new regulatory requirements. And regulators are not the only ones looking over providers’ shoulders. Family members, understandably emotional and concerned for their loved ones, often intervene in a counterproductive manner, with some taking an adversarial approach from the beginning. These factors, combined with a few highly publicized instances of egregious provider conduct, trial attorneys eager to exploit emotional turmoil, and the realities of aging—frail residents will decline and get hurt, with or without intervention—create an ever-present lawsuit risk.

Fortunately, many of my clients have access to Carol Marshall’s consulting services, enabling them to better navigate this risk-filled environment. Carol utilizes her extensive background as a healthcare professional and as a manager of other professionals to inform her approach to risk management consulting. Carol’s clients benefit from her vast knowledge, composure, attention to detail, and constant monitoring of developments in the field.

I have the ongoing opportunity to see Carol’s impact first-hand. For the past four years, the author and I have had the pleasure of serving a self-insurance pool comprised of some of the best long-term care and senior housing providers in the country. These providers have a stellar track record of avoiding lawsuits, thereby saving millions of dollars to put toward improving care instead of paying high insurance premiums and lawsuit settlements. Carol and her company deserve a lot of credit for the self-insurance pool’s success.

I have also been able to see the added value Carol provides; along with avoiding lawsuits, she helps communities establish processes and procedures that make operations run smoothly, improve regulatory compliance, and reduce exposure in billing. Now you too can benefit from Carol’s expertise by reading this book and implementing her suggestions and processes.
Foreword

I am awed by the perseverance and dedication of my long-term care and senior living clients, and I know Carol is as well. We share a profound respect for the individuals and organizations that care for our seniors. Because of this, I hope you and your organizations will take full advantage of this opportunity and utilize the tools presented in this book.

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Introduction

When a facility loses a lawsuit, it doesn’t get paid by raising its Medicare or Medicaid rates. Funds to defend and settle a lawsuit must be paid by insurance, and if the lawsuit exceeds the limits of the liability policy, the funds are taken from the profit of the facility. The final result is less equipment, fewer staff, lower-quality food, and unimagined budget cutting. The only winners in a lawsuit are the lawyers who handle the claim.

Some states are hotbeds for lawsuits against long-term care providers, while other states have seen a gradual decline due to medical malpractice caps. In recent months, states have seen the caps expand to address cost-of-living increases, while still other states are repealing medical malpractice caps altogether.

The ultimate goal for long-term care providers is to operate sufficiently so that no one thinks to phone an attorney or governmental agency to report an adverse event.

Simply put, the risk of lawsuits can be reduced if the facility builds a partnership with residents, families, and staff. By removing the idea that a resident is a “recipient” of facility services and replacing it with a true partnership, a lasting relationship supersedes the desire to sue. Facility leaders, direct care staff, therapists, social workers, nurses, and business office managers are at risk for lawsuits, not only because of the conduct of the facility as a whole, but because they are being held personally liable for unethical and illegal activities. Whether or not the allegations are founded, the expense of defending against claims is an expensive proposition. The goal is for the facility and its staff to never have to hire an attorney to defend against an allegation.

The purpose of this book is to provide tools and approaches that will guide long-term care providers to open lines of communication and build trust between staff, residents, and families. The techniques and philosophy of reducing lawsuit risk found in this book are designed to be used as springboards for ideas to strengthen the workings that make a good facility great. None of the approaches in this book should be construed as legal advice or proof that lawsuits are preventable. As long as there are attorneys, and as long as there is financial gain to be made from lawsuits, litigation will continue to be on the forefront of long-term care providers. This book is intended to offer ideas that when implemented may prevent a family member or employee from ever contacting an attorney to begin the lawsuit process.
Chapter 1

Attorney-Client Privilege

Attorney-client privilege is the relationship between a client (the facility or its staff) and his or her attorney. The relationship protects certain information from being revealed to opposing attorneys. Attorney-client privilege protects the client’s privilege to refuse to disclose information, and it prevents others from disclosing information that is confidential between the client and the attorney. The information must meet certain requirements. The information must be established as a communication intended for the attorney and for the purpose of obtaining legal advice or assistance. The privilege protects the client from being forced to reveal certain information. Attorney-client privilege also protects the attorney from being required to disclose information from the client. This privilege is designed to create a method for clients to be able to openly and honestly communicate with attorneys. Without this protection, clients would be restricted when seeking advice. Attorneys require this privilege to effectively advise and defend a client.

There are some very specific steps that need to be considered to establish this privilege. These steps include:

1. Documents presented to the attorney must be marked for privilege.
2. Emails may not be protected. Emails between individuals are not protected and can be used as evidence. When sending emails to an attorney with a CC to other recipients, it may break the privilege and become discoverable. Confirm with attorneys the proper way to protect emails intended to apply attorney-client privilege. There are specific steps that must be in place for emails between a client and the attorney. All those communications must contain protections indicated in the email message. Email messages that are forwarded throughout the corporation can inadvertently interrupt the privilege. It is important to understand that by moving information from between the attorney and the client, there is a risk of losing attorney-client privilege. Always consult with legal counsel to determine who can receive forwarded messages from the attorney.
3. Privilege may be lost if private conversations between the attorney and the client are revealed to individuals unrelated to the case. Clients must be very careful not to share conversations conducted in confidence with an attorney.
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It is important to consult with legal counsel to ensure compliance with attorney-client privilege. There are some specific steps facilities must consider when establishing and maintaining attorney-client privilege. They are:

1. Mark documents intended for the express use by the attorney. Clearly label documents as “attorney-client privilege.” Additionally, as an extra safeguard, indicate who is authorized to receive them. “Attorney-client privilege asserted for express use by corporate legal counsel.” Caution: Placing the privilege statement on documents not intended to be used as legal documents may negate the protection of the document.

2. Obtain written confirmation from individuals who have cause to communicate with the attorney. If a nurse is part of an action and needs to receive information pertaining to the suit, issue a written confidentiality statement that requires the nurse to adhere to privilege protections. It is essential to instill confidentiality with all who are participating as witnesses or defendants. Revealing confidential information may damage the defense.

3. Designate who is included in the action and who needs to know as part of the corporate responsibility. Top executives of the corporation should be informed every step of the way along the lawsuit proceedings. Usually, executives are included in the privilege protection, but they may not disclose information to parties who are outside of the privilege.

4. Separate documents and keep them in a secured location. Separate documents that are attorney-client privilege protected from non-protected documents. Keep the documents in a secured location that restricts access. Only those who are a party to the suit should have access to protected documents.

5. Use caution when faxing and emailing. Inadvertently sending an email or fax to the wrong email address or fax number may risk privilege. The recipient that is not protected by privilege, who does not understand the strict nondisclosure rules, may breach the confidentiality. It is best to mark emails and faxes as privileged and confidential.

6. Refrain from referring to the conversation conducted with attorneys. Innocently stating, “Our attorneys told us …” and other such statements may waive the privilege and entitle the opposition to inquire into the advice from the attorney. Restrict all communications to those protected under the confidential attorney-client privilege.

What Constitutes Privilege?

- Jim sends a memo to all of the nurses regarding facts surrounding the care provided to the resident who is suing. He asks anyone who has knowledge surrounding the adverse event to come to the office. Communications must be confidential for privilege to apply.
  - This memo is not protected under attorney-client privilege.

- A memo is sent to the director of nursing (DON) from the administrator with a copy to the attorney asking for facts surrounding the circumstances related to the care for the resident who is suing. Communications must be confidential for privilege to apply.
  - This memo may be protected, because both the administrator and the DON are in a
Attorney-Client Privilege

relationship with the attorney under attorney-client privilege. Both the administrator and the DON are required to be informed regarding the facts of the case.

- The administrator meets with the attorney to discuss specific facts regarding the lawsuit. Later in the day, he has lunch with the admission coordinator to discuss census. The topic of the lawsuit finds its way into the lunch conversation. The administrator tells the admission coordinator what the attorney told him during the meeting earlier in the day.

- The administrator violated confidentiality by discussing the meeting with the attorney, because the admissions coordinator is not party to the suit. As a result, the conversation can be admitted as evidence during the trial. The admissions coordinator can be called to testify regarding the conversation with the administrator.

Medical records are not, in and of themselves, considered attorney-client privilege-protected documents. If the resident’s record is part of the suit, the record cannot be protected from being part of the proceedings. That means all of the notes, reports, errors, and omissions are subject to scrutiny by a judge and jury. Marking a resident’s record as attorney-client privilege does not protect them. To be protected, the document must pass from one individual to another for the purpose of legal advice; the medical record has multiple staff contributing to it, reading it, and relying on it on a daily basis.

Incident Reports

The incident report is prepared per facility policy. It accurately records what happened, employees’ names, witnesses, causes, and prevention approaches to reduce the risk of recurrence. Three years later, the facility receives notice of a lawsuit, and it centers around the injury reported on the incident report. During discovery, the plaintiff’s attorney requests the incident report.

Is the incident report protected from discovery? It depends on several factors. You should always contact your attorney before responding to any plaintiff attorney demands. A defense attorney has various tools that can be used in an attempt to protect the incident report from being used against the facility. The defense attorney can petition the court to protect the documents, file motions, and use any number of filings to assist the facility.

There are times when the incident report will benefit the defense. Under those circumstances, the facility will want to use it as a defense approach. It might contain information that will be beneficial when the jury weighs evidence. For example, a staff member has written that when she contacted the daughter, she stated, “Thank you for calling. I know she wants to get up without staff help. She can be pretty stubborn at times.” The defense attorney might be able to use a statement such as this to prove the family knew the resident did not request help from staff before trying to get out of bed.

It is always important to share the incident report with the corporate attorney before complying with any plaintiff attorney request. Simply respond to the plaintiff’s request by forwarding the
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request to the corporate attorney. Then DO NOTHING until instructed to do so by the corporate attorney. Once a document is turned over to the plaintiff’s attorney, it is too late to assert confidentiality and attorney-client privilege.

What is on the blank report?

Blank reports that do not contain language indicating they are confidential, or not part of the medical record, may have a more difficult time being protected from discovery. Placing a phrase such as “CONFIDENTIAL. NOT PART OF THE MEDICAL RECORD. FOR INTERNAL USE ONLY. DO NOT PHOTOCOPY.” may strengthen your position when trying to protect the document from discovery and asserting confidentiality. Incident reports that do not contain a privacy statement have little or no protection.

Even with a confidentiality statement on the form, a court may rule that the incident report is discoverable because it was not provided by an insurer, not necessarily forwarded to an attorney or insurer, and not necessarily prepared for the purpose of defending against a lawsuit. The decision of whether the incident report is protected depends on the intended use of the report at the time it was constructed. If the incident report is used primarily to chronicle an adverse event so the facility can track, trend, and prevent similar events, it may be ruled by the court not to be under attorney-client privilege. States have individual discovery laws regarding incident reports; always consult with legal counsel.

Communicating the Event to the Attorney

If the incident report is not protected, there are still steps the facility should take to start the attorney-client privilege. These steps include:

1. If an incident happens to a resident that has a very contentious family, create a separate report and forward it to the attorney on the day of the incident or as soon as possible. When families are a threat to the facility, it is necessary to start and maintain ongoing information to the attorney on a regular basis. If the incident report is open to discovery, be sure to audit the report for content, blame, opinion, and guilt. Incident reports should be observational only. Outside of the incident report, compile a detailed report for the attorney detailing the incident, separate from the incident report. File the facility’s copy of the report and mark it as attorney-client privilege. It is better to have it and not need it than to neglect to document it and have regrets.

2. Any serious injury or egregious act. No matter the relationship with the family, any time a resident sustains a serious injury, such as a fracture or serious head injury, send a detailed report to the corporation’s attorney. Even though the incident report details the circumstances surrounding the injury, starting the attorney-client privilege is necessary in the event the family files suit.

3. Anytime a family threatens to sue. Relationships can become contentious at any time. No matter what circumstances surround a threat to sue, it is imperative to write a report to the
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corporate attorney surrounding the conversation. Even if it is an empty threat, and the family
doesn’t ultimately sue, it is best practice to start the protection at the time of the threat. There
may be some documents that can be forwarded to the attorney at the initiation of the contact
that will preserve some information from discovery.

No matter the initiation, the progress of a suit, or the threat of a suit, using attorney-client privilege
is a legal structure that must be managed carefully. You should always consult with an attorney
before turning any documents over to a plaintiff’s attorney.
There are many common situations that leave a nursing home at risk for a lawsuit: falls, skin issues, and family relations, just to name a few. *Reduce Lawsuit Risk: A QAPI Approach for Long-Term Care* will take a deep dive into implementing Quality Assurance and Performance Improvement (QAPI) processes to help reduce situations like these and lower your chances of litigation. This book explains QAPI best practices for gathering data to conduct a root cause analysis of any situation. It also shows you how to take the developments of a compliance committee meeting and effectively implement QAPI procedures.

In addition, this manual provides education and training resources for staff educators to ensure that all nursing staff know how to assess and resolve an impending or existing lawsuit situation.

**This book provides:**
- An overview of QAPI and effective methods to implement it throughout a facility in order to reduce lawsuit situations
- Analyses of the main areas where long-term care facilities are at risk for a lawsuit
- Information on how to assess and resolve a potential lawsuit situation
- Staff education resources and training tools

**ABOUT THE AUTHOR**

Carol Marshall, MA, is a risk management specialist based in Fort Worth, Texas. For the past 18 years, she has trained managers and staff members in long-term care facilities across the country about the benefits of exceptional customer service and risk management. She has offered training programs at numerous state conferences, professional groups, and individual facilities.