

LTC PROFESSIONAL

NEWS AND VIEWS YOU CAN REALLY USE



THE ADELMAN ADVANTAGE

by Rebecca Adelman

Preservation of Evidence: You Gotta Know When to Hold ‘Em

Best Practices for Litigation Hold Policies – Part 2

In an upcoming article, we will review the Patient Protection and Affordable Care Act (the “PPACA”) and the far-reaching implications for long-term care facilities. The article will highlight particularly the sections “Nursing Home Transparency and Improvement” (“Transparency Act”) and the “Elder Justice Act” (“EJA”) and one of the most significant features of the EJA which imposes notification and reporting requirements on individuals affiliated with a nursing home. Both of these reform Acts contain mandates regarding production of information and records retention. Thus, establishing best practices for Litigation Hold Policies is more relevant and critical than ever before. In Part 1 of this series we defined the terms and litigation hold scope and the need to preserve evidence through a well-designed and implemented “Litigation Hold Policy” as a legal hold is required whenever an organization has a duty to preserve documents and electronically stored information (ESI). Part 2 will provide guidelines for best practices for your Litigation Hold Policy.

Consider the priorities outlined as well as the guidelines. Keep in mind these are guidelines, not standards, and the priorities and guidelines must be understood in the context of and customized to your organization. Organizations should review the priorities and guidelines, comparing current processes and procedures and adapting what is reasonable for business. It is recommended that qualified legal

counsel review the organization’s legal hold process and procedures, ensuring defensibility in court.

Priorities for Best Practices for Litigation Hold Policies:

First – Know Your Data – Hard drives, CD-ROMs/DVDs, Off-line and off-site storage, Backups and organization, Erased/Damaged data;

Second – Current Date Retention Policy – Review policies/Update, Evaluate and monitor implementation;

Third – Preservation – Know when to preserve (see Part I and the Guidelines);

Fourth – Issue Hold Notice – Sent by email/regular mail, synopsis of case, documents/data to be preserved, how to preserve information, contact information for legal/technical;

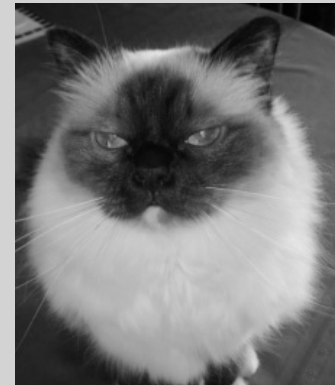
Fifth – Monitor Litigation Hold – Take affirmative steps to monitor compliance with policies;

Sixth – Establish a Company Working Group – Legal, IT, Risk and Records Management; and

Seventh – Create a Response Team – Legal, IT, Risk and Records Management and Procedures for responding to discovery.

Adelman Advantage continued on page 5

KESSLER’S CORNER



by Chip Kessler

How Much Are You Aware? (And My Challenge to You at the End)

Hopefully you like me have been blessed with pretty good eyesight, though in my case I’ve been wearing glasses since I was six years old. Back then I was falling asleep in class and it was decided that my faulty vision was causing my drowsiness and not because my first-grade teacher was doing a poor job of keeping my attention on the schoolwork. The same with our hearing; we have the ability to listen however do we?

Indeed having good eyesight and hearing, and using these gifts are two different matters entirely. The title of this column is *How Much Are You Aware* however I very easily could’ve labeled this piece *How Well Do You Pay Attention to Your Surroundings?* In the nursing facility and assisted living profession this is vitally important. Some questions to ponder:

- You see someone walking through your building’s halls and are obviously lost; do you stop to ask if you may be of some help?

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CMS Publishes the Final Rule for SNF PPS and Consolidated Billing 2012. What changed, and how can technology help you navigate these changes successfully.

Co-Authored by Joel VanEaton and Linda Kunz

The SNF PPS FY 2012 Final Rule

In August 8th, CMS published the Final Rule that will govern SNF PPS and Consolidated Billing for FY 2012. In this final Rule, CMS has maintained several significant adjustments to the MDS 3.0 and the RUG IV Payment system that were proposed earlier this year. In the June issue of the Long Term Care Professional newsletter, we detailed the changes that CMS proposed to make to SNF PPS and MDS 3.0. These proposed changes have been maintained in the final rule and have the potential to impact daily operations and fiscal outcomes in considerable ways beginning on Oct. 1. Here we will give a brief overview of the Final rule and discuss how integral technology will be to successfully navigating the changes CMS will be implementing. For a more detailed discussion of the Final Rule, see the June 2011 issue of Long Term Care Professional.

I. Updating RUG Payment: CMS has finalized a significant reduction to the current PPS rates. This is a parity adjustment that is CMS' attempt to equalize current PPS rates with pre RUG IV rates in order to achieve the budget neutrality that they intended with the implementation of RUG IV last October. CMS indicated that they significantly underestimated SNF payments under the RUG IV system, stating in the proposed rule that, *"... actual RUG-IV utilization patterns differ significantly from those we had projected using the FY 2009 claims data. In particular, the proportion of patients grouped in the highest-paying RUG therapy categories, such as Ultra High Rehabilitation, greatly exceeded our expectations."*

In order to achieve parity between what the expected payments should be versus what they currently are, CMS has recalibrated the nursing CMI's for the rehab RUG groups. Even with the Market basket update of 1.7%, CMS expects that the aggregate result of this recalibration on the SNF industry will be that payments for FY 2012 will be reduced by \$4.47 billion. This amount will be positively partially offset by the MFP-adjusted Market Basket update of 1.7%, or \$600 million. This will result in a 11.1% or \$3.87 billion reduction in payments, relative to FY 2011 rates. CMS indicates that this is actually an increase of 3.4% compared to FY 2010 rates.

II. Redefining, Allocating Group Therapy and Group Therapy Documentation Requirements:

Because of the way CMS perceives that the industry has begun to utilize group therapy practice in response to the allocation of concurrent

therapy under RUG IV, CMS has revised the definition of group therapy to be, *"4 patients (regardless of payer source) who are simultaneously performing the same or similar activities and are supervised by a therapist (or assistant) who is not supervising any other individuals."*

CMS has finalized the allocation of group minutes. This means that when group therapy is performed the minutes would be allocated among the 4 residents in the group just like concurrent minutes are allocated between two residents now. For example, if group therapy is performed for 1 hour, only 15 minutes will ultimately contribute to the RUG. Group therapy will continue to be confined to the 25% rule. Documentation guidelines related to group therapy have also been clarified.

III. Revised Therapy Student Supervision requirements: CMS has reevaluated its position on therapy student supervision in SNFs. Beginning FY 2012, CMS no longer require therapy students working in a SNF to be in the supervising therapist's line of sight. This will not however, increase reimbursement.

IV. Redefining SNF PPS Assessment Windows: CMS has identified that there are several instances where duplicative data can be, and has been, captured on more than one PPS assessment. To solve this issue, CMS has changed the assessment windows for all required PPS assessments. See chart below.

V. Two New OMRA: CMS is has finalized the addition of two new Other Medicare Required Assessments. These are an End of Therapy Resumption (EOT-R) OMRA, and a Change of Therapy (COT) OMRA. CMS has recognized the confusion that the rules regarding completion of the EOT have caused and has responded in two ways. First, they have eliminated the distinction between a 5-day versus a 7-day per week provider of therapy services, and will designate all providers as 7-day per week providers. Therefore the ARD of the EOT OMRA will be required to be set

2012 Rule continued on page 3

<u>Assessment</u>	<u>Assessment Ref. Window</u>	<u>Grace Days</u>	<u>Payment Days</u>
5 day +			
Readmit/Rtrn:	Days 1 - 5	6 - 8	1 through 14
14 day:	Days 13 - 14	15 - 18	15 through 30
30 day:	Days 27 - 29	30 - 33	31 through 60
60 day:	Days 57 - 59	60 - 63	61 through 90
90 day:	Days 87 - 89	90 - 93	91 through 100

day 1 - 3 after the discontinuation, planned or unplanned, of all therapy services. No days will be allowed to be excluded when selecting the ARD for an EOT OMRA.

Second, as a way to mitigate having to do an EOT and an SOT within a short period of time CMS has added an EOT-R OMRA to the mix. This assessment would be completed in instances where the break in therapy lasted no longer than 4 consecutive calendar days and the resident resumed therapy services at the same RUG level as before the break, but no later than the 5th day after therapy was discontinued. The MDS EOT item set has been revised to contain new items, O0450A and O0450B, which would record the resumption of therapy date.

For the EOT-R OMRA, SNFs will be paid at the appropriate non-therapy RUG-IV group starting the day following the last day that therapy services were provided and payment at the appropriate therapy RUG will resume as of the resumption of therapy date noted in section O of the MDS.

The second type of OMRA is a Change of therapy or COT OMRA. This OMRA type would be required whenever the intensity of therapy, based on the reimbursable therapy minutes (RTM), changes to such a degree that it no longer reflects the RUG classification and payment assigned based on the most recent MDS used for Medicare payment. It will also be required when therapy is being delivered and a non-therapy RUG is generated due to CMI maximization. It will be required for both higher and lower RUG changes.

The ARD of the COT OMRA will be required to be set on day 7 of the COT observation period which is a rolling 7-day window, with day 1 beginning on the day following the ARD set for the most recent scheduled or unscheduled PPS assessment, or in the case of an EOT-R, the day that therapy resumed.

Payment implications related to this OMRA type, as noted in the final rule are as follows; the new RUG rate resulting from the COT OMRA will be billed starting the first day of the COT observation period as noted above, and would remain at that level until an assessment is completed that changes the resident's RUG classification or, in the case of a discontinuation of therapy, days intervene that would be paid at a non-therapy rate.

How can technology help you navigate these changes successfully?

Before we talk about technology, let's talk about communication. Many of the new rules, such as Change of Therapy (COT) and the new End of Therapy- Resume (EOT-R) require significantly more communication among staff involved in therapy, MDS, nursing, and administration. With the right tools, it can be easier, more cost effective, and provide documentation which will be needed down the road for any audits. The management of Assessment Reference Dates is changing, the windows are shorter, and with the new COT rules overlaying, interrupting, and potentially changing the billing every seven days, good tools for managing ARD selection are essential.

What features in a tool set, or expert technology system, should you look for to help you manage FY 2012 and beyond? There are a number of things that technology can do to help manage the new rules, your costs, and billing. Again, the real purpose to technology is to enhance communications, streamline processes, make very complex processing and business rules easy, store documentation, and provide automated results to enhance your business. If your technology isn't doing these things for you today, then it isn't providing you an optimized return on your investment. Let's go through some of the ways technology can help you with FY2012, and beyond.

The first thing you want technology to help your facility with is practicing good financial and medical management of your residents for therapy. Expert systems that provide daily real-time comprehensive Rehab and Nursing RUG scores, and track all the moving parts in the new rules, are essential. For example, having daily RUG scores in a system report enables an MDS Coordinator to visually see when a resident is ramping up or down on therapy and allows them instant knowledge when therapy may have stopped due to illness.

This knowledge translates to action when the MDS Coordinator needs to use the new "resume" feature and applies the last rehab rug to the therapy resume day until the next COT or PPS Assessment. Interestingly enough, in one of the recent CMS Open Door Forums, CMS was asked if there are any software packages that did provide daily Nursing and Rehab RUG Scores, and they answered "no", but with the Dart Chart System there is.

We have an expert system that provides daily comprehensive Nursing and Rehab RUG scores, and many customers have found this feature to be very helpful in the past. With the rule changes daily RUG scoring is even more important. In addition to the automated real time RUG scores, your system should provide recommendations and take the complexity out of COT as well as EOT and ARD Management.

The second thing you want to look for in an expert system solution is an automated ARD Manager which will simplify the COT count, EOT, EOT-R, and make careful assessments based on complex Medicare rules and deep data analysis. Your system should be taking into account all the benefit sensitive fields, incorporating expert logic and employing selection algorithms which select ARD based on an understanding of the whole picture and likely Medicare stay scenarios.

At Dart Chart the approach taken was to conduct case study assessments to determine the best approach to yield the best results for clients. As an industry, we have a known 11% drop in the Medicare RUG reimbursement rates, but thorough optimized ARD management, you can mitigate that loss. In addition, an expert system for ARD and OMRA management can help by fostering communication of all involved in compliance with the new regulations. With an expert system, a facility can stay in compliance while maintaining and sustaining best practices for payment outcomes both in the near and longer term.

Our case studies of facilities show a dramatic difference between those intending to continue to use an expert technology and those without an expert system. By an expert

system, we mean a system with daily full Nursing /Rehab 66 RUG IV and internal PPS, COT, and OMRA management. Dart Chart's case studies showed the following differences and advantages when a layer of expert technology systems were applied to the new rules scenarios:

- Real time ARD and EOT strategies would save time by summarizing the need and automating the decision process.
- Proper management of the COT and ARD could counterbalance and change back the lost revenue due to the 11% overall decrease in Medicare RUG Payment rates
- The use of EOT and EOT-R features would allow continued Medicare stay or the restart of prior billing RUG more efficiently than a SOT assessment.
- Reduce the potential for additional financial losses due to COT, which our studies indicate can range from a 6% to 13% loss on top of the 11% rehab rate reduction
- Cost and time savings were experienced due to the expert system technology passing on COT assessments because of known category RUG domain holds thus avoiding the extra 20% billing and MDS staffing work associated with the rules.
- Applied COT advantages were seen to increase the previous seven days of billing when ARD management with COT was optimized in case studies.

Because of the complexity of FY2012, we offer a complimentary financial analysis service to long term care organizations assessing the impacts of new rules. We think it is especially important for you to consider these impacts in your organization and the financial challenges of the COT with a seven day billing rate reversal. We are always happy to help facility staff members to understand the new rules impacts, and that is the reason we offer free educational webinars on various FY2012 topics. Please visit to our website if you are interested in attending at no cost to your organization at www.dartchart.com.

The last part of this article starts the same as the beginning; "Before we talk about technology, let's talk about communication." We have had many investors, administrators, CPA's and financial auditors ask us questions about the upcoming rules and their potential pitfalls and risks. One of the things that we always bring out is the risk of non-compliance. It is easy to miss a COT if you are not managing the day count correctly. And it is easy to miss documentation that would indicate a COT advantage, meaning you also miss potential revenues. But really, the point is communication.

What your system should do is provide communication for every level of your organization from CNA through CPA, MDS and MBA, and even provide inputs to those who have interest in your organization's compliance, like RAC / MAC Auditors and financial auditors. Documenting your results and keeping track of decisions is an essential part of communications. For things like RAC audits, the questions won't even start being asked until 2014, but a truly expert system is ready now to track, store, and produce the historical results anytime you need them.

Another important aspect is management reporting. These changes require people to coordinate and communicate more, and from an administration standpoint, it gives you one more thing to add to your list of concerns, but an expert system should make that seamless and easy. Seamless, easy, and good communication is what Dart Chart has planned for our customers to support FY2012 and beyond, and we continue to believe you deserve credit for all the care you provide.

Linda Kunz, PhD, MBM, RAC-C

Dr. Kunz, Co-Owner and President of Dart Chart Systems, LLC., is instrumental in the ongoing design and implementation of the expert system known as Dart Chart and the Dart Assured System.

Dr. Kunz's prior experience includes information system and business process design. Dr. Kunz's approach activates an organization's bottom line while recognizing and motivating the staff as a health care delivery team.

Dr. Kunz received her PhD in Clinical Medicine Research from Johns Hopkins University and her Masters in Business Management from American University. She has presented as an invited speaker and published original work on health care business process, research and medicine.

Joel VanEaton, BSN, RN, RAC-CT

Joel VanEaton has over 11 years experience in Long term Care serving initially as a MDS coordinator and currently as the Reimbursement and RAI Clinician, Client Services Nurse Consultant to 12 facilities in Tennessee and Kentucky. Recently, Joel was asked to serve on the Advisory Board for HCPRO's CPRA program. Joel also partnered with the Georgia Health Care Association in 2010, and for fall 2011, he will be back in Georgia giving a series of seminars on the changes to MDS 3.0 and RUG-IV. He is a monthly contributor to the Extended Care Products' *LTC Professional Newsletter* and has contributed to *MDS Alert* and *PPS Alert* Newsletters as well. He is also the Reimbursement, MDS 3.0 and RUG IV resource and education coordinator for Extended Care Products Inc.

Risk Manager (RN): Quality Health Care Center in Winter Garden, Florida is seeking a RN Risk Manager for our 100 bed Skilled Nursing Facility. Candidate will be responsible for the implementation and oversight of the Facility's Risk Management/Quality Assurance Program and all other duties assigned by the Administrator. Great Benefits: Medical, Dental and 401-K. Requirements: Must have a current RN License in the State of Florida and have a Florida Drivers License.

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Guidelines for Best Practices for Litigation Hold Policies:

- 1 - Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it may become involved in litigation or anticipates taking action to initiate litigation;
- 2 - The adoption and consistent implementation of a policy defining a document retention decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations;
- 3 - The use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith in meeting preservation obligations;
- 4 - The determination of whether litigation is reasonably anticipated should be based on good faith, reasonableness, a reasonable investigation and an evaluation of the relevant facts and circumstances;
- 5 - Judicial evaluation of a legal hold decision should be based on the good faith and reasonableness of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made;
- 6 - When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as it is practicable. Depending on the circumstances, a written legal hold (including a preservation notice to persons likely to have relevant information) should be issued;
- 7 - In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that should be considered;
- 8 - A legal hold is most effective when it:
Identifies the persons who are likely to have relevant informa-

tion and communicates a preservation notice to those persons; Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information; Is in written form; Clearly defines what information is to be preserved and how the preservation is to be undertaken; Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

9 - The legal hold policy and process of implementing the legal hold in a specific case should be documented considering that both the policy and the process may be subject to scrutiny by the opposing party and review by the court;

10 - The implementation of a legal hold should be regularly monitored to ensure compliance;

11 - The legal hold process should include provisions for the release of the hold upon the termination of the matter at issue. Take the time to review your current document retention and litigation hold policies and by establishing priorities and guidelines for your organization's best practices, you will have the highest chance to reduce risk of legal exposure and adverse consequences during litigation.

Rebecca Adelman, Esq. – Ms. Adelman is the Principal of Adelman Law Firm, PLLC in Memphis, Tennessee and has concentrated her practice in healthcare, and nursing home and medical malpractice defense litigation for the past 22 years. She also provides medico-legal consulting services and educational programming to the healthcare industry. She is licensed in Tennessee, Mississippi, Arkansas and Illinois. The firm is proud to be of counsel to Quintairo, Prieto, Wood & Boyer, P.A. and together provide services to our national and regional clients. rebecca@adelmanfirm.com

Kessler's Corner continued from page 1

- A resident or family member looks distressed; are you taking note of this fact and finding out what is troubling him or her?
- You overhear a voice asking a fellow staff member a question that you are better equipped to answer; do you get involved?

Hopefully you get the idea of what I'm leading up to here. Yes sometimes it's very easy to look away or purposely not pay attention and let things fall to someone else (who works inside your facility) unless you're specifically asked a question or for some assistance. After all, you're busy doing something else and there's always another staff member coming around who can cover. Yet it's the staff member (everyone from the administrator to the person who works in the kitchen or in the maintenance department) that keeps his or her eyes and ears open, who really stands out and makes a real difference in the lives of residents, family members and everyone else that sets foot inside the nursing facility or assisted living community.

Here's a tip for you: in this day and age of "take a number" in-person service and/or having to navigate through a seemingly never ending series of voice prompts on the telephone to finally get to speak with a live person on the other end of the line, the individual that has a heart and mind for hearing and seeing opportunities to be of assistance definitely stands out and helps his or her facility do so as well. Always keep this in mind: people (residents, families and other visitors in your building) today more than ever appreciate personal service and attention!

Awareness Test: Now for something fun. Let's test your ability to spot things which may be somewhat out of the ordinary, and one so blatantly obvious that if you can't identify it, you really need to step up your game. Within the body of this newsletter are three items that do not match what are usually there. One of these things (as just stated) should be very easy to spot

(just like the person I earlier mentioned that's roaming your building's halls obviously lost and in need to help). The next one should be fairly easy to identify if you pay close enough attention (comparable to the facility resident that's continuously ringing his or her call button because of an issue). The third and final item is something not as easily spotted- you'll have to do some close checking and think creatively, perhaps even take a previous issue of *The LTC Professional* and compare that issue with this one ... I'll give you a hint: it's on the back page and it's something that's very important to this newsletter's distribution each and every month (just like each and every person who works in long-term care, or is associated with a nursing facility or assisted living community through a management company or other such business or association is important).

Your Reward: For the first three readers of *LTC Professional* who can correctly name all three of my "differences" you're going to win some prizes from our Extended Care Products family of programs. To the first person who correctly identifies all three: you'll receive three of our staff training and development and/or risk management programs with my compliments (with a value of at least \$500.00); the second individual who checks-in with the correct answers gets two of these programs (with a value of at least \$250.00); and the third person to name these three testers will win one of our programs (with a minimum value of \$100.00. Just e-mail your three answers to me at chip@ecpnews.net and I'll let you know if you are one of our three winners! In next month's *LTC Professional* I'll print the answers and who the winners were.

Chip Kessler is General Manager of Extended Care Products, Inc. He has developed and produced some 18 staff development and training programs, as well as risk management programs for nursing facility and assisted living use. Included among these programs is "The Official Customer Service Training System on DVD. Discover more at www.extendedcareproducts.com.

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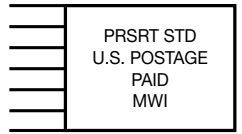
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Dart Chart Systems offers Revenue Management Solutions, management reporting tools and effective optimization of ARD (Assessment Reference Dates) with new FY 2012 Rules!

Ask your organization:

- *How are we optimizing our Assessment Reference Day selections with COT considered?*
- *Are we facing extra staffing costs or financial losses from COT assessments every seven days?*
- *How are we documenting results of COT assessments for future audits?*
- *What are we doing to mitigate our loss of the 11.1% rehab RUG decreases?*

Call Dart Chart Systems at 1-888-210-3200 for your complimentary financial assessment and FY 2012 readiness review. *We believe you deserve credit for all the care you provide.*