

# SHORTS ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP



## The Power of “I’m Sorry”

In the 1970s movie *Love Story*, Ali McGraw looks up at her big-screen husband, Ryan O’Neal, and utters the movie’s most famous line – “Love means never having to say you’re sorry.” That line works pretty well in a Hollywood blockbuster, but in the real world, not so much.

The truth is that “I’m sorry” is one of the most powerful phrases in the English language. Think about it. Have you ever faced a friend or loved one who is just red-faced and livid with you over some perceived slight, and watched the anger melt away when you sincerely say “I’m really sorry?” That’s the power of those two words.

In the business world, we also know the power of empathy. A study several years ago examined lawsuits filed by employees against their employers. A shocking number of those plaintiffs identified one primary reason they filed suits – feeling like their employers didn’t care, didn’t listen, or wouldn’t express empathy or sympathy with the employee, regardless of whether the issue involved an employer’s wrong doing or just a tough time in an employee’s life not caused by his or her employer.

The same thing is true for long term care. We all know that long term care providers have a legal obligation under state and federal law to keep residents and their families fully informed about all aspects of their care. More importantly, it’s just the right thing to do. But many times providers want to express sympathy to a resident or family for a resident’s health status, failure to thrive or an unintended event in the facility. We hear this over and over again from our clients and readers.

So, then, why don’t we do it more often? It’s the fear of being sued and having that “I’m sorry” used against you later in court as an admission of fault on the part of the facility or staff, even if that’s not what you said. Remember, there’s a big difference in expressing sympathy for a resident’s or family’s situation and admitting the facility caused it by negligent care. “I’m sorry for the situation” is not the same as saying “I’m sorry we messed this up,” and that’s a very important distinction.

North Carolina long term care providers have a tool that allows you to say “I’m sorry for your situation” to a resident or family without fear of having that expression of empathy used against you later in court. Thanks largely to the efforts of the North Carolina Health Care Facilities Association, the N.C. General Assembly in 2004 enacted Rule of Evidence 413. This rule dictates what can and can’t be introduced in civil court proceedings.

### Rule 413

Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial



By Jessica Lewis and Ken Burgess

treatment or actions, and gratuitous acts to assist affected persons shall not be admissible to prove negligence or culpable conduct by the health care provider in an action brought under Article 1B of Chapter 90 of the General Statutes.

The Rule applies to apologies related to adverse or unanticipated outcomes if the event giving rise to the outcome occurred on or after August 2, 2004. It’s designed to encourage, not discourage, expressions of sympathy and offers to help – a public policy goal that many states have embraced. Numerous other states have laws like Rule 413, and there is a history with these protections in the courts. So, providers in North Carolina can take comfort in that as they take advantage of this very important tool.

Okay, lawyers are writing this article, so we have to do that lawyerly thing and issue a small word of caution and some practice tips. If statements of sympathy and offers to help are properly handled, Rule 413 provides protection for providers who are simply trying to do the right thing. Obviously, if handled the wrong way – i.e., phrased as “we messed this up and we’re sorry” – then Rule 413 may not prevent that sort of statement from being used in a later court proceeding.

Our second caution: Don’t let our first caution dissuade you from taking advantage of the freedom to say “I’m sorry and how can we help?” Instead, think about implementing some or all of the practice tips below, which are designed to help you work within the protections of Rule 413. Each facility has to decide how to handle these situations and how best to approach them. By giving these practice tips, we do not

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**Poyner Spruill**<sup>LLP</sup>

ATTORNEYS AT LAW

## Corporate Compliance: A Nursing Facility's Responsibilities Under the Medicare Part D Program

by Ken Burgess

In prior issues of *Shorts*, we highlighted corporate compliance issues based on our work with the American Health Care Association to revise and update the Association's 2002 Corporate Compliance Guidance to nursing homes across the country. This month, we're focusing on nursing facilities' roles and responsibilities under the federal Medicare Part D program. This article is based on a national webinar held in March 2009 and related materials published at [www.ahca.org](http://www.ahca.org) as part of that national project.

In our March 2009 webinar, we explained how to approach the auditing and monitoring aspects of an "effective" compliance program, using the Medicare Part D program as an example. The Part D program is one of the new risk areas identified by the OIG as an area of concern in its 2008 Supplemental Compliance Guidance for Nursing Facilities.

We've based this "primer" on Medicare Part D and nursing facilities on the OIG's 2008 Supplemental Compliance Guidance (73 Federal Register 56832 at pages 56846-56847). This document and the OIG's advisory opinions, fraud alerts and similar publications published at [www.oig.hhs.gov](http://www.oig.hhs.gov) are a great source for identifying the risk areas that the OIG is especially concerned about with nursing facilities (along with each company's specific risk areas, as identified by internal auditing and monitoring systems).

With respect to Medicare Part D in nursing facilities, the OIG has pointed out that:

- Medicare Part D extends voluntary prescription drug coverage to all Medicare beneficiaries, including nursing facility residents.
- Nursing facility residents who elect Medicare Part D have the right to select their own Part D Plans.
- Different Part D plans offer a variety of drug formularies and have arrangements with a variety of pharmacies to dispense drugs on the plan's specific formulary. Nursing facilities also contract with pharmacies to dispense medications to their residents. These arrangements are often exclusive or semi-exclusive arrangements between the nursing facility and one or more pharmacies, designed to ease the administrative burden on facilities and help coordinate the accurate dispensing of medications to residents.



- In some cases, the Part D plan that best meets a resident's needs may not have a contract with the nursing facility's pharmacies.
- CMS has said that it expects nursing facilities to work with their current pharmacies to ensure that they recognize the Part D plans chosen by their Medicare residents or to add additional pharmacies to ensure residents' rights to select the Part D plan that's best for them. In the alternative, according to CMS, the facility could enter an exclusive contract with another single pharmacy (other than its current pharmacies) that contracts more broadly with an array of Part D plans and thus offers more choices.
- CMS has also said that nursing facilities "may, and are encouraged to, provide information and education on all available Part D plans to their residents." If facilities choose to do this, they should ensure that the information they provide is "complete and objective." This could include walking residents through the important details of all Part D plans available to them, including premium and cost-sharing obligations, and discussing which plans do and do not cover a resident's medications.
- The OIG warns that in carrying out these educational efforts or even at other times, nursing facilities must not act in ways that frustrate a resident's right to choose a Part D plan; must not require, request, coach or steer any resident to select or change a plan for any reason; and must not "knowingly and/or willingly allow the pharmacy servicing the nursing home" to do the same.
- In addition, nursing facilities, their employees and contractors should not accept any payments (or other items of value) from any plan or pharmacy to influence a resident to select a particular Part D plan or pharmacy (a potential kickback and violation of a resident's right to choose a Part D plan).



Monitoring compliance with a facility's Part D obligations isn't necessarily difficult, but it does involve an array of facility staff, management, contractors, consultants (such as consulting pharmacists), pharmacies and Part D plans. For more information on how to set up an auditing and monitoring plan for Part D, and to see a sample audit program, visit [www.ahca.org](http://www.ahca.org), roll over "Facility Operations" in the orange tool bar and then select "Compliance Program" from the bottom of the drop-down box.

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## The Campbell Law School Senior Law Clinic: Follow-Up to Last Month's Story

Our story in last month's *Shorts* about the new Campbell Law School Senior Law Clinic opening in Raleigh in September 2009, and my statement that I'd be dialing for dollars to help the school raise money for the clinic, prompted emails and calls from a number of you wanting to contribute now and asking me how. Here's the answer.

Checks should be made out to Campbell Law School. Please note on the check's memo line "Senior Law Clinic" so the school will know that the donation is earmarked for the clinic. Also, we are tracking the number of industry providers and friends who donate to the clinic, so please drop me an email if you contribute, or if it's easier, just stick a note on your check that you are donating based on our *Shorts* story or as a member of the industry.

You can mail your check to the Law School at Post Office Box 158, Buies Creek, NC 27506; or if you prefer, for tracking purposes, you can send your check to me (but please make it out the Law School) and I'll forward all donations to the school.

A heartfelt thanks to those of you who've already indicated that you'll help support this worthy cause. I have to quote my favorite song lyric in closing, from the great Nina Simone, "Remember when you give, you also get your share." - Ken

## The Power of "I'm Sorry" (continued from page 1)

want to make you say, "Geez, we just shouldn't go there." You need to follow your conscience, but just use a little common sense along the way.

Think about the following tips in deciding how your facility will approach the "I'm sorry" issue. Some facilities have adopted policies and procedures to govern the situation, including one or more of the following points:

- Think about designating one or two people in your facility to handle the "I'm sorry" discussion. These people should be genuine, represent either facility management and/or the direct care staff with which the resident and family deal most often, or a combination of the two.
- Think about having two facility representatives present during these discussions, which serves two purposes - it demonstrates that this is a sincere expression of sympathy coming from the entire facility staff and, obviously, it provides a witness to ensure that what's said isn't later communicated differently.
- Don't be defensive in these conversations. Instead, be genuine and comforting. Don't assign blame to the resident, family or other staff members, and don't share details of internal quality or peer review discussions or findings related to the matter. The point of these conversations is to say "I'm sorry this happened to you and that you're going through this."
- As with everything else we do in health care these days, it's a good idea to document these types of discussions in the resident's medical record. In doing that, stick to the facts. Document the time and date of the discussion, persons present, what was discussed and plans for follow-up (if made).

Again, don't let these practical words of wisdom stop you from following your heart and conscience with residents and families. A sincere "I'm sorry" coupled with a little common sense is great for everybody involved - the resident, the family and your staff. Whether or not those efforts keep disgruntled residents or families from suing you later really isn't the point. Rule 413 is designed to allow providers to do what they feel is right without having to worry about it later.

*For more information on this article or other health care law related issues, please contact Jessica Lewis at 919.783.2941 or [jlewis@poynerspruill.com](mailto:jlewis@poynerspruill.com).*

## Ken's Quote of the Month

*"The future belongs to those who believe in the beauty of their dreams."* Eleanor Roosevelt



## The Fair Pay Act Increases Employers' Exposure to Discrimination Claims

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009. The Fair Pay Act amends Title VII of the Civil Rights Act and the Age Discrimination in Employment Act so that an "unlawful employment practice" occurs not only when a discriminatory compensation decision is initially made or a discriminatory pay practice is first implemented, but also each time an employee receives a paycheck resulting from a "discriminatory compensation decision."

The Fair Pay Act is significant for employers because it extends the time during which an employee may initiate claims based on allegedly discriminatory pay practices. Although the act does not extend the 180-day time period within which an employee must file a charge of discrimination based on a pay practice, under the new law, every paycheck could start a new 180-day filing period.

The Fair Pay Act reverses the U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, Ledbetter sued Goodyear for sex-based pay discrimination. The Court did not deny that Ledbetter had suffered discrimination, but it ruled against her because her claim did not satisfy the Title VII requirement that a discrimination claim be filed within 180 days of the "alleged unlawful employment practice." The Court rejected Ledbetter's argument that each paycheck was a new and separate "unlawful employment practice" for purposes of this 180-day deadline. Instead, the Court decided that Goodyear's initial decision to pay Ledbetter less than it paid men performing similar work was the "alleged unlawful employment practice," and Ledbetter's failure to file a discrimination claim within 180 days of that decision barred her claim.

The U.S. Chamber of Commerce and other opponents of the Ledbetter Fair Pay Act contend that the act will cause an explosion of litigation against employers and make it possible for claims to be filed decades after alleged discriminatory acts occurred. It remains to be seen how much additional litigation will result from the new law, however, since the Fair Pay Act does not change either the requirement that a plaintiff prove there was discrimination or the current law limiting awards of back pay to two years.



By Kevin Ceglowski

### The New Form I-9

Another employment law change from the president's administration is a White House directive requiring pending federal regulations to be put on hold until they can be reviewed. One such regulation is a requirement that employers begin using a new Form I-9.

As part of the new-hire process, employers are required to complete an Employment Eligibility Verification for every employee, known as a Form I-9, to verify eligibility or authorization for employment under U.S. immigration laws. The U.S. Citizenship and Immigration Services (USCIS) has developed a new Form I-9 and has proposed new regulations governing the types of acceptable identity and employment authorization documents employees may present to complete the new form.

As part of the White House's directive delaying implementation of pending federal regulations, the USCIS recently announced a 60-day delay in implementing the new Form I-9 and its proposed regulations. The new form is now scheduled to be implemented on April 3, 2009. Employers should continue using the old Form I-9 until April 3, 2009, or until there is additional notice regarding the new form.

*For more information about the Fair Pay Act or other employment law issues, please contact Kevin Ceglowski at 919.783.2853 or [kceglowski@poynerspruill.com](mailto:kceglowski@poynerspruill.com).*

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