Medical Directors, Surveys, and the Law

During the Survey
Surveys will frequently interview a medical director in person or by phone during the course of a survey. The input of a medical director can be critical in determining an outcome, such as whether or not there are alleged deficiencies.

I am familiar with instances where a well-meaning surveyor believed that a resident’s negative outcome was caused by substandard care, only to have the issue clarified by the medical director. For example, as every physician knows, some pressure sores and some falls are unavoidable in spite of a facility’s best efforts. CMS recognizes this fact as well, but not all surveyors fully appreciate that some clinical outcomes are unavoidable.

In one recent situation, a surveyor was preparing to recommend an “immediate jeopardy” level deficiency to her supervisors regarding the care a resident had received. Only when the medical director, who also happened to be the attending physician, intervened did the surveyor understand that there was no basis for a deficiency. Although other team members such as the director of nursing and other clinical staff will be interviewed, the interview with the medical director can be highly persuasive to a surveyor.

A Persuasive Role
A number of years ago I represented CMS in a case involving cardiopulmonary resuscitation (CPR). Essentially, an alert and oriented resident who had “full-code” status had a witnessed cardiac arrest. The facility’s nurses and a respiratory therapist performed CPR for two cycles of chest compression (approximately 30 seconds) and then abruptly ended their efforts. They did not call 911. When they terminated CPR after less than a minute, the resident was not resuscitated. CMS imposed a civil money penalty, which the facility appealed.

At their appeal, the facility called Dr. Cyril Wecht, MD, JD, an internationally renowned forensic pathologist, as their expert witness. I argued that the issue was not the cause of death but whether the CPR administered by the facility was consistent with the accepted standards of care. Incredibly, Dr. Wecht testified that only two cycles of chest compression and no call to 911 were indeed within the standards of care for CPR in a witnessed cardiac arrest.

I vigorously cross-examined Dr. Wecht’s surprising testimony, but I thought it would be best to have the testimony of a physician who could rebut the world-famous pathologist: I called Dr. Steven Levenson, a member of the Society. The ALJ found Dr. Levenson’s testimony far more credible and compelling: “CMS presented an expert witness, Steven A. Levenson, M.D., who has extensive experience in the long-term care field and with federal regulations. He testified credibly and persuasively about the ethics of when CPR should be initiated and how long it should last.”

The ALJ added, “I found the procedures preferred by Dr. Levenson, who has written and studied in this area of medical ethics, to be far more persuasive [than those of Dr. Wecht]” (John J. Kane Regional Center – Glen Hazel v. CMS, CRD No. CR1394 [2006], aff’d DAB No. 2068 [2007]). Thus, a medical director affiliated with the Society was determined to be “far more persuasive” than a world-famous forensic pathologist.

The CPR case is only one example of the many times I have called on a medical director from the Society in an appeal where a CMS enforcement action was being challenged. Based on my own experience, there is no doubt that a medical director’s persuasive testimony can make the difference in an appeal of a CMS enforcement action.

A Challenging Role
There are many valid reasons for challenging unsustainable deficiencies. Alleged deficiencies can result in civil money penalties in the high six-fig- ure range, frequently over $1 million. Additionally, lower 5-Star Quality ratings, higher insurance premiums, and adverse publicity often follow an imme- diate jeopardy allegation.

When alleged deficiencies turn out to be legitimate, the medical director can assist in correcting the underlying causes. However, when deficiencies are wrong- fully alleged — as often occurs — the medical director’s input can help the ALJ correctly decide the case. Challenges also may incentivize CMS to rethink unpunish- able deficiencies.

In either case, the medical director has a key role to play. The medical director can help steer the facility in the right direction and maintain the focus on pro- viding the highest quality of care.

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EDITOR’S NOTE
Due to the COVID1-19 pandemic, on March 4, 2020, CMS has tempo- rarily suspended surveys for certain non-emergent issues. However, in- spectors will still be able to address safety issues such as infection control and abuse. The medical di- rector can serve a critical role during these unprecedented times in mak- ing sure that proper infection control precautions are put in place.

— Elizabeth Galik, PhD, CRNP, coeditor in chief