
Quality Assurance Privilege

A collaborative effort of:
the Office of Quality Assurance (OQA),
the WI Association of Homes & Services
for the Aging (WAHSA) and
the WI Health Care Association (WHCA)



Why are we here?

- Reach a common understanding and agreement as to what documents are covered by the Quality Assurance Privilege



Presenters

- **Paul Peshek, Chief – Moderator**
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Today's Program Agenda

- Brief review of QA regulations
- Overview of legal and QA privilege
- Identify which documents of a health care facility are protected by the QA privilege
 - General Rule
 - Specific areas
- Review case studies
- Question & Answer Session



Warm Up Question

- Which documents are protected by the QA Privilege?

Incident Reports	Yes	No	Not sure
Fall Investigations	Yes	No	Not sure
QA Committee Documents & Reports	Yes	No	Not sure



What's the law?

- Federal Regulation
 - 42 CFR 483.75(o)
- Appendix PP – F520
 - Quality Assessment & Assurance



What's the law?

- Wis. Admin. Code Sec. HFS 132.46 – QA&A
- Wis. Stats. § 50.04(3), 50.07(1)(c)
- Wis. Stats. § 146.36 – Health care services review; confidentiality of information



Required Components of the QA&A Committee – 42 CFR 483.75(o)

- 1) A facility must maintain a quality assessment and assurance committee consisting of
 - i. The director of nursing services
 - ii. A physician designated by the facility; and
 - iii. At least 3 other members of the facility's staff



Required Component of the QA&A Committee – 42 CFR 483.75(o)

- 2) The quality assessment and assurance committee –
 - i. Meets at least quarterly to identify issues with respect to which quality assessment & assurance activities are necessary; and
 - ii. Develops and implements appropriate plans of action to correct identified quality deficiencies.



Required Components of the QA&A Committee – 42 CFR 483.75(o)

- 3) A State or the Secretary may not require disclosure of the records of such committee except in so far as such disclosure is related to the compliance of such committee with the requirement of this section.
- 4) Good faith attempts by the committee to identify and correct quality deficiencies will not be used as a basis for sanctions.



Where's the proof?

- Agendas showing dates of meetings, general topics covered, persons attending
- The Facility's written policy and procedures regarding the QA Committee.
- A diagram or chart showing the composition of the QA committee and sub-committees, as applicable
- A calendar showing the scheduled QA Committee meetings and general topics for discussion



Wis. Admin. Code Sec. HFS 132.46

- 1) Committee Maintenance and Composition.
A facility shall maintain a QA&A committee for the purpose of identifying and addressing quality of care issues. The committee shall be comprised of at least all of the following individuals:
 - a) The director of nursing services
 - b) The medical director or a physician designated by the facility
 - c) At least 3 other members of the facility's staff



Wis. Admin. Code Sec. HFS 132.46

2) Committee Responsibilities.

The quality assessment and assurance committee shall do all of the following:

- a) Meet at least quarterly to identify quality of care issues with respect to which QA&A activities are necessary.
- b) Identify, develop and implement appropriate plans of action to correct identified quality deficiencies.



Wis. Admin. Code Sec. HFS 132.46

3. Confidentiality

The department may not require disclosure of the records of the QA&A committee except to determine compliance with the requirements of this section. This paragraph does not apply to any record otherwise specified in this chapter or s. 50.04(3), 50.07(1)(c) or 146.82(2)(a)5., Stats.



Examples of Records Not Covered by Sec. HFS 132.46(3) - Confidentiality

- 1) HFS 132.45(5) Medical Records – Content
- 2) HFS 132.45(5)(c)4b – “...each resident’s medical record shall contain: All incidents or accidents including time, place, details of incident or accident, action taken, and follow-up care”



Wisconsin Statutes - Chapter 50

- Wisconsin Statutes Section 50.04(3):
 - Requires the Department to make at least 1 inspection biennially of each nursing home to determine compliance with applicable standards by examining a portion of the residents, records or physical plant.
- Wisconsin Statutes Section 50.07(1)(c):
 - States that no person may intentionally prevent or attempt to prevent any Department representative from examining any relevant books or records in the conduct of official duties.



Wis. Statutes - Chapter 146

- Health Care Services Review Privilege
 - State statute affords protection from discovery in civil litigation to “health care service review” documents. Wis. Stat. § 146.38(2)



Wis. Statutes - Chapter 146

- Statutory Provision
 - All organizations or evaluators reviewing or evaluating the services of health care providers shall keep a record of their investigations, inquiries, proceedings or conclusions. No such record may be released to any person under s.804.10(4) or otherwise except as provided in sub.(3)...



Wis. Statutes - Chapter 146

- Statutory Provision – cont'd

...No such record may be used in any civil action for personal injuries against the health care provider or facility; however, information, documents or records presented during the review or evaluation may not be construed as immune from discovery under s.804.10(4) use in any civil action merely because they were presented...



Wis. Statutes - Chapter 146

- Statutory Provision – cont'd

...Any person who testifies during or participates in the review or evaluation may testify in any civil action as to matters within his or her knowledge, but may not testify as to information obtained through his or her participation in the review or evaluation nor as to any conclusions or such review or evaluation.



Wis. Statutes - Chapter 146

- Protected Providers

- Applies to reviews or evaluations of the services of "health care providers."

- Scope of Privilege

- Protects records of health care services review committee investigations, inquiries, proceedings or conclusions from discovery by a third party, with limited exceptions.

- Such records cannot be used in a civil action for personal injuries against a health care provider or facility.



What is Privilege?

- A legal protection for communication – verbal or written – between certain persons
- In general, the protected communication must be for the purpose of facilitating or obtaining services from the professional
- Codified in the law – See, Wis. Stats. Chapter 905



Public Policy & Privilege

- Encourage full and frank discussions between the parties
- Recognizes the long-standing expectations of privacy surrounding certain confidential conversations or written disclosures
- Enables a professional who is advising a client or patient to provide accurate and meaningful advice



Examples of Legally Privileged Communications

- Attorney & client
- Physician & patient
- Registered Nurse & patient
- Psychologist & patient
- Domestic Abuse or Sexual Assault Advocates & victim
- Husband & wife
- Communications to members of the clergy



Exceptions

- Only the person entitled to the protection (e.g., the client or patient) may waive the privilege
- Examples of other exceptions:
 - Furtherance of crime or fraud (Attorney – client)
 - Child abuse reporting (Physician – patient; Therapist – client; advocate – victim; husband-wife; communications to clergy)



The Quality Assurance Privilege

- Certain activities conducted by a health care facility are privileged or protected from release to others outside of those involved in the communication;
- Includes activities conducted by the facility's *bona fide* quality assurance committee.
- Public policy: Encourage the facility to critically examine trends or incidents in order to improve care, treatment or services



Privileges in the QA Context



PRACTICE POINTERS

- ✓ In order for a document to fall within the QA Privilege, it must be created by or at the request of the QAA Committee.
- ✓ Need documentation to evidence QAA Committee's directive to create document.
- ✓ Applies to nursing homes only.
- ✓ Protects QAA documents from access by surveyors or other state agencies, not plaintiff's attorneys.



Open Records

- ✓ Once a surveyor obtains a copy of a document it likely becomes a public record, which means it is accessible by anyone (including plaintiff's attorneys) pursuant to Wisconsin's open records law (Wis. Stat. §19.32).



Applying What You've Learned



Case Study – # 1

- 1) On 9/1/06, the survey team enters Golden Days Nursing Home to conduct a recertification survey. During record review of a sample resident, the surveyor notes that Resident A fell on three different occasions. The surveyor requests to review the fall investigation for each of the 3 falls.



Case Study – #1 continued

The DON reports that the facility utilizes incident reports to investigate falls but she can't let the surveyor see them because they are part of the facility's quality assurance program.

- Q: Is the facility required to provide the incident reports to the survey team?



Case Study #1 - Answer

- If a facility's only system for investigating falls is through the use of incident reports, then the facility is required to provide the incident reports for each fall to the survey team even though the fall investigation program is a part of the facility's QA program.
- Refer to QA Committee Info handout



Case Study #1 – Answer continued

- Authority
 - §483.20(b)(1) – F272 – Resident Assessment
 - §483.20(c) – F276 - Quarterly Assessment
 - §483.20(k)(3) - F281 - Professional Standards
 - §483.25(h)(2) – F324 – Supervision to prevent accidents
 - Wis. Admin Code Sec. HFS 132.45(5)(c)4b – Incidents/Accidents



Case Study - #2

- 2) During a resident interview, Resident B told the surveyor that the food is always cold at supper and staff do not respond to her call light. Resident B stated that she had repeatedly complained to the DON with no improvement.



Case Study - #2 continued

The surveyor spoke to the facility about Resident B's complaints and asked to review their complaint / grievance log related to Resident B.

- Q: Is the facility required to provide this information to the survey team?



Case Study #2 - Answer

- Yes: The facility is required by §483.10(f)(1) to have a system to allow each resident the right to voice grievances. The facility is also required by §483.10(f)(2) to have a system that promptly resolves grievances, and
- If the facility reviews complaints as part of QA, the actual complaints would be *presented to* the QA committee
- Refer to QA Committee Info handout



Case Study - #3

- 3) On 10/1/06, the survey team entered Valley View Nursing Home to investigate an allegation of abuse that an aide allegedly punched a resident in the eye. During the investigation, the survey team confirms through record review that the allegation occurred. The survey team asks for the facility's investigation of the incident.



Case Study - #3 continued

The facility provides the survey team with the written report which summarizes the facility's investigation. The facility's process for investigating allegations of abuse is not a part of the facility's QA&A committee.



Case Study - #3 continued

Having reviewed this report, the survey team determines that the summary report does not demonstrate a thorough investigation. The survey team asks the facility to provide the individual statements obtained from all staff.

Q: Is the facility required to provide this information to the survey team?



Case Study #3 - Answer

- Yes
- Refer to QA Committee Info handout
- Authority
 - 42 CFR §483.13(c)
 - Wis. Stat. §50.09(1)(k) and (6)
 - Wis. Admin. Code HFS 13.05(3)



Case Study #4 – Part 1

4) On 8/1/06, the survey team enters Oak Lane Nursing Home to conduct a complaint survey. The complaint alleges that a resident acquired a UTI while a resident of the facility. The surveyor reviews Resident A's record which confirms that the resident has a UTI. During care observations, the surveyor observed that staff washed this female resident's peri-area from back to front.



Case Study #4 – Part 1 - cont'd

Survey team members identify additional sample residents with UTIs. A survey team member asks the infection control designee to show the surveyor the record of infection for each sample resident with a UTI as well as the log or tracking method of UTI infections for July 2006.

Q: Is the facility required to provide these records to the survey team?



Case Study #4 – Part 1 - Answer

- Yes
- Refer to QA Committee Info handout
- Authority
 - 42 CFR §483.65 – Infection Control
 - Wis. Admin Code Sec. 132.51(2)(b) – Communicable diseases



Case Study #4 – Part 2

During discussions about the identified resident UTI's, the facility infection control (IC) designee mentions that the QA infection control subcommittee was actively working on some IC issues.



Case Study #4 – Part 2 - cont'd

The IC designee reported that the QA Committee hired a consultant to assist them in conducting a root cause analysis related to infections and observations of employee behavior. The surveyor asks to see the documentation of this activity.

Q: Is the facility required to provide this documentation to the survey team?



Case Study #4 - Part 2 - Answer

- No
- Refer to QA Committee Info handout
- Authority
 - §483.75(o)(3) – State or Secretary may not require disclosure of the records of such committee...
 - Wis. Admin. Code 132.46(3) Confidentiality



Case Study - #5

- 5) On 2/1/06, the survey team entered Valley View Nursing Home to conduct a recertification survey. During the initial tour, surveyors identified 2 sampled residents in contact isolation for scabies. The surveyor interviewed the infection control nurse & learned that the facility had a scabies outbreak in May and November 2005 and again in February 2006.



Case Study - #5 continued

The surveyor requested to review the facility's outbreak investigation and corrective actions taken related to the May and November 2005 outbreaks. The NHA told the survey team that the requested information are quality assurance tools and not available for surveyor review.

Q: Is the facility required to provide this information to the survey team?



Case Study #5 - Answer

- Yes, the facility must provide evidence of its investigation and corrective action, however, the analysis, review and conclusions drawn by the QA committee do not need to be produced.
- Refer to QA Committee Information handout



Case Study #5 – Answer continued

- Authority
 - §483.65(a)(3) Maintains a record of incidents and corrective actions related to infections.
 - Wis. Admin Code Sec. 132.51(2)(b) – Communicable diseases



Questions?



Online Evaluation

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