

Risk Management in Private Duty Care

Elizabeth E. Hogue, Esq.

Office: 877-871-4062

Fax: 877-871-9739

E-Mail: ElizabethHogue@ElizabethHogue.net

Some private duty home care agencies do not provide any skilled services, such as nursing or therapy services. Instead, these agencies may, for example, provide only chore or homemaking services. Private duty home care agencies that do not provide skilled services may describe their services as “non-medical.”

Since they provide no skilled services, non-medical home care agencies may appropriately take a “hands-off” approach with regard to the health problems of their clients. Nonetheless, many clients and their families seek non-medical home care services because they are having difficulties with their physical or mental health. Non-medical home care agencies, therefore, are often caring for clients whose health is less than optimal.

Consequently, private duty agencies may be at risk regarding liability for negligence. In order to prove negligence, clients would have to prove all four of the following:

- 1) **Duty** - Agencies have an obligation to their clients to provide reasonable care. Duty is defined by standards of care from a variety of national sources, and by agencies' own internal policies and procedures.
- 2) **Breach** - An act, doing something the provider should not do; or an omission, failing to do something the provider should have done.
- 3) **Causation** - "But for" the act or omission of the agency, the client would not have been injured.
- 4) **Injury or damage** – Clients must usually show that they were physically injured by agencies. Injuries that are *only* emotional usually will not satisfy this requirement, unless the conduct of agency staff members is extreme and outrageous.

If clients fail to prove any one of the above, then the agency wins the lawsuit and the patient loses.

When private duty agencies do not provide any skilled services, what risks may they incur for possible liability for negligence? It is likely that private duty agencies that do not provide skilled services to clients may still be liable for monitoring and reporting regarding clients' condition and need for services. Agencies may report to health care providers, such as Medicare-certified home health agencies and attending physicians. They may also be required to make reports to adult protective services. It may also be appropriate for private duty agencies to report to family members or others involved in the care of their clients. Failure on the part of agencies to fulfill their duty to monitor and report may result in liability for negligence.

How can these risks be effectively managed? An effective strategy for managing these risks includes documentation of observations and reporting on a contemporaneous basis. Caregivers should be required to document regularly their observations regarding clients' conditions and reports made to health care providers and individuals involved in patients' care. Examples may include reports that caregivers from private duty agencies make to staff from agencies providing skilled care to patients. When staff members accompany clients to appointments with health care providers, they may report falls, difficulty swallowing, etc. to such providers. These communications should be carefully documented.

Despite the fact that private duty agencies may not provide skilled services, it appears that they have a duty to their clients to observe, monitor, and report regarding the condition of their health. Documentation that this obligation was met is the best defense to claims that private duty agencies did not fulfill their responsibilities.