



## Client Alert



Contact Attorney Regarding  
This Matter:

Alan C. Horowitz  
404.873.8183 - direct  
[alan.horowitz@agg.com](mailto:alan.horowitz@agg.com)

Arnall Golden Gregory LLP  
Attorneys at Law

171 17th Street NW  
Suite 2100  
Atlanta, GA 30363-1031

Two South Biscayne Boulevard  
One Biscayne Tower 2690  
Miami, FL 33131

1775 Pennsylvania Avenue NW  
Suite 1000  
Washington DC 20006

[www.agg.com](http://www.agg.com)

### **OIG Plans to Review Nursing Facilities' Administration of Atypical Antipsychotic Drugs**

#### ***Former Director of Nursing Sentenced to 3 Years in Prison for "Convenience Drugging"***

On January 9, 2013, California Attorney General Kamala D. Harris issued a Press Release describing why a former Director of Nursing (DON) at a skilled nursing facility was sentenced to three years in state prison. The DON entered a plea of "no contest" to a felony count of elder abuse with an added allegation that the abuse contributed to the death of a nursing home resident. One of the criminal counts against the former DON was "assault with a deadly weapon, to wit, Risperdal, a psychotropic medicine." The facility's former medical director and a former pharmacist were also charged with elder abuse, resulting in death; elder abuse with infliction of injury; and assault with a deadly weapon (the psychotropic medications).

The former DON "ordered" psychotropic medications for 22 residents "not for therapeutic reasons, but instead to control and quiet them for the convenience of staff," according to the Attorney General's (AG) Office. When at least one of those residents refused the medications, he was "held down and injected with the psychotropic medicine by force." Additionally, three residents died as a result of the "convenience drugging," while the others suffered serious adverse effects, such as weight loss, lethargy and dehydration, according to official documents.

According to a sworn declaration filed by a Special Agent for the California Department of Justice, who conducted an investigation, the former DON would initiate Interdisciplinary Team (IDT) meetings to discuss the behavior of some of the facility's residents. During these meetings, she directed the pharmacist to write prescriptions for psychotropic medications for some of the residents. The pharmacist then wrote the orders and the nurses administered the medication to the residents.

On multiple occasions, residents were forcibly injected with the psychotropic medications, according to the Special Agent. The medical director signed the orders after the IDT meetings - sometimes, three weeks after the medication was given. Additionally, he failed to examine the residents to determine if the psychotropic medications were medically necessary, according to the AG.

The facility's former CEO was alleged to have allowed the forcible "convenience drugging" to continue after she knew about its existence. She was charged with conspiracy to commit an act injurious to the public health based on her failure to adequately supervise the DON, whom she had hired. After pleading "no contest," the former CEO was sentenced to three years formal probation and 300 hours of volunteer service. The former medical director was also sentenced to 300 hours of volunteer service and was placed on probation by the California Medical Board. As a condition of probation, he is prohibited from practicing medicine in skilled nursing facilities, convalescent homes and assisted living facilities during his probation.

### ***Why Is the Use of Psychotropics Important to Health Care Providers?***

The type of case described above is highly unusual and fortunately rare. However, health care facilities, and especially skilled nursing facilities can expect heightened scrutiny regarding their levels and patterns of psychotropic medication use. Each year, the U.S. Department of Health and Human Services, Office of the Inspector General (OIG) issues its Work Plan. According to the Fiscal Year 2013 OIG Work Plan, OIG will be reviewing nursing facilities' administration of atypical antipsychotic drugs, both in terms of the percentage of residents receiving these drugs as well as the types of drugs being administered.

In May 2011, OIG released a report, *Medicare Atypical Antipsychotic Drugs Claims for Elderly Nursing Home Residents*, in which it noted that in 22% of the atypical antipsychotic claims it reviewed, the medications "were not administered in accordance with CMS standards regarding unnecessary drug use in nursing homes."<sup>1</sup> A little more than a year later, in July 2012, OIG released another report dealing with antipsychotic drugs, *Nursing Facility Assessments and Care Plans for Residents Receiving Atypical Antipsychotic Drugs*.<sup>2</sup> In that report, OIG determined that 99 percent of the records it reviewed failed to comply with one or more federal requirements.

The extent of inappropriate psychotropic drug use is underscored by a recent letter from the American Medical Directors Association (AMDA) to nursing facility medical directors. In its June 18, 2012 correspondence, AMDA asked the medical directors of facilities "to join with AMDA and [the Centers for Medicare & Medicaid Services], in the nationwide effort to reduce the unnecessary use of antipsychotic agents by refocusing the interdisciplinary team on a better understanding of the root cause of dementia related behaviors."<sup>3</sup>

CMS previously expressed the goal of reducing antipsychotic medications by 15% by the end of 2012. Nursing facilities should expect that State agency surveyors, CMS and OIG will be closely scrutinizing their

<sup>1</sup> Department of Health and Human Services, Office of the Inspector General, *Medicare Atypical Antipsychotic Drugs Claims for Elderly Nursing Home Residents*, OEI-07-08-00150 (May 2011).

<sup>2</sup> Department of Health and Human Services, Office of the Inspector General, *Nursing Facility Assessments and Care Plans for Residents Receiving Atypical Antipsychotic Drugs*, OEI-07-08-00151 (July 2012).

<sup>3</sup> American Medical Directors Association, "Dear Medical Director" (June 18, 2012), available at: [http://www.amda.com/advocacy/antipsychotic\\_msg.pdf](http://www.amda.com/advocacy/antipsychotic_msg.pdf). Last accessed on January 23, 2013.

use of antipsychotic medications in 2013. Towards that end, and in keeping with providing quality care, facilities should ensure that their initial resident comprehensive assessment, subsequent assessments and care planning are properly performed and implemented. Whenever clinically feasible, psychotropic drug doses should be gradually decreased and eliminated, if appropriate. Adequate documentation, including all related diagnoses, should support the drug and dose. (It is a violation of a federal regulations to administer “unnecessary drugs” or drugs used as “chemical restraints.”)

Providers should consider availing themselves of the many tools and educational programs available for free that assist facilities in reducing and eliminating the use of psychotropic medications. For example, AMDA as well as organizations such as the American Health Care Association and initiatives such as Advancing Excellence in America’s Nursing Homes, offer useful techniques, sample policies and clinical practice guidelines aimed at reducing antipsychotic medication usage.

*Arnall Golden Gregory LLP serves the business needs of growing public and private companies, helping clients turn legal challenges into business opportunities. We don't just tell you if something is possible, we show you how to make it happen. Please visit our website for more information, [www.agg.com](http://www.agg.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice.*