

# **SURVEY AND ENFORCEMENT:**

## **The Future is Now**

*Session W-18*

Ohio Health Care Association  
Annual Convention

May 2, 2012

Carol Rolf, Esq.  
Christopher M. Tost, Esq.



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## The Long-Term Care Law Firm

*ROLF* is the law firm of long-term care providers, and of the Ohio Health Care Association (OHCA). Our focused practice is dedicated to partnering with our clients to assist them with strategizing for the future, and in responding to all of their current needs. Over the years we have established ourselves as true advocates of not only our clients, but of the LTC profession as well. We serve as legal counsel to OHCA, and to providers across the Midwest in a wide range of matters, including, but not limited to:

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*A Long-Term Commitment  
to Long-Term Care <sup>SM</sup>*



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# Carol Rolf



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- Senior Partner
- 30+ years experience
- Top 100 Ohio Attorney
- *Best Lawyers in America*
- Ohio Superlawyer

Carol Rolf is the Senior Partner of the law firm of Rolf Goffman Martin Lang Co., LPA.

The firm has an extensive health care practice, representing long-term care providers, hospitals, physicians, pharmacies and numerous other providers across Ohio and in other states.

Ms. Rolf has been selected multiple times as one of the Top 100 attorneys in the State of Ohio by Super Lawyers, as well as being named one of the best health care attorneys and as one of the Top 50 female attorneys in Ohio every year since 2004. She was selected for the cover of Ohio Superlawyers magazine in 2011. She has also been selected as one of the best health lawyers in the country by “The Best Lawyers in America” (each year since 1995).

Ms. Rolf is a nationally recognized speaker, and has been a presenter and author of materials and seminars at hundreds of engagements over the years.

Ms. Rolf is currently serving at the appointment of Leading Age’s Board of Directors on the core group of its Legal Committee, and also serves on the Legal Committee of the American Health Care Association. She is a member of the Facility Standards Committee, Payment for Services Committee and Developmental Disabilities Committee of the Ohio Health Care Association. Ms. Rolf has taught the legal portion of the Core of Knowledge at the Ohio State University’s Fisher School of Business – the course necessary for licensure as a nursing facility administrator in Ohio – for over 20 years.

Ms. Rolf has served as Special Counsel to the Attorney General of Ohio (appointed in 1992 and served through 1997). She has also served on numerous governmental and association task forces and boards, including: the Ohio Department of Health Certification and Licensure Task Force; the Medicaid Long-Term Care Reimbursement Study Committee; the Ohio State Board of Examiners of Nursing Home Administrators; the Advisory Committee for the Ohio MR/DD Victims of Crime Task Force. Carol is a former member of the Board of Trustees for the United Church Homes, and currently serves on the Board of Trustees of the Boys and Girls Clubs of Cleveland.

She is admitted to practice in any state court in Ohio, the U.S. District Court for the Northern District of Ohio, and the U.S. Sixth Circuit Court of Appeals. Carol is a member of the Cleveland and Ohio State Bar Associations, as well as the Ohio Women’s Bar Association, the American Health Lawyers Association.

## Christopher M. Tost



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- Health Care
- Ohio Superlawyer  
Rising Star
- 10+ years experience

Chris Tost is an attorney with the law firm of Rolf Goffman Martin Lang Co., LPA.

The firm is dedicated to the representation of health care providers, including long-term care facilities, hospitals, physicians, home health agencies, pharmacies and numerous other providers across Ohio and in other states.

Mr. Tost concentrates his practice on various issues affecting health care providers, including regulatory compliance, fraud and abuse, licensure and certification, and appeals. He also has significant experience representing employers in complaints made to the EEOC or OCRC. He has been named a “Rising Star” in health care law every year since 2005 by *Ohio Super Lawyers – Rising Star Edition*.

Mr. Tost received his Juris Doctorate from Case Western Reserve University School of Law, where he graduated *cum laude*. During law school, he was managing editor of the *Health Matrix Journal of Law & Medicine*. He earned his Bachelor of Arts degree from St. Francis College, where he graduated *magna cum laude*.

Mr. Tost is admitted to practice law in any state court in Ohio. He is a member of the American, Ohio State, and Cleveland Metropolitan Bar Associations, as well as the Ohio Health Care Association and American Health Lawyers Association.





## Survey and Enforcement: The Future Is Now

Ohio Health Care Association  
May 2, 2012  
Carol Rolf, Esq.  
Christopher Tost, Esq.



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### Headlines

- ❖ Stricter Enforcement
  - Increased Number of Jeopardies
  - Higher, More Extended Fines
  - Increased Risk of Special Focus
- ❖ New Appeal Mechanisms
  - State/Federal Independent IDR Processes
- ❖ Licensure Changes
- ❖ Federal Rule and Policy Changes
- ❖ Transparency Requirements



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### CMS FY 2012 Survey Budget Memo

- ❖ To Apply Following Principles:
  - Reduce Time on Low Value Areas & More Attention to Higher Value Areas
- ❖ Additional Steps Under Consideration:
  - Expansion of Poor-Performing Initiative;
  - Reduce Inappropriate Use of Anti-Psychotic Medications;
  - Reduce Avoidable Falls;
  - Potential Reduction in Time for 5 Star Facilities



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### Initiative to Reduce Avoidable Hospitalizations

- ❖ Published by CMS on 3/15/12
- ❖ CMS to Partner w/ Independent Organizations to Improve Care & Reduce Hospitalizations
  - Organization Ex.: Physician Practices, Care Management Organizations, Other Public & Not-For-Profit Entities
  - Organization to Collaborate w/ SNF
  - Applications Due by 6/14/12



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### Enforcement In Ohio

- ❖ No Significant Trend in Citation Numbers Except for IJs
  - Total Cites (2010: 5996; 2011: 5821)
  - "G" & Above (2010: 229; 2011: 204)
  - IJs (2010: 21; 2011: 35)



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### Immediate Jeopardies

- ❖ Top Cited Issues
  - 15: Abuse (F223, F225 & F226) – Staff, Resident & Visitor
  - 11: Accidents and Supervision (F323)
  - 8: General Quality of Care – CPR, PT/INR, Pressure Sores
  - 3: Unnecessary Drugs (F329)



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## Top 10 Health Deficiencies

- ❖ F323 ACCIDENT HAZARDS/SUPERVISION: 334
- ❖ F309 HIGHEST WELL-BEING: 327
- ❖ F441 INFECTION CONTROL: 305
- ❖ F329 UNNECESSARY DRUGS: 285
- ❖ F279 COMPREHENSIVE CARE PLANS: 274
- ❖ F371 FOOD PROCUREMENT: 232
- ❖ F157 NOTIFY OF CHANGES: 213
- ❖ F272 COMPREHENSIVE ASSESSMENTS: 212
- ❖ F225 ABUSE/NEGLECT REPORTING: 197
- ❖ F314 PRESSURE SORES: 185



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## Resident Choice/Satisfaction

- ❖ ODH is Tracking Citations on Important Aspects of New Quality Measures
  - Dining Choice
  - Bath or Shower Choice
  - Participation in Care Planning
  - Emphasis on Resident Interviews



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## Most Cited LSC Tags (CMS Region V)

1. K018 – Corridor Doors
2. K038 – Exit Access
3. K062 – Sprinkler System Maintenance
4. K029 – Hazardous Area - Separation
5. K144 – Generators Inspected / Tested
6. K050 – Fire Drills
7. K147 – Electrical Wiring and Equipment
8. K056 – Automatic Sprinkler System
9. K052 – Testing of a Fire Alarm
10. K012 – Construction Type



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## Sprinkler Requirements

- ❖ All Facilities Nationwide Must Have Sprinklers by August 13, 2013
- ❖ No Waivers, FSEs or Even Temporary Construction Waivers Will Be Granted
- ❖ Facilities May Have Areas Not Currently Sprinklered Which May Have Met Ohio Sprinkler Standards but May Not Meet Standards under NFPA Beginning August of 2013



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## Sprinkler Requirements cont.

- ❖ Make Sure Your Sprinkler System Complies With NFPA 13, 1999 Edition
- ❖ Complete Coverage Includes Attic Areas, Overhangs & Porches Exceeding 48", Basements, Storage Areas, Walk-in Coolers and Freezers
- ❖ Updated/Clarifying CMS Guidance to Be Released in Spring
  - All Overhangs, Closets, Electrical and Equipment Rooms, Elevator Shafts



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## LSC Waivers

- ❖ Waivers Being Granted Based on Compliance w/ 2012 LSC
- ❖ Provider must show No Adverse Affect on Health/Safety Only; Unreasonable Hardship Presumed
  - Capacity of Means of Egress;
  - Cooking Facilities;
  - Heating, Ventilation & Air Conditioning; and
  - Furnishings, Mattresses and Decorations



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## Enforcement Concerns

- ❖ Fine Amounts Appear to Be Higher (Especially IJ)
  - Daily vs. Per Instance
  - Starting Before Survey
  - Now Identified on Nursing Home Compare (w/ Payment Bans)
- ❖ Increased Risk of Becoming Special Focus Facility (SFF)
  - Ohio: 2 slots to 9 slots
  - 5 Candidates for Each Slot



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## Special Focus Facilities

- ❖ One Bad Survey Can Lead to Being “Chosen” or at Least Being a Candidate
  - Even if Excellent Survey History
  - Even if Centered on One Incident Involving a Visitor
  - Even if No Harm Level Deficiencies (Multiple Deficiencies)
- ❖ Removal Can Be Difficult
- ❖ Selection Also Corresponds with Decline in 5 Star Rating



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## Ohio State IDR Process

- ❖ Final Rule (3701-63-02) Effective 1/20/12
- ❖ 1st Level – Filed w/ Columbus BRC, but reviewed by District Office 10 days after receipt of 2567
 

Mail to: Ohio Department of Health, 246 North High Street, 3<sup>rd</sup> Floor, Columbus, OH 43215, Attention: IDR Request
- ❖ Reviewed in 10 Working Days
- ❖ Facility notified by telephone of results



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## Ohio 2<sup>nd</sup> Level IDR

- ❖ 2<sup>nd</sup> Level Independent Review
  - 10 Days to Request in Writing
  - Mail to Ohio Department of Health, Revenue Processing #3212, P.O. Box 15278, Columbus, Ohio 43215, cc: Kathy Kimmitt
  - \$150 Initial Fee; \$75 Per Hour Thereafter
  - Select Tags for Review
  - No New Information May be Submitted
  - 2 Types of Hearing Officers



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## Ohio 2<sup>nd</sup> Level IDR cont.

- 30 Days for Review and Decision
- BRC will communicate decision via telephone
- ❖ Concerns:
  - Cost
  - Inability to Discuss Decision With Hearing Officer
  - Decision Only a Recommendation to ODH
  - Decision Not Discoverable, but Will Know if Hearing Officer is Overruled (ODH Summary Available Through FOIA)



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## Federal I- IDR Process

- ❖ Effective for Standard/Complaint Surveys after 1/1/12
- ❖ Currently Available if "G" or Above Citation w/ Imposed CMP
  - All Tags Cited During Such Survey May Be Argued
  - Only Available if: (a) State IDR on Tag Not Requested, or (b) if State IDR is Requested, It Is Completed Before CMP Is Imposed
- ❖ To Be Offered by State Agency within 30 Days of CMP Imposition
- ❖ Must Request Within Ten Days of Offer



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## I-IDR Process cont.

- ❖ Submitted to Selected ODH Contractor
  - Independence = Not Connected to Agency
  - Required Qualifications (Expertise & Training)
  - No Cost to Provider
- ❖ Resident, Family & Ombudsman Given Opportunity for Comment
- ❖ Final Decision to Be Issued Within 60 Days of Request
  - But: Failure to Comply Does Not Invalidate Deficiencies or Remedies
- ❖ Concern: Will Facility Receive a Decision Prior to the 60 Day Timeframe For a CMS Appeal?



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## I-IDR Review Process

- ❖ Review Process:
  - Independent Reviewer Issues Written Record & Summary (Rationale) to State;
  - If State Agrees with Findings, Issues Written Notification of the Final Decision Within 10 Days
  - If State Disagrees With Findings, Complete Record Sent to CMS For Final Review & Decision
- ❖ If Revisions, A New 2567L Will Be Issued and Remedies & ASPEN Will Be Revised
- ❖ CMP Subject to Collection & Escrow the Earlier of 90 Days After Imposition of Remedy OR when I-IDR is completed
  - CMP Released With Interest if Appeal is Successful



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## Highlights of Licensure Changes

- ❖ Elimination of Tub/Shower Requirement
- ❖ Elimination of Sub-Categories in Nurse Staffing Requirements (Minimum Daily Average = 2.5 Hours Direct Care, RN, LPN, Aides)
- ❖ Clarification Regarding Proposed Location in Resident Discharge
- ❖ Requirement That Photos Be Kept on File for Elopement Risks



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## Federal SOM Highlights

- ❖ **F497 (Nurse Aide Training):** Revised SOM Guidance (8/12/11)
  - Annual Nurse Aide Training for Dementia Residents to Include 2 Abuse Topics
- ❖ **F323 (Accident Prevention):** Re-Emphasis of SOM Guidelines (11/10/11)
  - Assess Smoking Areas
  - Provide Emergency Equipment in Smoking Areas
  - Clearly Assess Residents Safe to Smoke Without Supervision
- ❖ **F321 (Feeding Tubes):**
  - Clarified when use of a feeding tube is avoidable/unavoidable



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## CMP Reduction for Self-Reporting

- ❖ Rule Effective on 1/1/12
- ❖ Reduction of CMP From 35% to 50% When:
  - Incident is Self-Reported;
  - Alleged Non-Compliance is Corrected;
  - Provider Waives Right to Appeal
- ❖ Does Not Apply When:
  - IJ, SQC, Incident Resulting in Death
  - Repeat Cites
- ❖ Basically for G's



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## Elder Justice Act (EJA)

- ❖ In Effect Since March 2010, But CMS Guidance on 6/17/11, 8/12/11 & 1/20/12 (*S&C: 11-30-NH, Rev. 1/20/12*)
- ❖ Requires "Covered" Individuals to Report "Reasonable Suspicion" of Crime Against a Resident to State Agency (ODH) and Law Enforcement Within 2 Hours for Serious Bodily Injury (Otherwise 24 Hours)
- ❖ Applies to NFs, Hospices Serving LTC Residents and ICFs/MR



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## Facility Requirements Under EJA

- ❖ Notify Covered Individuals Annually of Their Obligation to Report
- ❖ Post Conspicuous Notice to Employees Outlining Their Right to Report and Right of Non-retaliation
- ❖ Amend Policies – Abuse, Neglect, Employee Handbook, Corporate Compliance



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