



# ISSUES INVOLVED IN TAKING A NURSING HOME CASE TO TRIAL

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# Federal & State Regulations

- Federal Regs – the Omnibus Budget Reconciliation Act (OBRA) of 1997 [Nursing Home Reform Act / 42 CFR 483]
- Alabama State Regs – Alabama Medical Liability Act (AMLA)
- Goal – Maintain the “highest practical physical, mental and psychosocial well being” of nursing home residents

# Federal & State Regulations

- Quality of Life: Maintenance and enhancement of resident's dignity and respect for individuality. 42 CFR 483.15
- Quality of Care: 42 CFR 483.25
- Facility Administration: 42 CFR 483.75
- Resident Rights: Protects rights re: access to records, refusal of treatment, examination of survey, ect. 42 CFR 483.10

# Federal & State Regulations

- Access to Record: Upon an oral or written request to access all records pertaining to resident...within 24 hours and after receipt of resident's records for inspection, to purchase copies at cost not to exceed community standard within 2 working days of advanced notice to the facility. 42 CFR 483.10(b)(2)

# Federal & State Regulations

- Notification of Changes: Facility must notify resident, legal representative or interested family members:
  - Accidents resulting in injury,
  - Significant change in resident's status,
  - Need to alter treatment significantly, (or)
  - Transfer or discharge of resident.

42 CFR 483.10(b)(11)

# Federal & State Regulations

- Comprehensive Assessment/Plan of Care:
  - individual plan of care developed to address any nursing care needs identified in that resident's assessment.
  - must describe resident's ability to perform daily life functions and any significant impairment in functional capacity. 42 CFR 483.20(b)

# Federal & State Regulations

- Staffing: facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable well-being of each resident, as determined by resident assessments and individual plans of care. 42 CFR 483.30
  - Requires facility to provide sufficient numbers of both licensed nurses and other nursing personnel. Id.(a)

# Federal & State Regulations

- Required Staff:
  - Medical Director: 42 CFR 483.75(I)
  - Director of Nursing: 42 CFR 483.30(b)(2)
  - Licensed Nurses: 42 CFR 483.75(a)(2)
  - Other Nursing Personnel (including CNAs) 42 CFR 483.75(e)(1)
  - Facility Administrator

# Federal & State Regulations

- Record-keeping Requirements:  
Clinical record must contain:
  - sufficient information to identify resident;
  - a record of resident's assessment;
  - the plan of care and services provided;
  - the results of any pre-admission screening conducted by the State and progress note. 42 CFR 483.75(I)(5)

# Federal & State Regulations

- Record-keeping requirements (cont'ed):
  - Nurses chart nursing notes, progress notes, medication administration records, assessment plans.
  - Nursing Aides chart activities of daily living (ADLs).
  - Medical Director chart physician order

# Injuries Linked with Neglect

- Progressive failures and omissions of care
  - Decubitus ulcers – Stage III or IV
  - Infected decubitus ulcers
  - Severe dehydration
  - Severe protein-calorie malnutrition
  - Septic shock
  - Gangrene
  - Aspiration pneumonia

# Injuries Linked with Neglect

- Over medication and administration failures.
- Injuries precipitated by untoward incidents:
  - strangulation, drowning, scalding, wandering off cases, falls and fractures, rapes/sexual assault, and physical abuse/assault.

# Reviewing the Chart

- Get entire nursing home chart – records request should be detailed to maximize the chance of getting the most complete record early on in the evaluation process.
- Auditing charts
- Take time to read the chart

# Reviewing the Chart

- Utilize a legal nursing consultant
  - Amer. Ass. of Legal Nursing Consultant
  - Case summaries
  - Expert identification

# Reviewing the Chart

- Obtain Certification Surveys:
  - assess if type of care intended by the law is actually being provided.
  - Facilities must be in substantial compliance or be denied payment for new admissions, civil monetary penalties can be assessed, Medicaid and Medicare certificates can be revoked.
  - Surveys are unannounced

# Reviewing the Chart

- Obtain Certification Surveys (cont'd):
  - Survey results can be obtained from the Medicare web site.  
[www.medicare.gov/NHCompare/home.asp](http://www.medicare.gov/NHCompare/home.asp)
  - Determine if your resident was apart of any surveys prior to event.
  - Determine if facility was cited for any similar injury suffered by your resident.

# POTENTIAL DEFENDANTS

- Licensee/Owner/Parent – The entity that is licensed to operate the facility.
- If Owner is different from Licensee, you can name both.
- If there is a Parent company, conduct discovery to show that Parent actually controls operation of home.
- Online source “Dunn and Bradstreet”

# POTENTIAL DEFENDANTS

- Management Company:
  - If a management co. was involved in the day to day operation of the nursing home during the time at issue, they are necessary defendants and may be a separate corporation unaffiliated with the owner or licensee.

# POTENTIAL DEFENDANTS

- Physician:
  - Medical director of the facility may potential defendant.
  - Physician's position typically is that they is independent contractor.
  - This issue should be discussed with the family

# POTENTIAL DEFENDANTS

- Administrator:
  - State and Federal Regs specifically address the duties and responsibilities of a nursing home administrator.
  - Regs charge them with the responsibility of developing and implementing policy and procedures to ensure that all residents in nursing home receive proper care.

# LITIGATING THE CASE

- File complaint and discovery:
  - Doc's reflecting ownership or management of the facility.
  - Articles of Incorporation or partnership agreements
  - Organization charts reflecting officers, directors, departments, employees, ect.

# LITIGATING THE CASE

- File complaint and discovery (cont'ed) :
  - Insurance agreements
  - List of names and last known addresses and telephone numbers of present and former nursing personnel (RN,LPN,CNAs).
  - Facility's resident care Policy and Procedures.
  - Facility's personnel Policy and Procedures.

# LITIGATING THE CASE

- File complaint and discovery (cont'ed):
  - Advertisements or other representations to the public concerning quality, characteristics, type and standard of care provided to residents at the facility
  - Documents reflecting level of staffing (work schedules and time sheets showing the identity, number and classification of staff) in area resident was housed.

# LITIGATING THE CASE

- File complaint and discovery (cont'ed):
  - Employee work schedules
  - Clocked time cards
  - Personnel records of persons involved in providing care to resident.
  - Personnel records - facility Administrator.
  - Documents pertaining to disciplinary action/investigation of employees providing care to resident.

# LITIGATING THE CASE

- File complaint and discovery (cont'ed):
  - Evaluation of personnel in providing care to residents.
  - Other lawsuits
  - Documents relating to alleged violations by licensed nursing boards and regulations.

# LITIGATING THE CASE

- File Motion to Compel and Set hearing.
- Set DON/Administrator's Deposition
- Chart review – identify employees that treated resident leading up to the event.
- Set Nurse/Physician Expert depositions – for medical and nursing standards of care.

# EXPERT TESTIMONY

- Plaintiff must produce evidence that establishes:
  - the appropriate standard of care (SOC);
  - the nursing homes deviation of SOC;
  - a proximate causal connection between the act or omission constituting the breach and the injury sustained by plaintiff.

# EXPERT TESTIMONY

- Breach of SOC:
  - Plaintiff has BOP by substantial evidence that the nursing home failed to maintain a SOC.
  - Must show that resident's condition was adversely affected by the alleged negligence.
  - Must offer expert medical testimony as to what is proper practice, treatment, and procedure in the particular case of the resident.
  - Lack of medical evidence = lack of proof!

# ADDITIONAL ISSUES

- ARBITRATION – The most frequently reviewed question associated with nursing home litigation!!
- Alabama Supreme Court has upheld Nursing home's motion to compel arbitration based on provisions in its admission contract in almost all cases.

# ADDITIONAL ISSUES

- Arbitration Clauses Upheld:
  - Where residents or their representatives (who later become the legal/personal representative) signed an agreement containing an arbitration clause on admission.
  - *Carraway v. Beverly Enterprises Alabama, Inc.*, 2007 WL 2070354 (Ala. July 20,2007)

# ADDITIONAL ISSUES

- Arbitration Clauses Denied:
  - Where resident's "*next of friend only*" signs an admission contract in *absence of legal* authority to act on behalf of the *already mentally* incapacitated resident.
  - When personal rep of deceased resident's estate, who was not the "next of friend", files suit (obo deceased resident), motion to arbitrate is Denied.
  - *Noland Health Service, Inc. vs. Wright, 2007 WL 1300721 (Ala. May 4, 2007).*

# ADDITIONAL ISSUES

- Arbitration – Additional Arguments:
  - Non-signatory – whether resident has assented to the arbitration clause when signed by someone else.
  - Unconscionability – when contract terms that are unreasonably favorable to one side (OR) the process of contract formation, use of fine print and convoluted language, lack of understanding, ect.

# ADDITIONAL ISSUES

- Arbitration – Additional Arguments (cont.):
  - Claims of Estate Had not Arisen – (Some states say that Wrongful death statutes create and independent cause of action.
  - Arbitration Clauses in Admission Agreements Prohibited by Statute – Federal and state Medicare and Medicaid regs prohibit inclusion of these clauses in admission agreements.



# Enjoy Cancun!!!!

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