

**LITIGATING NURSING HOME CASES AGAINST BEVERLY ENTERPRISES, INC. –
WHAT TO LOOK FOR IN DISCOVERY**

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I. Introduction.

There is nothing more important in the litigation of a nursing home case than “internal” documentation generated by the owners and/or management companies responsible for the operation of the nursing home. This internal documentation can lay the framework for the successful prosecution of your case. While the data memorialized in the documentation may vary from nursing home to nursing home, the type of information is typically of the same general nature. The data can be categorized into three major groups:

- Staffing/Payroll
- Clinical Issues
- Financial Analysis

This paper will focus upon the internal documentation generated by Beverly Enterprises, Inc. and the affiliates through which it operates (“Beverly”). Beverly has a very comprehensive and intensive documentation system. It has been said that Beverly’s documentation is so complete that they can tell how many ounces of orange juice have been used at a facility for any given period of time. The internal documentation produced by Beverly can give you a complete picture of its operations at the facility, state, regional and national levels. This paper will address

the various documents produced by Beverly and discuss how they can be used in litigation against this national nursing home chain.

II. Staffing/Payroll.

A great deal of the internal documentation produced by nursing homes centers around staffing and payroll information. The single largest item of expense in the operation of a nursing home is the cost of labor. The equation is quite simple – if you reduce your cost of labor, you increase your profit margin. Therefore, it is no surprise that nursing homes generate detailed documentation to assess this area of operation. Beverly is no different in this regard.

A. Punch Detail Report.

The Punch Detail Report is a computerized report that is the “timekeeper” for employees of the facility. This report provides the information which has traditionally been obtained from time cards. Most facilities have transferred to a system where the employees “swipe in” and “swipe out” to indicate the time they are on the job. The Punch Detail Report contains a separate record on each employee for each pay period. This report indicates to the exact minute the time each employee has spent in the facility for the pay period, and it provides a summary of regular and overtime hours worked for the pay period. In states where the minimum staffing requirements are based on the number of direct nursing care hours provided to residents on a per patient day basis, the information contained within the Punch Detail Report is critical to a determination of whether the minimum staffing requirements have been met.

B. Hours of Labor Report.

The Hours of Labor Report is a comprehensive report that details the hours of labor expended by a particular facility for a given period of time. This report is most often a monthly

evaluation of the number of hours worked by all departments within the facility – administrative, nursing, dietary, etc. One can also look at this report to determine the amount of labor used by a particular facility as a whole. The report typically provides an analysis of the labor hours in several sub-categories such as: per patient day, Medicare hours, Medicaid hours, RN hours, LPN hours and CNA hours. A further use of this report is to provide a comparison or validation of employee work hours recorded in the Punch Detail Report.

C. Key Factor Report.

One of the most insightful reports generated by Beverly is the Key Factor Report. This is a Beverly specific document that provides a weekly facility analysis of staffing and payroll information. The report provides the number of “nursing hours” and “other hours” for each day of the report. The information is further broken down into “certified hours” and “non-certified hours” by RN, LPN and CNA positions. The most interesting aspect of the report is that it shows the “actual” nursing hours versus the “budgeted” nursing hours. The report then provides the variance between the actual and budgeted hours, and it shows the actual cost savings or overrun due to the variance.

This report is normally submitted by the facility administrator via e-mail to the Director of Operations for the facility on Thursday afternoon of each week. The Director of Operations often comments on specific areas and provides feedback to the administrator based upon information in the report. These comments can provide some useful insight into the “profit driven” nature of the business.

D. Payroll Period End Report/Payroll Analysis Report.

A report used to verify actual dollars spent on payroll is the Payroll Period End Report (sometimes referred to as the Payroll Analysis Report). This report allows the facility to see if it

is within budget for a particular pay period, and it provides a review of “overtime hours”. A consistently high number of overtime hours in a facility over a period of time can indicate several things about the staffing patterns in the facility. This can be an indicator that the facility is experiencing a high number of “no shows” or “call-ins”. A high number of overtime hours can also indicate that there is a small group of core employees who provide the bulk of the nursing care.

III. Clinical Issues.

Quite often, patterns can be established in regard to specific clinical issues due to a nursing home’s failure to provide the minimum standard of nursing care. These patterns may be discernable from state survey information for the facility. While the state surveys for a facility are a good place to start, a more accurate picture of the specific clinical issues can be gleaned from the facility’s internal documents. Attempts to obtain internal documentation on clinical issues are almost always met with an objection that the documentation is protected from discovery based on the “quality assurance” privilege.

Counsel for the plaintiff in a nursing home case should attack the assertion of this privilege each time it is asserted. Depending on the law of the state in which you are litigating, the documentation may or may not be covered by the quality assurance privilege. First, the burden of establishing the privilege is typically on the defendant. Second, strategic deposition questions can often reveal that the documentation you seek is not in fact a part of the quality assurance process.

A. Scorecard System.

Beverly has established a “Scorecard” system in which each facility is rated according to various performance factors. This system has been highly touted by Beverly’s CEO. The Scorecard is an integral part of Beverly’s Executive Director and Director of Nursing Services’ “Performance and Bonus Plan”. The stated purpose of the Plan is “to align performance planning and rewards system for Executive Directors and Directors of Nursing Services with Beverly’s core values as outlined in the Beverly Scorecard”. The Plan is basically the system through which administrators and directors of nursing can qualify for an annual bonus.

The Scorecard is a prime example of a document that is not subject to the quality assurance privilege in many states. The Scorecard focuses on a facility’s performance in four operational areas:

- Commitment
 - Associate satisfaction
 - Associate turnover
- Integrity
 - Quality standards
 - State survey
- Passion
 - Customer satisfaction
- Value
 - Pre-tax income
 - Occupancy
 - PDDSO

This is Beverly’s own statement of the areas addressed by the Scorecard. It is clear that several of these items have absolutely nothing to do with the function of quality assurance. In addition, all employees participate in the program and have access to the results; therefore, the information is accessible to persons who are not a part of the quality assurance committee. Counsel for the plaintiff should tailor her deposition questions to the particular state law applicable to the quality assurance privilege. Deposition testimony is essential in providing the

trial judge with the basis to support a ruling in the plaintiff's favor on a discovery request for this documentation.

A. Weekly RVP Report.

Beverly's regional vice-presidents provide a weekly "RVP (Regional Vice-President) Report" to the executive vice president and chief operating officer for Beverly Health and Rehabilitation Services, Inc. This report contains information on various topics including surveys, extraordinary events and legislative affairs. The survey information is in the form of an "executive summary" which contains a brief description of the deficiencies contained in the survey. This information can be used not only to identify trends in clinical problems, but also to establish that upper level members of corporate management were placed on notice of the problems.

III. Financial Analysis.

As Beverly is a publicly traded company, much of its financial information is easily assessable within the public domain. This should not keep counsel from investigating the financial operations of the company as the picture painted for Wall Street is much different from the one presented in litigation. Further, Beverly is allowed to use a "consolidated financial statement" which combines the financial information for the parent company with the financial information of all subsidiaries and affiliates. Therefore, counsel should examine the financial condition of the individual facility and all companies directly connected to it in the chain of command.

A. White Book Report.

Beverly utilizes a White Book Report to analyze a variety of data from all of its different operational regions. The White Book Report is provided to the executive vice president and chief operating officer of Beverly Health and Rehabilitation Services, Inc. on a monthly basis.

This report includes information on some of the following items:

- General operating statistics;
- Census;
- Payor mix;
- Average revenue rates;
- Expense items;
- Medicare statistics;
- Accounts receivable; and
- Labor reports

As these are regional reports, they can be used to establish broad patterns that are easily identifiable to corporate management. Many of these patterns involve staffing and clinical issues that can be directly related to the allegations contained in the plaintiff's complaint.

- **Natural Class Profit and Loss Report.**

As opposed to many of the financial documents that are consolidated statements, the Natural Class Profit and Loss Report provides the core financial information on a particular facility. The information in this report is similar to a traditional profit/loss report and financial statement.

IV. Conclusion.

As anyone who has been involved in nursing home litigation is aware, the mechanism by which your client has been injured is often only the last ripple in the pond that is generated from corporate decisions. These decisions are based upon information compiled and reviewed by the entities responsible for the operation and management of the nursing home. Far too often these decisions are driven by a goal of increasing the profit margin of the nursing homes. This often results in adverse consequences to residents. It is essential to obtain key internal documents in litigation involving Beverly and other corporate nursing homes in order for plaintiff's counsel to trace each ripple back to the force by which they were set in motion.