

**PREPARING WITNESSES FOR TRIAL:
PLAINTIFF'S PERSPECTIVE**

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INTRODUCTION

As everyone knows, witness preparation is vital in every case, and possibly even more so in a nursing home case. The nursing home resident will most likely be "introduced" by way of their personal representative or guardian. By calling as witnesses, the nursing home administrator, director of nursing and other current nursing home employees (all of which will be defendants to the lawsuit or adverse witnesses), plaintiff's counsel will seek to get admissions directly from the nursing home personnel that various standards of care were breached. Ex-employees (often disgruntled by their treatment while employed by the nursing home) will be able to provide pattern and practice testimony, to the extent it is discoverable, and may have personal knowledge pertaining to how the nursing home resident was treated while they were employed at the nursing home.

Finally, expert witnesses (registered nurses and physicians) will be able to recognize and confirm the various breaches of standards of care committed by the nursing home and its employees, and will further be able to establish the causal link between the resident's death or injuries and said breaches.

I. Client

In the majority of nursing home cases, the nursing home resident will not be physically or mentally able to testify on their own behalf. Therefore, it is up to the resident's personal representative, most often a close family member (spouse, child), to provide the jury with the pertinent information concerning the resident's treatment at the nursing home. If the resident is deceased, the personal representative will be the executor/executrix or the administrator/administratrix, depending on whether the resident had a will. If the resident is still living, the resident's sponsor or guardian will provide the jury with that information.

The personal representative (or guardian) will most likely be the family member who spent (spends) the most time with the resident at the nursing home. This person will be able to provide the jury with information that cannot be found elsewhere. Therefore, it is important to spend as much time as it takes with that person to help them understand what the jury needs to hear and how they need to hear it. Meet with the personal representative/guardian face-to-face and go over all of the questions he/she will be asked on the witness stand. Listen carefully to their responses and let them know if a response needs to be more thorough. Make sure your dialogue with the witness "flows" and does not sound "canned." Stress to your client the importance of making eye contact

with the jurors when answering your questions on direct examination. Chances are, you and your client will have better results if the jury likes your client and feels a bond towards that person.

Specifically, here are some areas in which you need to make sure your client is prepared to testify:

1. The resident's condition before being admitted to the nursing home.

- Independent functional abilities
- Able to perform all or most daily living activities without assistance
- Prior medical history/health problems
- History of falls
- Use of wheelchair/walker
- Dementia
- Hobbies/activities

2. Reasons for admission to the nursing home.

3. How the resident got worse while in the nursing home.

- Bedsore
- Weight loss
- Dehydration
- Falls/broken bones
- Bruising/contusions
- Gangrene

4. Any acts or omissions by nursing home employees, which were witnessed by your client or that your client has knowledge of:

--Resident sitting in body waste for extended periods of time

--Ignored requests for care

--Missed meals/lack of water

--Missed turns, treatments, therapy, or medication

--Verbal or physical abuse

--Missing/stolen possessions

--Improper restraints

Finally, make sure your client is prepared for likely areas of cross-examination.

II. Administrator, Director of Nursing, and Other Current Nursing Home Employees

Although you will be unable to prepare these defense witnesses, I feel like it is important to highlight the type of questions these witnesses will need to be asked in order to prove your client's case.

Obviously, these witnesses will be deposed in discovery after you and your nurse consultant have thoroughly reviewed the resident's nursing home chart. Therefore, you will be able to bring out testimony from these witnesses that reveals acts or omissions, which caused or contributed to the resident's death or injury.

According to 42 C.F.R. § 483.15, a nursing home is required to **"care for its residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individually."**

Further, 42 C.F.R. § 483.25 spells out the "bottom line" duty of the nursing home to provide appropriate nursing services to each and every resident, to maximize each resident's well-being. Under this standard:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, a psychosocial well being, in accordance with the comprehensive assessment and plan of care.

You will be able to get the administrator to admit that these are the appropriate standards of care and then, through the director of nursing and other nursing home personnel, you will be able to elicit testimony which shows how the standards of care were breached. This, of course, will vary from case to case; however, to give you specific examples:

1. In a bedsore (decubitus ulcer) case, you will be able to prove through testimony from the director of nursing and other nursing home personnel that the resident did not receive the necessary treatment and services to promote healing, prevent infection, and prevent new sores from developing, due to the fact that:

- No care plan was implemented to turn resident on a regular basis;
- Care plan was implemented, but not followed (no evidence of charting); and
- Bedsore was not discovered in a timely fashion to prevent infection.

2. In a fall or fracture case, most likely you will have evidence of the fact that the resident had a

propensity for falls and had fallen in the past. Therefore, you will be able to prove through nursing home personnel that the resident did not receive adequate supervision and assistive devices to prevent this type of accident.

3. In a malnutrition and/or dehydration case, you will be able to prove your case through testimony from nursing home personnel with questions regarding the resident's chart. Specifically, the chart should indicate:

- The rate at which the resident lost weight;
- The percent of meals eaten by resident during the period of time in question;
- The failure to implement alternative feeding procedures when necessary (feeding, assistance; feeding tube, etc.); and
- Increased BUN level, which is a positive sign of dehydration.

Concentrate on the strengths of your case, which will be reflected in the resident's chart, and question the nursing home personnel accordingly.

You will be able to use leading questions while questioning the nursing home personnel who will be considered adverse witnesses. Be sure you know what their answer will be before you ask the question (based on deposition responses). If your examination is prepared properly, you will be able to get them to admit that the resident did not receive the quality of care that they contracted to receive. Be firm with nursing home witnesses, but at the same time be respectful.

III. Ex-Employees

Ex-employees of the defendant nursing home case oftentimes provides the "heat" you need in your case to take it from average to excellent. Since they are ex-employees, they have no motive to be anything but up-front and honest with you and the jury. These are people who have been terminated or have resigned due to understaffing or difficult working conditions.

In one of my nursing home cases, we allege that the resident developed bed sore on her body because she was not properly turned. Even though a turning program was implemented and posted in the resident's room, her chart indicated that the turning was not done according to the schedule. According to an ex-employee, one of her jobs was to turn resident's to prevent them from getting bedsores. Due to understaffing, she was unable to physically perform all the tasks required of her. When she complained to nursing home management, they ignored her requests for help. A social worker at the same facility revealed that during the evening hours, nursing home employees would meet their boyfriends inside or outside the facility when they were supposed to be on duty.

The following type of testimony is what you want to elicit from ex-employees:

- Testimony regarding understaffing;
- Testimony of complaints made to supervisors, which nothing was done about it;
- Testimony regarding the care (or lack of care) of

the resident; and

--Testimony regarding similar incidents (resident and other residents).

It is very important to spend time with ex-employees before trial and go over their testimony. This will make them feel more comfortable because they will know what to expect. They also need to be prepared for potential areas of cross-examination by defense counsel. It is highly likely that defense counsel will attempt to make these witnesses appear as "disgruntled" employees. However, if properly prepared and utilized, ex-employees may very well be your most effective witnesses!

IV. Experts

To bring your entire case together, you will need expert testimony. Ala. Code, § 6-5-548(a), sets out the burden of proof required of the plaintiff in a nursing home case:

In any action for injury or damages or wrongful death, whether in contract or tort, against a healthcare provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated healthcare providers in the same general line of practice ordinarily have and exercise in a like case.

In order to meet this burden of proof, the plaintiff must provide expert testimony from a "similarly situated healthcare provider." To be qualified to testify to the standard of care that a defendant allegedly breached, an expert witness must

come within the definition of a "similarly situated health care provider" under § 6-5-548(b) or § 6-5-548(c), depending on the situation.

. . . if the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a 'similarly situated health care provider' is one who meets all of the following qualifications:

- (1) Is licensed by the appropriate regulatory board or agency of this or some other state.
- (2) Is trained and experienced in the same discipline or school of practice.
- (3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

§ 6-5-548(b) (applies to administrators, nurses, and physicians who are not board certified).

However,

. . . if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a 'similarly situated health care provider' is one who meets all of the following requirements:

- (1) Is licensed by the appropriate regulatory board or agency of this or some other state.
- (2) Is trained and experienced in the same specialty.
- (3) Is certified by an appropriate American board in the same specialty.

- (4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

§ 6-5-548(c). (applies to board certified physicians).

Therefore, the nursing care expert testimony must be provided by a 1) duly licensed registered nurse; and 2) who was serving as a director of nursing for a nursing home during the year preceding the date of the alleged incident. See Husby v. South Alabama Nursing Home, Inc., 712 So.2d 750 (Ala. 1999). Your causation expert (medical doctor) must testify that the injury or death of the resident was "probably" caused by the failure of the nursing home to comply with the applicable standards of care.

Once again, it is very important to go over all aspects of the expert testimony with the expert prior to trial. This will ensure that you and your experts are "on the same page" and that the expert testimony can be presented effectively to the jury.

CONCLUSION

Nursing home cases are very challenging. It takes a great deal of time, effort, and money to get this type of case ready for trial. If your case does go to trial, it is crucial to make sure that all plaintiffs' witnesses are properly prepared for trial. This will ensure that the

plaintiff's case tries as well as possible, and will increase your chances of success for your client.