

THE DREADED DEPOSITION

TRIAL STRATEGIES - HOW TO PREPARE AND SURVIVE

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Learning Objectives

- Objective 1: Understand the basics of risk management
- Objective 2: Identify common lawsuits
- Objective 3: Identify common mistakes that can lead to lawsuits
- Objective 4: Discuss Arbitration Agreements
- Objective 5: Identify parts of a lawsuit
- Objective 6: Understand the basics of a deposition

Common Lawsuits

- **Falls**
- Abuse
 - Physical
 - Sexual
- Elopement/Wandering
- Assaults
 - Other Residents
 - Staff
 - Nanny cameras
- Failure to Supervise
- Wrongful Death
- Medication Errors
- Corporate Negligence
- **Wound issues**

Documentation Mistakes That Lead to Lawsuits

- “Rubber stamp” physician orders
- Lack of communication during facility transfers
- Not documenting discussions with staff/physicians and residents/families
- Not documenting lab results sent and reviewed
- Poor documentation on MARs and TARs
- Records alteration/destruction issues
- Poor interviewing and background checks on direct caregivers
- Failure to update Care Plans

Alzheimer's Residents: A Growing Trend

- Does the family understand the natural progression of the disease?
- Is the family prepared for the behaviors that often occur with the disease?
- Are educational materials provided?
- Are conversations/information provided to families documented?
 - Doctor has the conversation, but its not documented

Plaintiff's Litigation Tactics

- **Corporate theories of liability**

- Attack the corporation
- Focus on staffing
- Lack of physician oversight
- Failure to follow federal and state regulations
- Failure to provide necessary resources to the facility
- State surveys
- Ombudsman reports
- Negligent hiring
- Email communications
- Use of accounting experts to show corporate control.

Plaintiff's Litigation Tactics

- “Split the Defense”
- Attending physician v. staff
- Nurses v. CNAs
- Personnel files
- Disgruntled former employees
 - Complaints about staffing
 - Inadequate resources to do their jobs
 - Negative comments about the facility
 - Plaintiff's attorneys hire investigators to locate former employees

Plaintiff's Litigation Tactics

- **Policies and Procedures**

- Request for Production of Documents
 - Confidentiality Agreements
- Argue facility violated it's own standards
- Argue facility/corporation did not establish appropriate policies and procedures
- P & P do not comply with Federal and State Regulations

Plaintiff's Litigation Tactics

- **What is being marketed to families?**
 - Consumer Fraud
 - Does the facility meet its marketing promises?
 - Are families given unrealistic expectations?
 - Is there communication about medical condition?
 - Does resident/family understand role of SNF?
 - staffing, physician visits and limitations of services
 - Is this understanding documented?

Resident Rights Statute

- Prevailing plaintiff can recover attorney's fees and costs of litigation.
- Use of DOH Surveys.
 - Deficiencies with regard to that specific resident's care and treatment?
- Placing jurors into the shoes of the sole regulatory body responsible for enforcement of the regulations.

Risk Management

- Providing good care
- Hiring/retaining competent and caring staff
 - Orientation for new staff
 - Ongoing in-services
 - Annual performance reviews
 - Background checks on new hires
- Knowing what mistakes are made that lead to lawsuits
 - In-Services on litigation

Risk Management

- Good documentation and family relations
- Explaining difficult medical issues in a way that creates realistic expectations
- Relationships with families and residents
- Role of the Medical Records Custodian
 - Prevention of self-inflicted documentation wounds.

Arbitration Agreements

- A contract requiring disputes to be resolved through binding arbitration before a neutral arbitrator instead of in court
- Part of Admission process
- Explained to resident/family at admission
- Federal Arbitration Act
- State Arbitration Acts and Statutes

Arbitration Agreements

- Fact finding-and decision-making in hands of attorney/arbitrator vs. lay jury
- Limits discovery, witnesses, experts and other procedures
- Valid arbitration agreements remove a case from the court's jurisdiction
- Limits possibility of a runaway jury verdict

Challenges to Enforceability

- Possibly procedurally unconscionable if contract of adhesion
- Substantively unconscionable if terms unreasonably favor one party
 - limitations on damages
 - restrictions on discovery

Stages of Litigation

- Records request
- Complaint filed
- Written discovery
 - Interrogatories
 - Document requests
- Expert reporting
- Witness and expert depositions
- Mediation
- Trial/Arbitration

Records Request

- Define medical records
- Is Request Valid / Authorized?
 - HIPAA Compliant
 - Look for Red Flags
- Request vs. Subpoena vs. Court Order

Complaint

- Allegations of Resident/Family
- Likely Name Every Party Possible
- Make Any Claim Possible
 - [Plaintiff] while on the premises and/or under the care of Defendants, suffered, endured, and experienced, including but not limited to: physical assault, assault, shoving, fracture(s), multiple fractures, orthopedic injury, back injury, spinal fracture(s), wrongful imprisonment, denial of access to medical care, intentional infliction of emotional distress, negligent infliction of emotional distress, held as a prisoner, handled roughly, suffered numerous violations of her state and federal resident rights, improper treatments, a failure to provide proper treatments, pressure ulcers requiring treatment and surgical intervention, infections, a failure to properly assess wounds, a lack of allocation of resources from the managers and/or owners and/or administrators of the facility, extreme pain, suffering and discomfort, mental and emotional anguish, a significantly decreased quality of life, deprivation of dignity, general neglect and lack of care; and has incurred substantial costs and expenses for medical care and treatment.

Written Discovery

- Interrogatories
 - Questions for Other Party
- Request for Admissions
 - Asking other party to admit to certain facts
- Document Requests
 - Broader than initial medical record request

Deposition

- Question and answer session
- Court reporter
- Answer only the question that is asked
- Do not volunteer information
- Confusing questions
- I don't know and I don't remember
- Plaintiff's attorney is not your friend!

Deposition of an Administrator

- Regulations – Standard of Care?
- Staffing
- Surveys/Deficiencies
- Policies and procedures = Guidelines
- Corporate structure and reporting to "Corporate"
- Budgeting
- Hiring and firing of staff
 - Background checks
- Complaints from current/former employees
- Identification of potential disgruntled former employees
- Bonuses
- Documentation
- In-Services and staff orientation
- Involvement in resident care/resident Interaction
- Plaintiff's care and treatment

Conclusion

Two things to remember:

- 1) Documentation; and
- 2) Communication.

THANK YOU!
QUESTIONS?