Making a Difference

Baker Donelson Long Term Care Newsletter

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Arbitration For Nursing Home Residents: *Is It All It's Cracked Up To Be?*

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Last month, Baker Donelson arbitrated one of Tennessee's first nursing home resident cases to go to a final arbitration judgment. It was quite an adventure. Our team drafted the arbitration agreement when the facility put it in place in 2005, then wrote the script for the video which explained the arbitration to the family. We were also involved in training the admission coordinator on how to offer the arbitration agreement to the family. The team received the Complaint against the facility, filed in court rather than with an arbitrator, which alleged that the nursing home caused a Stage IV pressure sore on a resident which resulted in amputation of his leg. We filed the Motion asking the court to send the case to arbitration. We went through discovery in the arbitration, then over the course of two weeks presented our nursing home's case to the arbitrator. In the end, three years after our path began with the drafting of an arbitration agreement, we received a final, non-appealable judgment from the arbitrator.

We've certainly gained a new and broader perspective on arbitration for disputes with nursing home residents. And, in reflection, it is important to ask, "Is it all it's cracked up to be?" For both nursing homes and the families they serve, the answer is a qualified "yes." The benefits we tout of nursing home arbitrations are each analyzed in reference to this case.

Privacy – The family and the caregivers enjoyed the privacy of a conference room as they each told the arbitrator what they knew. The deceased's private medical history was protected from public disclosure and the family matters which were aired were kept just that, family matters. This was a touted benefit which proved its worth.

Continued next page

Recent Long Term Care Successes

In October, **Christy Crider** and **Sonya Smith** became the first lawyers in the state to win a nursing home arbitration (see *Arbitration For Nursing Home Residents: Is It All It's Cracked Up To Be?* for lessons learned).

Christy Crider and **Sonya Smith** spoke at the American Bar Association Women Rainmaker Seminar in Tucson, Arizona. Their presentation included information on the niche area of long term care.

Craig Conley, with the assistance of **Betty Campbell,** won a Motion to Dismiss all claims except Medical Malpractice from a nursing home wrongful death Complaint.

In September, **Harry Ogden**, **Heidi Hoffecker** and **Thomas O. Helton** attended the Defense Research Institute Medical Liability and Health Care Law Committee's program titled *Nursing Home/ALF Litigation Seminar*. They participated in seminars and discussions with a focus on recent developments in long-term care law; the four questions every juror asks in a long term care case; and how to prevent assisted living facilities (ALFs) from being held to the skilled nursing facility standards among others.

Arbitration for Nursing Home residents: *Is It All It's Cracked Up to Be?,*

continued

Informality/Flexibility – Our mutually-selected arbitrator maintained a respectful, yet relaxed environment. We all sat around one table together. Breaks were taken whenever convenient for the parties rather than for a jury. We ate snacks, and sometimes meals, during testimony when agreed to by all parties and the witness to keep everyone comfortable and the process moving. The informality and flexibility made the process of adjudication more comfortable for everyone.

Efficiency – We entered into an Agreed Scheduling Order signed by the Arbitrator which gave each side the same number of days and set forth the start time and end time each day. If we had followed that Agreed Scheduling Order, the process would have been quite efficient. However, the Plaintiff asked to continue very late each night, sometimes resulting in 13-hour days. The Arbitrator accommodated this request under the theory of being accommodating and allowing all proposed testimony to be heard. Certainly, many trial judges would have done the same thing. However, it resulted in long, more expensive days. In most trial courts, the arbitration itself would have gone for more days and thus resulted in more costs. The lesson learned is to interview each potential arbitrator prior to hiring one.

Less expensive – Our arbitration as a whole was less expensive than a jury trial would have been. There is no appeal right absent fraud, saving the parties tens of thousands of dollars. The motion practice was less expensive because we decided to have all of our hearings by phone before the start of the regular work day. Therefore, there was no expense of traveling to and from the courthouse and waiting our turn for our motions to be heard. However, both parties must be careful to select an arbitrator who will make hard decisions. This means he must enforce rules which limit the claim to viable causes of action and limit discovery to information genuinely calculated to lead to the discovery of admissible evidence. In our case, we had few written discovery disputes. It should be anticipated that many attorneys will try to distract from the medicine in the case by requesting thousands of pages of irrelevant documents about the operation of the nursing home.

It is key to understand the arbitrator's philosophy before one is selected. If you have an arbitrator who believes that discovery should have few limits in the name of flexibility and informality, then costs and inconvenience to the parties could escalate quickly. Also, many trial judges will dispose of all or part of claims which are not viable prior to a trial. When selecting an arbitrator, it is important to seek out this trait. It does not benefit either party to allow nonviable claims to go to arbitration; it only drives up the cost for both sides with the same result. The lesson on this point is: Select an arbitrator with care and your proceeding should be much less expensive than a trial.

What is the verdict on nursing home arbitration? When the right arbitrator is selected, the process is much more tolerable for all parties than protracted litigation and appeals. Both sides in our dispute seemed quite pleased with the professionalism of our arbitrator. And what was the verdict in our arbitration? A full defense verdict. It would likely have been the same result in front of a jury, but it would have taken both sides much more time, money and inconvenience to get there.

Ms. Crider and Ms. Smith are attorneys in Baker Donelson's Nashville office.

Incident Reports: *Protection or Production?*

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One of the stickiest issues in long term care litigation is production of incident reports. In virtually every case a plaintiff seeks discovery of facility incident reports, particularly regarding the resident at issue. These incident reports may be internal quality assurance documents that include statements submitted or authored by eye witnesses (e.g., CNAs who observed or addressed a fall), as well as trending analyses that may be conducted and documented by the facility quality assurance committee. Incident reports also include reports that are required by federal and/or state authorities to be submitted to the administrative or regulatory body of the State.

In order to participate in the Medicare reimbursement program, a long term care facility is required to have a quality assurance committee:

> A skilled nursing facility must maintain a quality assessment and assurance committee consisting of the Director of Nursing Services, . . . which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies.
> 42 U.S.C. § 1395i-3(b)(1)(B)

Under this same section of the Social Security Act, the records of such committee are subject to strict confidentiality requirements and are expressly excluded from discovery. Under the Act, a state "may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such Committee with the requirements of this subparagraph." *Id.* Most states have similar "peer review" protection laws that likewise protect the work and materials of such a committee. For example, the Tennessee Peer Review Law of 1967 states, "All information, interviews, incidents or other reports, statements, memoranda or other data furnished to any [peer review] committee . . . are declared to be privileged." Tenn. Code Ann. § 63-6-219(e). The Tennessee Supreme Court "has emphasized that the 'broad language of the [peer review law] encompasses any and all matters related to the peer review process.'" *Stratienko v. Chattanooga-Hamilton County Hosp. of Auth.*, 226 S.W. 3d 280, 283 (Tenn. 2007) (quoting *Eyring v. Ft. Sanders Parkwest Med. Center, Inc.* 991 S.W. 2d 230, 239 (Tenn. 1999)).

Stratienko narrows the protection somewhat to documents that are not available from some "alternative" source, e.g., chart materials maintained in the ordinary course of business. *Id.* at 285-286. Accordingly, a peer review committee may review nurses' notes from a resident chart as part of the review process. However, simply reviewing materials from an "alternative" source (i.e., the resident chart) does not shield those documents with the cloak of confidentiality. On the other hand, incident report forms and statements gathered solely for presentation and consideration by the committee should be protected as they are not so available from an "alternative" source.

Likewise, long term care facilities are required to report certain "unusual events" to the State. Such reports may generate surveys but are required by most state laws. *See e.g.*, The Tennessee Health Data Reporting Act of 2002, Tenn. Code Ann. § 68-11-211. Similar protection from discovery is afforded to these reports as well. "The event report and the corrective action report . . . shall be confidential and not subject to discovery, subpoena or legal compulsion for release to any person or entity, nor shall the report be admissible in any civil or administrative proceeding, . . ." Tenn. Code Ann. 68-11-211(d)(1).

What must a facility do to assure compliance with these standards so as to protect these reports? In a recent case in the Eastern District of Tennessee,

Continued next page

Incident Reports: *Protection or Production?*, *continued*

a defendant sought to protect 18 documents, 17 as peer review protected and the eighteenth as immune under the Health Data Reporting Act of 2002. In addition to filing a privileged log identifying the date and general nature of the event reported, the defendant also filed the Affidavit of a member of the peer review committee. Key elements of that Affidavit on which the Court relied in upholding the privilege were:

- The affiant was a member of the peer review committee and reviewed all 18 of the documents in connection with the quality assurance process.
- The documents withheld were not prepared in the ordinary course of business or otherwise available from some "alternative" source.
- The documents were not maintained or kept with the resident nursing chart but rather were kept in a secure and separate area in the nursing department office. They were not seen by anyone other than members of the quality assurance committee nor accessible to anyone other than the administrator, director of nursing and assistant director of nursing, all of whom were members of the quality assurance committee.
- The documents were all reviewed by the quality assurance committee for purpose of determining if some kind of procedure might be implemented that would improve the quality of care or otherwise prevent the documented incident/accident from occurring or reducing the likelihood or frequency of such occurrence.

In addition to reviewing the defendant's privilege log, affidavit and substantial briefing, the Court also reviewed in camera the documents in question, from all of which the Court concluded that the documents were protected under the Tennessee Peer Review Law (as to the first 17) and likewise privileged under the Health Data Reporting Act (Item No. 18). The Magistrate Judge's Memorandum and Order can be reviewed at Brown v. Sun Healthcare Group, Inc. et al; E.D. Tenn., 3:06-cv-240 (May 27, 2008).

The lesson therefore is that if these documents are reviewed and worked with by the quality assurance committee of a facility and they are separated and maintained as confidential documents, they should be protected from discovery under both federal and applicable state law protections.

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