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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.

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.