

Nursing Home Litigation- Winning Strategies for the Next Decade-November 2010

Ethical Considerations in Prosecuting and Defending the Nursing Home Case

Presentation:

- November 4, 2010- OKC- Doug Shelton, Dshelton@sheltonlawok.com
- November 5, 2010-Tulsa- Tony Laizure, tlaizure@stipelawtulsa.com
- Materials and Power Point: Ginger K. Maxted: gmaxted@sheltonlawok.com

As you no doubt appreciate, prosecuting and defending Nursing Home negligence cases is no simple matter. Ethical considerations, like the other aspects of these claims, are multi layered. As counselors, in this context, we must consider the serious needs of our clients and our ability to assist them. Further, we have to constantly analyze our position as to witnesses as we gather information. The following materials cover the ethical concerns when the client engages you as attorney, and your ability to conduct witness interviews throughout the case. First we will examine the "simple" question: who is your client?

WHO IS YOUR CLIENT

Nursing home cases so often begin with a phone call a conversation like:

Attorney: "This is Ms. Maxted how can I help you?"

Caller: " I don't know, I mean my Mom is really sick, but I'm not there or anything. My brother lives close to there but we don't really talk much. She moved out there after we had a fight about how she was being taken care of here. I know he does not know all about what she needs but he said she had to come down there. "

Attorney: "I am sorry to hear of that. Where do you live?"

Caller: "Colorado"

Attorney: "And your Mother, where is she?"

Caller: "Oak Hill manor or something like that in some town, Wewoka, I think, it is the town where our other sister lives."

Attorney: "How is it that your Mother is sick?"

Caller: "Well, Bill says that Linda may have done it to her because she kept her at home with her before she went to the nursing home but I don't know. All I know is when I went to see her she had a nasty sore on her backside and a bunch of bruises and a big cut on her face and she talked funny and wouldn't even eat. She never did that when she lived with me...."

As you quickly realize, representing the injured party in these cases often requires finding a relative of that party who is competent and has that party's interest at heart. Often you find tense family dynamics, that we are all familiar with, being played out against the gruesome backdrop of negligent elder care. You also find cross allegations of abuse within the family and between the family and the NH. Therefore, as the attorney you must establish who is in the best position to represent the actual injured party. This may require some investigation and meeting with the interested parties individually. Often, if the injured is living, the person whom they live with is already serving as a guardian and you can contract with them on the behalf of the injured. However, some cases will require appointing someone to serve as guardian. And, if the action is for wrongful death, you will need to open a probate case and have the personal representative appointed by the court. It is beneficial to involve the court in these matters in order to have an unbiased third party with the authority to make decisions. As an advocate for your client you are not always in the best position to solve problems within the family dynamic. Nor are you able to disburse funds to family members according to their wishes. Involving the court can save you many battles if and when it comes time to hand out money.

The following steps may help in determining who is your client and who you need a contract with to bind your client:

1. Establish who is the injured or deceased party this is your client (client).
2. At case intake, ask for the names and addresses of all relatives. Consider the modified per stirpes model and get all names, i.e. children of client and any children of deceased children of the client. If client is deceased go to step 7.
3. Establish if the client is competent.
4. If the client is competent, find out who is the client's power of attorney, if any. Contract with client and/or power of attorney.
5. If the client is not competent, find out who is the current guardian or power of attorney.
6. Interview the Guardian to be sure he or she can handle going forward with suit. If he or she is able, contract with the Guardian.
7. Interview the family to establish who is best willing and able to bring the suit. Consider the ability of the person to testify and the relationship of that person to the client.
8. After discovering who should be appointed to handle the law suit, file the guardianship or probate and have a contract signed by that person. Be sure to express to the family that the judge who will be handling the guardianship or probate case is in charge of that, not you.

There are myriad issues that will go into your decision about whom to contract with, but keep in mind that convenience is not your prime directive; your priority is with the victim of neglect and you must do your best for their interests to be represented. Frequently you will be dealing with relatives who are out

of town and cannot appear for court. It is best to clear this with the judge when you file your guardianship or probate. Then you will need to communicate with your clients representative explicitly about their duties. I include as much as possible in the contract in order to be clear about what is required by the client representative. Often you will also be dealing with siblings who are not happy with one another, and who are each interested in a share of any money that might be gained. As much as possible, remove yourself from this and focus on making your case. This is why a probate is such a good option. Then the probate judge will divide case proceeds equitably, not the attorney.

It is important to communicate with all of the interested parties and to get expectations in check immediately. Do not hesitate to establish the best possible family member or even non-family member as the guardian or PR. Your duty is to make the best case on behalf of your client, not to please the family. Be sure to record everything. I frequently send out letters noticing problem family and asking that they sign the letter and agree to let the best person serve as PR or Guardian, before I even open the probate or guardianship.

It is important to note that your duty to your client goes beyond mere compliance with the Ethical rules. The Restatement (Third) of the Law Governing Lawyers, section 16, gives further guidance regarding the fiduciary duty owed to a client.

§ 16. A Lawyer's Duties to a Client - In General

To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation; act with reasonable competence and diligence; comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and fulfill valid contractual obligations to the client. Lawyers owe a fiduciary duty to their clients. This duty is often assumed into the concept of legal malpractice and is embodied in the

relationship maintained between the lawyer and the client. Lawyers must

remember that this fiduciary duty is owed to the client and is not satisfied simply by complying with the Rules of Professional Conduct. The lawyer must always be sensitive to the important aspects of this fiduciary duty.

For Oklahoma Rules Governing the Client -Lawyer Relationship see, 5 O.S.

Chapter 1, Appendix 3-A.

NOTES: Powerpoint:

When Do You have A Client?

When they think you're the lawyer! Togstad v. Vesely, et al NW 2d 686 (Minn.1980)

Who is Your Client?

Resident

Guardian

Family Member

Personal Representative

WITNESS INTERVIEWS

Let us return to the initial client conference. In order to decide whether to take that case, it is important to establish the true facts of the case by meeting with the rest of the family and hopefully discovering some witness names. If you are able to interview anyone prior to the onset of litigation- GREAT! This is the ideal time to find and interview witnesses, as an attorney is not restricted by the Matter in Controversy Proscriptions of Rule 4.3. Further this allows you to fully discover the facts of the matter prior to taking on the risks and costs of litigation. (Corporate employee, even one who may be liable to plaintiff, may be interviewed as part of a pre-suit investigation, a no matter exists yet. Jougenson v. Taco Bell Corp., 58 Cal. Rptr. 2nd 178 (Ct App.1996)

However, this is often difficult, and you find yourself in the position of interviewing these nursing home employees sometime after the event, after the employee has left the nursing home and after litigation has commenced. In this case, you must be aware of who is represented and what testimony is privileged with or without representation. Post-suit, current employees of a facility with "decision making authority" are deemed represented. The tortfeasor is also deemed represented. A fact witness is not. Former employees are not deemed represented. (Ex-Parte Communications with facility Employees; Informal interviews are an exceptionally efficient means for the meaningful gathering of facts. Clark v. Beverly health and Rehab services. Former Employees; Not tied to employer, more willing to talk, reluctant to speak freely in presence of organizations lawyer Clark v. Beverly Health and Rehab services., Inc 787 NE 2d 905,911).

The following is an example of the most common type of fact witness statement that you will take. These are the first few questions of an interview of a witness who is a former employee of the nursing home where the negligence took place. Following this outline you will help you comply with the ethical rules that bind you in such an instance.

Sample Witness Statement:

GM: Sally, you're here with me today of your own volition, right?

W: Yes.

GM: You know that you do not have to speak with me correct?

W: Yes.

GM: Have I asked you to say anything today?

W: No

GM: Have you ever met me before?

W: No

GM: Do you understand that I am an attorney.

W: Yes

GM: Do you understand it is part of my job to investigate, the care of Henry?

W: Yes.

GM: Do you understand that I represent Plaintiff in a law suit against NH?

W: Yes.

GM It's my understanding that you worked at The NH some time ago, and that you no longer work there.

W: Yes

GM: And are you represented by any attorney as we sit here today.

W: No.

GM: Have you ever met with an attorney regarding anything at The NH?

W: No.

GM: Have you ever discussed, anything with any attorney regarding The NH?

W: No.

GM: Did you serve on any quality assurance committee at The NH?

W: Yes.

GM: You understand I do not want you to tell me anything that might have been discussed on quality assurance because that is privileged material.

W: Yes.

GM: You understand that I do not want to violate any of the other patients' rights at the NH, so therefore I would not want you to use any names of any patients if we discuss that.

W: Yes.

GM: Thank you. You understand that I am taping our discussion ...

W: Yes.

GM: And all I want you to do is tell me the truth as you remember it.

Notes: Powerpoint:

Pre-suit

Management/ tortfeasor/fact witness- OK

5 O.S. 1 App 3-A § 4.2:

Matter, "subject of the representation" = post suit

Post-Suit

Management/ tortfeasor- NO

fact witness- OK

Former Employees- OK

Rules for Witness Interviews:

1. Lawyer must not state or imply that they are disinterested-5 O.S. 1 App 3-A §
2. Must not give advice -5 O.S. 1 App 3-A § 4.3
3. Must not embarrass, delay, violate rights of third person- 5 O.S. 1 App 3-A § 4.4:

Additional Case Law:

Michaels v. Woodland, 988 F. Supp. 468, 472 (D.N.J. 1997) (expressly rejecting the defendant hospital's assertion that nurses and nurses aides could not be interviewed by the plaintiff's counsel because the hospital has offered representation to those employees).

Terra Int'l v. Miss Chem Corp., 913 F. Supp. 1306, 1317 (N.D. Iowa 1996) (rejecting arguments that all employees of an organization are represented parties "simply by virtue of their employment with the represented organization without any initiative on the part of the employee to obtain legal help from the organization").

Carter-Herman v. City of Philadelphia, 897 F. Supp. 899, 903 (E.D. Pa. 1995) (rejecting the argument that every employee of the defendant was automatically a represented party simply by virtue of his or her employment without any initiative on the part of the employee to obtain legal help from the defendant).

Brown v. St. Joseph County, 148 F.R.D. 246, 251 (N.D. Ind. 1993) ("[r]egardless of how much [an employer] may wish to provide its former and current employees with individual legal representation, an attorney-client relationship cannot be created unilaterally or imposed upon the employees without their consent").

Patriarca v. Center for Living & Working, 778 N.E.2d 877, 880 (Mass. 2002) (organization may not assert a preemptive and exclusive representation by the organization's lawyer of all current (or former) employees as a means to invoke rule 4.2 and insulate them all from ex parte communication with the lawyers of potential adversary parties).

I hope these materials assist you in your practice. Thank you for your time, please do not hesitate to contact me with any questions you may have.