What I am going to be speaking about today could be called deposing any nursing home employee. And what I’d like to suggest to all of you is a goal you should attempt to achieve when you depose any nursing home employee. We don’t believe we are taking depositions for quote “discovery purposes”. The discovery should be when you learn the chart, understand what happened in your particular case, and you should go into the deposition prepared to win the case through the testimony of the nursing home employees. I mean that sincerely. That should be your goal. To win the case. Not to discover information because you should have that information before you start the deposition. And we use a deposition its really a cross examination with all the fun but none of the risks because your not in front of a jury. It doesn’t matter if you get a bad answer and you have a chance to cut off any possible defense that can be raised in the discovery deposition and that’s the purpose in our view of taking these depositions. So there’s a lot of conventional thought, don’t ask the question if you don’t know the answer. If it doesn’t apply to a cross examination in a deposition. Don’t ask that one question to much if it doesn’t apply, don’t worry about that. Don’t beat a dead horse. We beat a dead horse. If we get an answer that we like we ask that question every possible way until the defense finally gets up and leaves the room. And then I’m still asking the question as their outside the door. So you need to beat a dead horse if you get an answer you want in a deposition.

I like to think of depositions as this... I use the depositions to develop our themes in the case and I’ll give you some specific examples and to defuse the defense themes. And not only the defense factual themes but also their legal themes. You could also use depositions to develop motions and limine to keep certain things out of the case. I like to think of a deposition of a roadmap to what in our jurisdiction is an adverse examination to trial. I like to think well, we’ll take this deposition for three or four hours and at the conclusion of that time I’ll have 20 or 30 or 50 questions that I can reorganize and use as my adverse examination.

I believe in a nursing home case you need to win the case through the testimony of the defendants employees. I don’t believe you can be successful in a nursing home case if it depends in a battle of the experts. Because if you get to a point where a nursing home and there’s a legitimate battle of the experts that nursing home is probably practicing way beyond the standard of care of any other nursing home. So you need to win the case through the testimony of the defendants employees.
Another purpose we use depositions for is to make it extremely difficult for any defense expert to testify creditably. Another words the defense expert is going to have to review the deposition testimony of the nursing home employee. The defense expert being a doctor or nurse cannot testify creditably if their at odds at what the defendant has said.

Another purpose is to help you own expert. It is extremely helpful to your own expert if you develop testimony through the defendant the nursing homes employ that your expert can rely on giving their opinion. That very powerful testimony and a good expert can take that testimony and run with it and it makes your own expert more comfortable.

Another extremely important purpose of a deposition is to obtain admissions that the defendant has violated the standard of care. You need to obtain those in the depositions and I’ll give you some thoughts as to how you can do that and also to obtain admissions that the violation of the standard of care approximately caused whatever injury you have in the case. To avoid certain legal problems like in some jurisdictions there’s a big issue as to whether or not OBRA is the standard of care. You can develop factual testimony in depositions to rebut that. Sometimes the defense wants to introduce the fact that there is a DNR order under the theory that this means that the family doesn’t care about the loved one. You can use the deposition testimony to develop material that it can’t happen. A lot of times the defense wants to say nurses can’t testify to certain things. Again you can use the deposition testimony to lay legal foundations for those arguments that you want to use at trial to rebut that kind of testimony.

You may want to think about a deposition as a form of brainwashing really. Brainwashing I mean in this sense. The deponent typically comes in prepared by the defense attorney. I don’t know what your experience is but in our jurisdictions sometimes the defense attorneys do a good job and sometimes they don’t do that good of a job and you success often depends on how seriously they take the preparation. Basically or very very frequently the deponent is going to try to do what the defense attorney has told them to say and the defense gives them certain themes. If you know what those themes are in advance you can break those themes down then the witness is on their own. And how brainwashing works is you first deprive someone of food and sleep and put them in a very inclimate room and then you take what they think are their beliefs and you show them that they don’t
apply. Like during the Korean War the Manturian candidate, they use to imprison African American GI’s and they use to say to them why are you fighting the War? Well for freedom. And them they would show them pictures of not so free things happening in this country. So they would destroy their belief structure. Once you destroy their belief structure the witness becomes you own witness and in a smaller sense the same thing happens in a nursing home case. So here’s an example of what I mean.

We’ve all heard this in a fall case. “Well we can’t watch him 24 hours a day” “We can’t provide one on one care so therefore whatever fall happens is not our fault. Now there’s two ways to approach this sort of testimony. The first thing is you can take it head on. Why can’t you watch him 24 hours a day and why can’t you provide one on one? Well, we don’t have the staff. “So when the resident cane into the nursing home and you knew that this resident needed one on one care and you didn’t provide it, I assume you explained that to the family?” “Well we didn’t really tell that to the family”. “Well how would the family know that you couldn’t provide the care that this resident really needed”? So in essence your admitting to us that you knew this resident needed this one on one supervision or 24 hour daycare and you couldn’t provide it and you didn’t tell anyone about it. So in essence in terms of OBRA you could not meet your obligation to ensure that the resident received adequate supervision in the system to prevent accidents because this resident needed a level of care that you couldn’t provide and you didn’t tell anyone about it. That’s one approach.

The other approach is to deflect it and when we know someone is going to say something like this a lot of times I bring it up. You would agree that you can’t provide one on one care to each resident? Correct? You would agree that you can’t provide 24 hour supervision to each resident? Correct? But what you need to do is give reasonable care. So the first thing you need to do is assess the resident. And you have to assess what type of care the resident needs. And then you have to develop a plan to deal with that type of care. And then you have to implement that plan. And then if the resident still falls and your implementing the plan then you have to change that plan. So before we can even get to the question if this is a one on one supervision case you have to do what’s reasonable to prevent the resident from falling. And still in the middle of the deposition the deponent will say, here’s a classic example of a deposition I took last week. It turns out that I was questioning a supervisor to try to show that they didn’t have a reasonable plan and in the middle of everything the supervisor blurts out well I was
actually there when the resident fell. I said “what do you mean you were there/” She said I saw the resident get up from her chair, I saw the resident stand up at the dining room table, I saw that the resident was wobbling and the next thing I knew the resident was on the floor. Ok so now I have specific testimony, but Mr. Levin says we can’t watch everybody all the time. And I said but in this particular case you were watching weren’t you? Yes. In this particular case you knew that it was unsafe for her to stand on her own? Didn’t you? Yes. And you knew that it was your obligation or any of the nurses or CNA’s who saw her to immediately go over to her once they saw her get up. And there was other CNA’s in the room and in fact you were in the room yourself, but not one individual went up to help this resident. Would you agree that you weren’t doing what you were suppose too? She says well Mr. Levin we can’t watch them 24 hours a day. I said but you saw her get up so there programmed to say it but you can break it down. You can apply the same thing to an elopement case. I mean it is your job to make sure residents do not leave the nursing home. We know Mr. Jones left the nursing home. In order for him to leave the nursing home this means someone wasn’t watching him or the doors weren’t alarmed. Or the doors or alarms didn’t sound, or you didn’t assess him. If you don’t do these things then something bad is going to happen. And that’s what in fact happened in this case. Mr. Jones got out of the nursing home and no one saw him get out. You weren’t doing the job that you were suppose to do.

And it was your failure to do this job that led to him falling down the stairs and getting a subdural hematoma and dying. And then when you get him to admit that they violated the standard of care or something was proximately caused then I sort of use reverse psychology. What is the basis for your opinion that you just violated the standard of care? Now they think I’m challenging them and now they go deeper and deeper into whatever they say and I say well what is the basis for that, what is the basis for that, what is the basis for that? The reason I do that is because later on in the case they may want to change that position and once you put in all that testimony they can’t change that position.

You can use that same testimony to develop that as a theme. You can establish legal, technical violations of the standard of care factual violations for the standard of care or you can use the same technique to develop it into a theme. This family brought this resident to the nursing home because he was falling at home and they felt that they couldn’t watch him. And they told you that when they admitted him to the home, didn’t they? And you basically represented to them that you could provide a safe enviorment for
the resident, didn’t you? In fact you promised them that you would provide
the safe environment that they couldn’t get at home. And then they fell and
you broke that promise. And if you broke that promise you didn’t tell them
about it. And then after you didn’t tell them about it, you covered it up in
the chart. So now you broke the promise, you betrayed their trust, and then
you lied about it. And you can develop any theme you want using that same
logic.

You could do it in a pressure sore case. Typically in a pressure sore case the
defense is no matter what question you ask even with the best of care
residents develop pressure sores. Even with the best of care pressure sores
are unavoidable. No matter what question you ask, that’s the answer.
Again, you can take it head on or deflect it. Often times I’ll say to the
witness cause I know this is coming, I’ll say sometimes pressure sores are
unavoidable, aren’t they? Oh yeah, absolutely. What we’re trying to find
out in this case, whether this was unavoidable or not unavoidable. In order
for it to be unavoidable, again, you need a plan, you need to implement a
plan, you need to change the plan if its not working, and you need to be able
to show that you have done everything that you need to do before the
pressure ulcer is unavoidable. Don’t you? Did you do that here? Well, I
don’t know. Well, does the chart say we did it? I don’t know. So you don’t
know if this was unavoidable or not? Also, you can take another approach.
You can take this approach. You have to remember, all this stuff is in the
law, the OBRA the NCCNHR materials is really there for a purpose.
We’ve all seen in pressure ulcer cases that there suppose to do daily
assessments. Now why are they suppose to do daily assessments? A lot of
nursing homes have policies and procedures. A lot of nurses will agree that
its good care. Why do they have to do daily assessments? That is once the
problem occurs then they can address them. You take a pressure ulcer case
where someone comes into a nursing home without a pressure ulcer. One
thing you have to remember is that some point in time that pressure ulcer
developed. In the real world that developed. When did it develop? Ok
we’ll take a case where we had a plan. We had a plan in affect. Your
suppose to turn you suppose to reposition, you were doing that plan. At one
point in time that pressure ulcer developed. When? I mean it just didn’t
come out of the clear blue sky. Where in the daily assessment did you note
that it developed? Well, we don’t really know. Well, how bad was it when
you first saw it? We, we really don’t know that either. Isn’t the purpose of
a daily assessment ma’am to determine to get it before it gets worse and you
didn’t even know where it occurred. Once it went from nothing to something, then you have to do something different. Did you ever do that?

So by using this logic you can show that they didn’t take the steps necessary to be able to say that the pressure ulcer was unavoidable because they didn’t even know how the pressure ulcer started and you can use that by saying doesn’t the standard of care require you to do daily assessments? And doesn’t the standard of care require you once a problem occurs to address it. And if you didn’t address the problem once it occurred you can’t say the pressure ulcer is unavoidable, can you? In fact you don’t even know how the pressure sore got from a stage 2 to a stage 3 to a stage 4 because there is nothing in the chart that shows that.

So by using that type of approach you can : a. Establish violations of the standards of care and b. show proximate cause. Now that’s another big thing. I don’t know if that happens in your jurisdiction but whenever you ask a nurse a question the defense lawyer either says objection, no foundation or objection, she’s not a doctor. Again, what I try to do anticipating this objection, you are a nurse. As a nurse you treat or your job is in part to prevent pressure ulcers. You know how to prevent pressure ulcers. You know what happens if you don’t take steps to prevent pressure ulcers. You know what causes pressure ulcers because if you didn’t know what caused them, you would know how to prevent them. You deal with pressure ulcers every single day. I’m saying this to the nurse, in fact, often times you know more about pressure ulcers than doctors know about pressure ulcers, don’t you? In fact you couldn’t do your job as a nurse if you didn’t know how to treat or prevent pressure ulcers could you? And you know what happens if you don’t do these things, pressure ulcers develop. And they get worse and they get worse and they get worse.

So its well within your expertise as a nurse to determine how to prevent pressure ulcers , what causes pressure ulcers and to determine what happens if this isn’t done. Now in some jurisdictions they’ll still say, its doctor testimony, but if you have deposition after deposition of the nurses saying this and then the doctors will agree too because normally doctors don’t treat pressure sores in nursing homes and half the time they don’t even know what the orders are for treating pressure ulcers, then you get the doctors to say that. Now you have the foundation for the nurse to say, yes the pressure sores resulted because we either didn’t use appropriate preventative or treatment measures. And the defense lawyer is still saying objection, no foundation objection she’s not a doctor. Or objection, she speculating. Its
not speculation for a nurse to say, if you don’t take steps to prevent a pressure ulcer, a pressure ulcer will form.

Another way to ward off a legal objection, is with DNR. The defense always wants to show that a do not resuscitate order means that the family doesn’t care about the loved one and is basically trying to kill them. So what I try to do is ok what is a DNR order? In this particular case was there any care that was withheld because of the DNR order? No I don’t. So there was nothing here that caused this DNR to come into place was there? No. And in fact you encouraged the family to do a DNR order. That doesn’t mean that the family doesn’t love the resident, does it? And so at the trial where the defense may want to introduce this into evidence I have a basis for a motion in limine to say well the DNR has nothing to do with this case its just an attempt for the defense lawyer to prejudice the jury and imply that that the family’s didn’t love their resident.

Another classic defense preparation technique is on the issue of charting. If there’s anything wrong with the chart the defense will prepare the witness to say charting doesn’t matter we’re giving care here where not charting. Good charting doesn’t mean good care. There is any number of variations of that theme.

So in all cases where we have charting issues or false charting, I establish through their witnesses the importance of charting before we get into any issues. Why do you chart in a nursing home? It’s not just paper compliances is it ma’am? Oh no, not at all. I mean there is a number of very important of medical and nursing reasons to chart, isn’t their? Yes. One of the things is ma’am you’re a nurse. One of the things your responsible for is to supervise CNS’s isn’t it? And CNA’s need to chart that they performed certain procedures so that you know that certain procedures have been performed. You can’t fulfill your position as a supervisor unless you know if the people you are supervising are doing what they are suppose to be doing and that’s the purpose of charting, isn’t it?

Another purpose of charting is continuity of care. You can’t determine whether a resident has a certain change in condition unless you know what their condition is. Another extremely important purpose of charting is communication, isn’t it? You use this to communicate with other healthcare professionals. So charting is not just paper compliance, charting is a vital part of your job. And then I start saying, tell me all the other reasons why
you chart, and then they're thinking of reasons, and tell me why those reasons are important. So when someone says later in the case, that wasn't an issue, it's just charting, you're taking that issue from their defense. Then you can have fun. Once you get the technique of doing this, you can say "why do you think people are false charting, are they lying? Are they lazy or just too busy?" Oh they're too busy. "You mean they don't have the time to provide the care and chart, so there really is not enough time for them to do the charting because they have too much to do to provide care, is that right? Then how do you know if the system is really working if none of the charting is accurate?" You can even go so far so if some expert relies on the chart to form an opinion for the defense, it really wouldn't be valid because we don't know if anything in this chart is accurate or not, do we? Well, we really don't.

OBRA — we all get the argument that OBRA is not the standard of care. In my opinion every nursing home employee in the United States thinks that OBRA is the standard of care, every single one follows them, there is an attempt to follow them in every single nursing home. You get certain legal arguments that OBRA only requires substantial compliance. I, personally, have no idea what that means; that you only have to "sort of" comply with OBRA, but you don't have to comply with other parts. OBRA is not a standard of care, it's a guideline. In the real world I don't know what that means either, but you can take that issue away from the defense factually, by questioning the nurses who typically believe OBRA is the standard of care. You say, you know OBRA, you follow OBRA, you're trained in OBRA, the purpose of OBRA is to regulate nursing homes. OBRA addresses fault care cases. OBRA addresses MDS: RAPS. You couldn't do your job without OBRA. Would you agree that a reasonably competent nurse has to follow OBRA, "absolutely". So in essence you're saying OBRA is a standard of care. It is not just a guideline; you have to follow it. There are 15 different ways to do this but you need to establish through the employees themselves so when defense makes a technical legal argument that it's not, you have facts. We recently, in a motion to dismiss, collected 20 depositions where various employees testified that OBRA is the standard of care in response. IT IS the standard of care. So, you need to develop that in the depositions.

Another big theme — all nursing home employees are prepared to say that the staffing is adequate. You try to find out how many cna's they try to rely on acuity or changes every day; 50 different answers. When you try to track
that down it gets confusing; hide the ball. Another approach is simply what does the term sufficient staff mean?