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When it comes to proving violations of the safety rules and the resulting harm to nursing home residents, you need to know the right questions to ask the defense witnesses, as well as how to dissect common defenses.

Weaving

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A NURSING HOME DEPOSITION STRATEGY

Nursing home cases are won in depositions. When conducted properly, depositions in these cases are powerful weapons to illustrate the safety rules, violations of the safety rules, and the resulting harm to your client. You can use depositions to anticipate, undermine, defuse, and reverse common defenses. With skilled deposition techniques, you can bolster your retained experts' opinions through the testimony of the defendant's own employees, while also discrediting and disarming the defense experts. Preparation is essential, and before the deposition you must anticipate the possible defenses and think of ways to defuse them.

Nursing home cases are unique in that there is a comprehensive body of federal regulations, more commonly known as

the Omnibus Budget Reconciliation Act of 1987 (OBRA),¹ and literature establishing the rules that nursing homes must follow. Nursing homes must comply with the OBRA regulations to participate in Medicare and Medicaid programs.

The resident's attorney should use these regulations as the basis for establishing the standard of care. Every nursing home case follows a basic model that is codified in the federal regulations and often mirrored in state regulations and nursing home policies and procedures:

Assessment. Every resident admitted or re-admitted to the nursing home undergoes a thorough assessment to identify the resident's needs and risk factors.²

Planning. The assessment's findings are used to develop a care plan specific

to the resident's needs. This plan must identify all the resident's health and safety concerns and the specific actions that will be taken so that the risks revealed by the assessment don't happen.³ For example, if a resident is at risk of developing pressure sores, the care plan must include interventions such as daily skin checks, turning and repositioning, pressure relieving devices, and monitoring nutrition and hydration.

Implementation. The individualized care plan must be communicated to and carried out by the nursing home staff. The nursing home must make sure an adequate number of qualified, appropriately trained, and supervised staff follow the interventions on the care plan.⁴

Reevaluation. The care plan must continually be reevaluated to determine whether the interventions are effective or whether changes are necessary.⁵ This is crucial when the resident's condition changes, such as when the resident suffers from a fall or develops a pressure sore.

Communication. The nursing home staff must be in constant communication with the resident, the resident's physician, and the family while assessing, developing, implementing, and reevaluating the plan.⁶

Deconstruct Defense Strategies

While the plaintiff lawyer focuses on the nursing home model above, the defense is likely to raise several common arguments.

Unavoidability. The most common defense is unavoidability. To claim "unavoidability" for a resident's injury or death, the defense must demonstrate that the nursing home complied with the model. It must show that the facility evaluated the resident's clinical condition and risk factors; defined and implemented individualized interventions that were consistent with the resident's needs, goals, and recognized standards of practice; monitored and evaluated the interventions' effects; and revised the approaches

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as appropriate.⁷ The defense cannot credibly claim unavoidability if the nursing home did not comply with the model.

To deflate this defense, you need to confront each deponent with the nursing home model and expose deficiencies in the assessment, planning, implementation, reevaluation, or communication process. Once the deponent admits to a misstep in the model, the defense can no longer claim the injury was unavoidable.

For example, in a fall case, the nursing home may argue that the staff cannot watch residents 24 hours a day, seven days a week. Break down this defense by asking each health care provider the following questions.

- Would you agree that you can't watch all residents 24/7?
- Some falls are unavoidable, correct?
- Some falls can be prevented, correct?
- To prevent falls from happening, you must assess the resident's risk factors for falls, correct?
- Then you must develop an individualized plan of care to address the risk factors for falls, correct?
- The interventions on the care plan must be communicated to the staff, correct?
- The staff must follow the interventions, correct?
- If a fall occurs or there are changes in the resident's condition, the plan must be reevaluated, correct?

If the facility did not comply with every step, the defendant cannot claim the fall was unavoidable. Before the deposition,

you need to find out where the facility failed in the process, and then expose that failure during the deposition.

Blaming comorbidities. Nursing homes often try to claim that the injury was caused by the resident's preexisting physical condition. The fallacy in that argument is that comorbidities are risk factors for potential harm, not the proximate cause of the harm.

Try asking if the witness agrees that some residents at risk for pressure ulcers (because of preexisting conditions) develop pressure sores. Then, follow up by asking: "Some residents at risk for pressure ulcers don't develop pressure ulcers, correct?" Once you establish that preexisting conditions are risk factors and not causes of the injury, go through the model again by asking a series of questions to show that the witness doesn't know whether all the required steps were followed.

You need to establish that not following one of the steps is a violation of the law, the standard of care, and the facility's policies and procedures, and that this can lead to an injury. The model applies in every case regardless of the severity of the injury.

Pointing the finger at the family or the resident. Nursing homes may blame the family or the resident. For example, in an assisted living case we worked on, a resident developed 18 pressure sores during a short stay at the facility. The home's executive director took the position that she informed the son that the resident was inappropriate for the facility soon after admitting him, but the son insisted the home keep his father. We used this defense to our advantage by asking the director these questions:

- Early in the resident's admission did you inform the resident's son that you did not have the resources to care for his father?
- Despite knowing you did not have the resources to care for the

resident, you kept the resident in the facility, correct?

- So every minute of every day that the resident was in your facility, every caretaker knew that you did not have the resources necessary to prevent the resident from developing pressure sores?
- Every time the resident developed a new sore, no one did or said anything about it?
- Each time there was a change to one of the resident's pressure sores, no one did or said anything about it, right?
- So the facility staff watched the resident deteriorate, knowing that the resident's needs could not be met, correct?
- For six straight months, you kept the resident in your facility knowing your staff was incapable of providing the care the resident required?

After answering these questions, the witness retracted her previous statement and said "maybe I didn't have a discussion with the son about not being able to care for his father." By shifting the blame, the nursing home is admitting that appropriate care was not provided, but it is trying to avoid responsibility and accountability.

Nursing judgment. A nurse may avoid admitting violations of the standard of care by claiming he or she relies on nursing judgment. To defeat this defense, ask whether the nurse agrees that nurses have to exercise judgment while performing their jobs, and then ask:

- When exercising judgment, a nurse must act as a reasonably careful nurse under the circumstances, correct?
- Nurses who don't act as reasonably carefully nurses are not using appropriate judgment, correct?
- Nurses who don't use appropriate judgment are not complying with the standard of care, correct?

OBRA is not the standard of care.

Nurses often say that OBRA deals solely

with Medicare/Medicaid reimbursement so they are not required to adhere to it. But most administrators and directors of nursing will agree that the facility must follow the OBRA regulations.

With respect to nurses and certified nursing assistants (CNAs), we have found it effective to simply read the OBRA regulation during the deposition without telling the witness you are referring to or quoting an OBRA regulation. For example, you could ask: "The standard of care requires that 'the facility must promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality,' correct?" (without mentioning that the quoted material comes from OBRA).⁸ Determine any applicable regulations ahead of time and phrase your questions in this manner. You will

be hard-pressed to find a nurse or CNA who disagrees.

Policies and procedures are only guidelines. Nurses sometimes argue there is no requirement to follow the nursing home's policies and procedures because they are merely guidelines. To counter this defense, ask the witness if the policies and procedures were developed with the safety and well-being of the residents in mind, and if all the policies and procedures apply to all the residents. Assuming the answer is yes, next ask whether the policies and procedures pertain to an area of care or treatment that is applicable to the resident.

You should also ask the witness more specific questions, such as: "Policies and procedures regarding fall precautions may not apply to residents who are not at risk for falls, correct?" and "The pressure ulcer prevention policies and procedures

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are required to be followed if the resident is at risk for pressure ulcers, correct?"

Poor documentation does not mean poor care. Nurses regularly say that just because it's not documented doesn't mean it's not done. Here's how to handle that defense. First, ask if documentation is important for continuity of care and for tracking whether treatment is working. Then, ask the deponent if accurate documentation is required by the law.⁹

Asking a witness why an action was not documented is also crucial. Ask, "Sometimes care is not documented but it was given, correct?" and "Sometimes care is not documented because it was not given, correct?" Follow up with: "If I go through the chart day by day, you will not be able to tell me whether care that is not documented was or was not given, correct?" Finally, don't forget to ask the witness to identify any individual who will testify that undocumented care was actually given. In our experience, no such individuals have ever been identified.

Custom and practice as evidence that care was provided. Employees often answer questions about what was actually done by explaining their custom and practice. But custom and practice do not prove that something was done. Consider the following line of questioning:

- Your custom and practice should be to act as a reasonably careful nurse under the same or similar circumstances, correct?
- You don't have any recollection of what you or anyone else actually did for this patient, correct?
- You don't know whether or not other individuals followed their custom and practice for this particular patient, correct?
- You don't even know what other individuals' customs and practices are, correct?
- You don't know whether you followed your custom and practice for this particular patient, correct?

The unprepared witness. A witness who says "I don't remember" or "I didn't read anything to prepare for the deposition" can be turned into a plaintiff witness. Start by neutralizing these witnesses, and establish that they have no opinions at the outset of the deposition. If you do this successfully, you control the witness for the rest of the deposition. By confirming the rules and creating a hypothetical situation based on your fact patterns, the witness's testimony will help prove that the defendant violated the law, the standard of care, and the facility's policies and procedures.

The unprepared witness is also an opportunity to show the defendant's complete and utter disregard for resident care, especially if the deponent is a supervisor. You can make the witness sound totally indifferent and disrespectful to your client by highlighting the supervisor's lack of knowledge and memory of a resident who suffered serious harm or death in the nursing home.

Systemic Failures

At the same time you are obtaining admissions from the nursing home employees that the safety rules were violated, you need to weave into the deposition transcript the systemic failures that result in poor care. Give each witness an opportunity to explain how difficult it is to do his or her job when confronted with inadequate staff, inadequate supplies, transient staff, absent ownership, lack of training, or insufficient pay.

You can obtain favorable testimony by giving the witness a chance to blame other caregivers. Ask the witness if the previous staff shift left the resident dirty and laying in waste. Ask if the witness had discussions with coworkers about understaffing or tardy employees. Ask about the problem with having a lot of agency nurses and if it is difficult to rely on health care providers who are unfamiliar with the residents and long-term

MORE ON NURSING HOME DEPOSITIONS

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care, and who have no stake in seeing that residents receive appropriate care. Ask about whether the caregiver feels like he or she has enough time and resources to do the job properly. Most important, you should ask if these concerns have been brought to the attention of the administration and how it responded.

Learning the nursing home model and how the specific safety rules were violated in your case is crucial to proving and maximizing the value of your case. Do not wait until trial preparation to develop these themes; think about them as early as case screening. 📌

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NOTES

1. 42 C.F.R. §483 (1987) ("Requirements for States and Long Term Care Facilities"; commonly known as the "OBRA Regulations").
2. 42 C.F.R. §483.20.
3. 42 C.F.R. §483.20(k).
4. 42 C.F.R. §483.20(k)(3) and 42 C.F.R. §483.30(a).
5. 42 C.F.R. §483.20(k)(1)(iii).
6. 42 C.F.R. §483.10(b)(11).
7. See the Interpretive Guidelines 42 C.F.R. §483.25(c), F314.
8. See 42 C.F.R. §483.15(a).
9. 42 C.F.R. §483.75(l).