Discovery Strategies

Discovery Strategies - Defendant's Perspective

The purpose of this article is to address the considerations that should be made from the defendant's perspective innursing home litigation. While this certainly will not cover every aspect in defending these complex cases, I hope that it will provide issues that each defense lawyer and facility representative should consider upon receiving a new lawsuit filed against a facility.

Venue Considerations
As with any lawsuit, one of the first considerations that should be made from the defendant's perspective is whether or not the case is in the proper venue. Many long term care facilities have been wise enough to obtain medical malpractice insurance coverage that allows them to fall under the Medical Malpractice Act as a qualified healthcare provider. Indiana Code 34-18-2-13 provides:

"Healthcare provider" means any of the following - an individual, a partnership, a limited liability company, a corporation, a professional corporation, a facility, or an institution licensed or legally authorized by this state to provide healthcare or professional services as a physician, psychiatric hospital, hospital, health facility, emergency ambulance services (I.C. 16-18-2-107), dentist, registered or licensed practical nurse, physician assistant, midwife, optometrists, podiatrists, chiropractor, physical therapist, psychologist, paramedic, emergency medical technician, or advanced emergency medical technician, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility or institution acting in the course and scope of the person's employment.

In order to be a "qualified healthcare provider" the nursing home must provide proof of financial responsibility, i.e. insurance and pay the required surcharge to the Commissioner of Insurance. Once those requirements have been met, a provider is deemed to be "qualified" and a medical negligence action against the provider proceeds pursuant to the Act. As an attorney retained to represent the nursing home, the litigator should contact the Department of Insurance to inquire about whether or not the facility is qualified. This can be done by calling 317-232-2401. The practitioner should be very careful in verifying what dates the facility was covered. It is not unusual to find facilities where they have been sued more than once and one of the lawsuits falls during a period of time when the facility was covered under the Act and another lawsuit does not. This should be determined as soon as possible. If the administrator or employee is named individually they are usually deemed "qualified" by virtue of their employment. It may be necessary for an affidavit to be obtained from the Indiana Department of Insurance in order to get the state court case dismissed and/or stayed.

If the facility you represent qualifies under the Act, a number of advantages exist. First and foremost, there is a cap on damages. For a cause of action occurring after July 1, 1999, a plaintiff may recover no more than $1,250,000 for injuries arising out of an alleged act of malpractice. Of that total recovery, a "qualified provider" is responsible only for the first $250,000 (I.C. 34-18-14-3).

In addition, by qualifying under the Act, the plaintiff must proceed through a peer review process whereby a medical review panel is selected to determine the standard of care and causation issues in the case. This process must be completed prior to any state court action being litigated. As a result, this process can act to eliminate a number of potential state court actions especially if the panel finds unanimously in favor of the facility. In addition, this process adds cost and time which are two things that can deter a plaintiff.

From the defense standpoint, if a favorable panel opinion is rendered, it automatically provides the defense with expert testimony as well as a veil of credibility that would otherwise not be available. For this reason, it is critical (as with any medical malpractice case) to provide an excellent submission to the panel in order to obtain

that favorable opinion and possibly provide a knockout punch to the plaintiff's case before it is ever litigated in state court.

If it is determined that the facility qualifies under the Act, one issue that may arise which we have seen in the medical malpractice arena is the attempt by plaintiff's attorneys to litigate the case in state court while the medical review panel process is pending. From the defense standpoint, it is important to take these issues head on and challenge this attempt by opposing counsel. If the case is not dismissed, at a minimum it should be stayed until after an opinion from the medical review panel has been rendered.

Another issue that needs to be addressed early on (although there is not a lot you can do about it), is the general reputation of your facility in the community. This is even more important if the facility you are defending is located in a rural or less populated county. Is the defendant a facility one that has had a number of local newspaper articles or other media attention that has not been favorable? Your inquiry should not only include questioning representatives of your facility but speaking with members of the local community and research via the internet. The results of this inquiry may effect whether or not you want to focus your case on an early settlement rather than risking a trial by jury in an unfriendly venue. At a minimum, it can play a role in your case evaluation.

Facility Visit/Chart Review

After you have checked on the venue considerations, it is imperative that a visit be made to the nursing home facility as quickly as possible. Amazingly, many defense attorneys fail to take advantage of this critical and necessary step. While it is not always available, defense counsel should attempt to obtain the original chart and have an opportunity to review that chart as soon as the lawsuit is received. To the extent there is any allegation of alteration of the chart, the original needs to be reviewed to determine if there is any merit to such a claim. For example, are there obvious additions with different colored ink that should cause concern? If these potential trouble spots can be located immediately, they can help you assess what impact they might have in the case. If possible, you should try and obtain the original chart and keep it in your custody so that nothing happens to it.

A review of the original chart will also help guide you towards those issues that may be the focus of plaintiff's complaint. For example, is this a case where decubitis ulcers are the main focus and if so what sort of treatment was provided to the resident? Is this a case involving a fall and does the chart contain a discussion regarding fall prevention? Is this a case where nutrition is an issue and there was there timely proper weighing of the resident? All of these issues need to be looked at closely early in the litigation process.

In defending a nursing home case, you will learn early on that there are a significant number of documents contained in the chart and many of them will be critical to the defense of the case. Some of the more important documents that need to be examined include the following:

1. Admission face sheet.
2. Physician orders.
3. Assessments.
4. Nurses notes.
5. Care plans.
6. Medication and treatment sheets.
7. Incident reports.
8. Consultant reports such as dietary or skin assessments.
9. Minimum Data Set (MDS) sheets.
10. Dietician records.
11. Social Service records.

Obviously the type of case you are defending will determine what portions of the chart need closer scrutiny.

In addition to focusing on the resident's care, the chart review should also focus on who are the key players that need to be statementized. For example, in a case involving a fall, the nurses on duty or the nursing assistants should be identified. Who is the administrator if this is a case involving problems with survey compliance? Who is the nurse in charge of the shift at the time of the alleged negligence? Who attended the care plan meetings and why were those plans not carried out? All of this information is valuable and extremely helpful if you can get it before your facility visit.

Within 30 days of the lawsuit being received, a visit should be made to the facility. There are a number of critical reasons why this facility visit should be made. First, what is the feel of the facility? Is this a place in which you would want one of your relatives? Is this a place where you walk in and you get the feeling right away that it is not a good facility? Many times you can tell within the first five minutes of your visit whether or not this will be a difficult case to defend and a difficult facility to represent. What kind of sign-in procedures does the facility have and do they keep records of these sign-ins so that you can check how often the resident was visited by family members? Where are the nursing stations located in reference to the rooms and what kind of beds are used in each room? This can be important in cases involving decubitis ulcers or falls? What kind of social programs are available to the residents and is there a separation of high risk residents versus those that are not?

Use this visit to size up the administrator. Is this someone who has been there for 20 years, knows the facility very well or is this a facility where the administrator has changed 5 times in the last three years. How do they handle themselves with other employees as well as residents. Will this person be a credible and likeable witness if the case proceeds to trial? How good are they in their documentation and do they appear organized. This will effect the work you will need to perform in defending the case.

What about the key players? Will the nurses be a good and credible witnesses? More importantly in the early stages of your case, have there been any key players who have left the facility? If yes, obtain the personnel file of each of these individuals and track them down as soon as possible to determine if they will provide favorable or damaging testimony. If they present favorable testimony you will want to get affidavits from them as quickly as possible to nail down their story. If on the other hand, the information is damaging, you will need to spend some time with them to see if their concerns are legitimate or not. Unfortunately, many of the recent cases that have been handed down are allowing more and more former employees to be contacted by opposing counsel. Keep in mind that Rule 4.2 of the Rules of Professional Conduct provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comments section of that Rule provides that former employees who had a managerial responsibility upon the corporation and whose acts or omissions in connection with the plaintiff's allegations may be imputed to the organization or whose statement may constitute an admission on the organization cannot be contacted by opposing counsel. In Brown v. St. Joseph County, 148 F.R.D. 246, (N.D.Ind. 1993), the court held that a lawyer representing a client in a matter adverse to a corporate party may without violating Rule 4.2 communicate about the subject of the representation with an unrepresented employee provided that employee does not have the managing authority to speak for and by the corporation, is not an employee whose acts or omissions in connection with the matter may be imputed to the corporation for the purposes of civil or criminal liability and is not a person whose statement may constitute an admission on the part of the corporation.

Even to the extent there are employees whose statements are negative to your position, attempts should be made to nail down their story in order to prevent exaggeration or changing of the story once they are contacted by opposing counsel.

Obviously for those persons who are still employed at the facility, as much information as possible should be obtained from them regarding the resident and the person or persons who visited the resident. Were there problems with the resident's family? What about notification to the family regarding any changes in the resident's condition? Is this a case where the family never visited the resident or is this a case in which the family was very proactive and a number of complaints were documented? Obviously with each current and former employee, you must size up how they would appear before a jury and/or how they would hold up under cross examination.

What about policies and procedure manuals at the facility? Typically a nursing home has a number of manuals that need to be reviewed. Were policies in effect concerning safety of the resident or accident prevention? If the case involves a fall, were there specific written policies regarding the use of restraints? Make it a point while you are visiting the facility to ask for all of the manuals that may have been in effect at the time of the incident in question. Keep in mind that many policies and procedures change over time and it will be important to determine which ones were in effect at the relevant times. Were the policies followed in your case? What about complaints and incident reports? Does the facility maintain a separate file regarding them. If yes, do they depict a pattern of problems similar to the case you are defending? Be sure to look for everything and anything.

During your visit, review the facilities and observe how the residents are treated. What is interaction between employees and residents? What kind of therapy facilities exist? Do they provide therapy that is required by the physician's orders or not? What expertise to they have on staff at the facility? How often do specialists visit residents (especially those specialists that are germane to your case, i.e., a wound care specialists for a decubitis ulcer claim). This visit presents a great opportunity for you to observe first hand the facility you are defending as well as the players that make up the facility.

A review of the chart, policies and procedures and a facility visit will enable you to provide your client a quick and valuable assessment of the case. It will allow you to determine early on the strengths and weaknesses of your defense and enable you to focus in on what type of expert you will need as well as areas of discovery that will be required from the plaintiff. In addition, it will allow you to develop a rapport with the people who you will be representing in the case.

Government Reports

It should come as no surprise to anyone who is involved in nursing home litigation that nursing homes are highly regulated. Many times this high regulation provides fertile ground for plaintiffs in attempting to build their case against the facility. Obviously, since this is the fertile ground for the opposition, as the defense attorney, it is imperative that you learn early on what is in this fertile ground and what problems exist.

The first place to look would be survey reports and plans of correction held by the Indiana State Department of Health. Have there been complaints? Have there been fine assessments? What do the survey reports reveal regarding your facility? Have your people been honest with you through your facility visit as to what problems they have and what problems they do not have? Were the plans of correction carried out by the facility?

In addition, the state operators manual should be reviewed. This tells the surveyor how to do a survey and what to look for. While these survey reports are not proof of negligence, they are allegations that the state requirements were violated. Was there any informal dispute resolution, i.e., did the facility dispute the survey allegations and what was the outcome?

What about complaint surveys by the Department of Health. Were there any unusual occurrences that might relate to the negligence alleged in your case. Many times there is mitigating evidence that exists and it will be your job to determine what evidence there was that can rebut these surveys.

There is also Medicaid and Medicare information that should be examined in the defense of your case. The Indiana Family and Social Services Administration maintains information on the facilities that should be

examined. While obviously in other presentations you will learn from plaintiff's attorneys, those resources that plaintiffs use to assist them in the case, those same resources need to be looked at defense counsel and need to be addressed with the facility. It is better to learn of this information before any of your people are deposed and before Interrogatories are answered. As a defense lawyer the last thing you want to happen is to be blindsided by complaints or surveys that were not addressed.

You should make yourself familiar with the various federal requirements that exist. This obviously would include the Omnibus Budget Reconciliation Act of 1987 (OBRA) 42 U.S.C. §1395-1396 (1999). OBRA lays out standards for nursing homes and the patient's bill of rights. OBRA requires nursing homes to conduct an annual assessment of each individual resident, create individualized care plans, reduce the use of restraints and ensure adequate staff training in special needs situations. It also guarantees residents rights including the right to be free from neglect and abuse.

You should also make yourself familiar with the Joint Commission of Accreditation of Healthcare Associations as well as the American Health Care Association Long Term Guidelines. These are just a few of the written rules and recommendations that will be used by opposing counsel against the facility.

Expert Retention

Just as it is important to obtain the chart and visit the facility, once you have determined the critical areas, and what will be the focus of plaintiff's case, an expert should be consulted at a minimum. An expert can help you focus on not only the plaintiff's claims, but also what potential defenses exist. Many times this expert may only be a consulting expert and one that will not testify at trial. You must feed this expert the chart and other valuable information so that they can accurately consult with you and provide strategy that will be helpful in the defense of the case.

Do your homework on your expert. Is this an expert who is credible in the field? Is this someone who has testified many times for facilities and will be easily impeached? What is their practical experience? Have they testified or helped plaintiffs in cases in the past? Check the literature to see if your expert has been published and whether or not these publications will be helpful or harmful to your case. Is this expert knowledgeable regarding regulations? Like the retention of an expert in any litigation, there are a number of important inquiries that need to be made before you can obtain the expert. In addition, as with any litigation, you need to decide early on what are you going to provide this expert and recognize that if the expert will testify that this information will no doubt be discoverable by opposing counsel. Be careful in sharing with the expert any information that might be privileged.

Not only will this expert help you in assessing your case but also in providing an outline of discovery of plaintiff'sexpert. Many times, defense counsel wait until it is too late to retain an expert. If at all possible this expert should be retained before any depositions are taken in the case. Due to the high exposure that exists in nursing home litigation, there is no reason why early expert retention should not be done.

Discovery To and From Plaintiff

As in any litigation, discovery into the medical history of the plaintiff is very important. In nursing home cases it isvery important. Typically, family members who file suit against facilities forget the kind of shape their loved one was in before they arrived at the facility. Many times through discovery it can be learned that the resident was in much worse shape before they arrived at the facility or they were in the middle of a decline that did not start at the facility but ended at the facility. As in any case, discovery should be conducted into family physicians, prior hospitalizations and prior facilities where the plaintiff received treatment. In many of these cases, one will learn that the resident has bounced around from facility to facility due to problems with the particular patient. Also many times, one will come across hospital records which indicate that the hospitals were looking for a place to dump the resident and that is how they ended up at your facility.

The production of these types of records will be helpful not only in mitigating the damages claimed by the plaintiff but also in impeaching the testimony of family members who pain a different picture. It will also help demonstrate to the jury the difficult situation that the facility has been placed in by accepting a patient who is in significant medical decline.

These records may also help identify potential expert witnesses who not only should be deposed but whom might also provide favorable testimony for you at trial. These may consist of physicians who treated the resident before their admission at the facility who can provide information regarding the resident's prognosis and ultimate demise. They may also provide excellent insight into the type of plaintiff you are dealing with as well as family members.

In addition to obtaining a medical history on the plaintiff, attempts should be made to discover information regarding the resident and their family. This is especially true in cases where the resident has died and the family members have filed a claim on behalf of the resident's estate. It would be interesting to find out how often these family members actually visited the resident and what kind of role, if any, they took in care plans. One might discover that the family members had nothing to do with the resident and in fact, abandoned the resident until after it appeared that litigation might provide some sort of gain.

It is also important to find out what caused the resident to be placed in an extended care facility in the first place. Did the resident go willingly or was this a situation in which the family members were forced to make them move. Many times there is a significant amount of guilt that exists with the family members and often times this guilt is the driving force behind the litigation. To the extent light can be shed on this guilt, it may prove beneficial either at trial or at a mediation.

As noted above, all of this discovery will also provide information in evaluating the damages portion of plaintiff's complaint. The medical history will help establish what kind of condition the plaintiff was in before she arrived at the facility. The family history will help persuade a jury that the damages being sought are not on behalf of the plaintiff but on behalf of potentially greedy relatives. Needless to say, this will have a significant impact.

Attempts should also be made to limit the claims asserted by the plaintiff. Typically plaintiffs allege a significant number of rights were violated in their complaint. Use requests for admission to ferret out those violations that did not cause injury to the resident. Also, use discovery to focus on the numerous healthcare problems plaintiff was having which in the end were the cause of plaintiff's demise rather than any negligence by the facility.

In terms of discovery, no doubt the more difficult task for the defense attorney is defending against the barrage of discovery that will be served on the facility. Many plaintiff's lawyers are under the belief that anything and everything is discoverable in nursing home cases. It is important to keep in mind that just because the defendant is a nursing home does not cause defendant to relinquish control of the discovery of many items. For example, many plaintiff attorneys believe it is their right to obtain discovery on the personnel files of any and all employees who may have ever worked at the facility during the time that the resident was there. Obviously, such information should be guarded and protected and should not simply be turned over to opposing counsel.

This is also true with other incidences that may have occurred at the facility. Again, the fact that the plaintiff fell in the facility does not automatically mean that the names of each and every resident who may have fallen in the three years leading up to the incident is suddenly discoverable. Likewise attempts should be made to guard against the discovery of post-accident analysis and investigation by the facility.

While Indiana has not taken the bold step regarding the Self Critical Analysis, this fact alone should not cause defense counsel to give up this argument. One can argue that the peer review privilege that exists in Indiana and is codified under Indiana Code 34-6-2-99 and Indiana Code 34-30-15, et seq. has basically codified the Self

Critical Analysis Doctrine and supports and extension of the law in this area. As stated in the case of Terre Haute Regional Hospital, Inc. v. Basden, 524 N.E.2d 1306 (Ind.Ct.App. 1988), "purpose of the peer review privilege is to foster an effective review of medical care." Id. at 1311. Indiana courts have broadly interpreted the scope of the peer review privilege so long as the policy behind the rule is served. Mulder v. VanKersen, 637 N.E.2d 1335, 1338 (Ind.Ct. App. 1994).

Certainly it makes sense that if a hospital is protected by the peer review statute as it relates to driving to improve healthcare services, similar protection should be extended to nursing homes. The Self Critical Analysis privilege protects an organizations internal review process and its analytical reports generated regarding its policies, procedures and practices. Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992). A party seeking to assert the privilege must show the following:

1. The information must result from a critical self analysis undertaken by the party seeking protection;
2. The public must have a strong interest in preserving the free flow of the type of information sought.
3. The information must be of the type whose flow would be curtailed if discovery were allowed; and
4. The document must be prepared with the expectation that it will be kept confidential and has, in fact, been kept confidential.

Obviously in your particular case if you are able to establish these four criteria, a good faith argument can be made that the law should be extended to include this privilege and it should protect the discovery of certain documents.

In addition, one should not ignore the argument that certain documents fall within work product in anticipation of litigation. Indiana courts have long recognized this privilege. See Cigna-Ina/Aetna v. Hagermann-Shambaugh, 473 N.E.2d 1033 (Ind.Ct.App. 1985), where the court recognized that there is a point in which insurance investigation shifts from claim evaluation to anticipation of litigation. This standard was clarified in DeMoss Rexal Drugs v. Dobson, 540 N.E.2d 655 (Ind.Ct.App. 1989), wherein the court held:

Accordingly, we affirm that pronounced Ina/Aetna that in the context of insurance investigations there is a point in which a focus of an insurer’s work turns from an evaluation of a claim to litigation preparedness. A document generated or obtained by an insurer is entitled to protection from discovery found in Trial Rule 26(B)(3), if the document can fairly be said to have been prepared or obtained because of the prospect of litigation and not, even though litigation may already be a prospect, because it was generated as part of a company’s regular operating procedure. Id. at 658.

While certainly many documents will fall outside of the work product privilege, it should not be overlooked.

In addition to protecting those documents regarding post accident analysis and investigation, in all likelihood in defending the facility you will be faced with a punitive damage claim. This claim becomes significant when opposing counsel attempts to obtain tax returns and financial records of the facility. As with post accident analysis and investigation, you should not lay down and simply turn over this sensitive material without a fight. At a minimum, discovery of this material should be stayed pending preliminary determinations regarding the viability of a punitive damages claim (i.e., after motion for summary judgment has been denied on the issue). There are a number of cases that support this position. Liedholt v. District Court, 619 P.2d 768 (Col. 1980); Chenoweth v. Schaaf, 98 F.R.D. 587 (W.D.Penn. 1983); Ball v. Prentice, 781 P.2d 627 (Ariz.App. 1989); Hudak v. Fox, 521 A.2d 889(N.J.App. 1987) and Suoczi v. Parente, 161 A.2d 232, 554 N.Y.S.2d 617 (1990). Both Liedholt and Chenoweth are medical malpractice actions in which the plaintiff attempted to discover the assets, income and net worth of the defendant doctors. Both courts noted the need for the discovery of defendant’s financial status must be balanced by weighing the defendant’s right to privacy and protection from harassment by intrusion in to his financial affairs against plaintiff’s right to discover information which is relevant to a claim for punitive damages in a tort action. The court concluded that plaintiff must demonstrate

that a trialable issue on liability for punitive damages exists in order to discover information relating to a defendant's financial status. Liedholt at 771.

Thus, at a minimum you should be able to prevent the discovery of this information pending a motion for summary judgment on the punitive damage claim. In the event you are unsuccessful in the motion for summary judgment and you are forced to turn over this material, a protective order should be obtained. This protective order should provide for limitations on the use and dissemination of the financial information as well as providing for the return of this information at the conclusion of litigation.

Once a determination has been made as to those documents which will be produced to the other side, in nursing home litigation due to the voluminous amount of records, it is important to Bates stamp and keep a clean record of those items being produced. This will allow you to not only keep track of those documents that have been produced but also should they show up in a deposition will make it easier for you to reference where the document came from. This will also help you when it comes time to prepare witnesses for deposition and knowing what documents have been turned over to the other side.

A review should also be made with representatives of the facility to determine what documents may have already been turned over to the other side before suit was filed. Many times attorneys are able to obtain a copy of the resident's chart before litigation has ensued and thus it is important to track down and verify exactly what was produced before your involvement. This may include a request for production to the plaintiff asking them to produce documents that have previously been obtained from the facility.

Conclusion

While the defense of a nursing home is very similar to the defense of any other civil litigation, additional obstacles exist. Due to the voluminous record keeping that not only exists but is required as well as governmental reporting and regulations, it is critical that the defense attorney moves rapidly once suit has been filed if not earlier (to the extent it is possible) in order to gain a complete understanding as to the strengths and weaknesses of the case as well as to educate himself and his client of the potential pitfalls. One only needs to look at the recent substantial verdicts that have been rendered against nursing homes to understand the importance of these discovery strategies and to understand that unlike other litigation, quick and thorough action must be taken from the outset.