

# Issues in Nursing Home Litigation



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# Issues in Nursing Home Litigation

## I. Why Do Nursing Homes and Assisted Living Facilities Get Sued?

- Same issues for Nursing Homes and Assisted Living Facilities
- Common Types of Claims
  - Negligent or Wanton Nursing Care
  - Breach of Contract
  - General issues rather than “incident specific”



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Typical problem areas in nursing homes and assisted living facilities:

- (1) Failure to follow physicians' orders;
- (2) Failure to correctly record physicians' orders;
- (3) Inadequate staffing;
- (4) Improper administration of medication;



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- (5) Malnutrition of residents;
- (6) Failure to properly administer medication;
- (7) Failure to supervise the nursing staff;
- (8) Failure to prevent foreseeable falls;
- (9) Sexual or physical abuse;



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- (10) Failure to respond to complaints or warnings by family members, visitors or employees;
- (11) Employment of personnel with criminal records or other employment history problems;
- (12) Poorly trained staff;
- (13) Poor in-service programs to ensure the staff is properly trained;



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(14) Failure to notify family of a resident's changing condition;

(15) Failure to provide resident care in accordance with the care plan;

(16) Failure to recognize side effects of medications;

(17) Failure to comply with DHR and other applicable regulations;



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(18) Failure to adequately care for decubitus ulcers;

(19) Scalding or other injuries received by the resident in connection with the misuse of various devices by the staff;

(20) Injuries to patients inflicted by other residents;

(21) Elopements or run-aways.



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(22) Injuries involving falls when walking, going to the bathroom, being transported;

(23) Alteration of records or inability to explain absence of records which should be available, or are required by law to be kept.





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- Pressure Sores
  - Key is management
  - Goal is to promote healing; dressings can be used to cover the wound and assist wound healing
  - 42 C.F.R. 483.25(c) addresses the issue of pressure sores and nursing homes
    - (c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that –



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- (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and
- (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.



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- Medication Errors
  - What is a “significant” error?
  - Imperative that the attending physician know the medication prescribing and current medications
  - Nurses are often held accountable for prescription errors



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- The five rights are:
  - Right drug
  - Right patient
  - Right time
  - Right dose
  - Right route
- (Iyer, R.N., M.S.N., Patricia, *Nursing Liability Issues*, in Iyer, R.N., M.S.N., Patricia W., *Nursing Home Litigation: Investigation and Case Preparation*, 1999, p.184)



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- Restraints
  - Under AL law, restraints can only be used to treat medical symptoms
  - Restraints are also regulated by Federal law. Pursuant to 42 C.F.R. § 1396r(c)(1)(A)(ii), resident has the right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to



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treat the reside resident's  
medical symptoms.  
Restraints may only be  
imposed:

- (i) to ensure the physical safety of the resident or other residents, and
- (ii) only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances. . .).



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- Wandering
  - Unfortunate part because of impaired cognitive status of many residents
  - Alzheimer's patients are particularly susceptible



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- Resident on Resident Abuse
  - Generally no duty to control the behavior of another individual
  - Statutory obligation to take care for residents
  - Owe statutory duty of care and protection to residents whose propensity to cause harm to others is known or should have been known





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- Things that can be done to reduce chances of an attack:
  - Reducing noise levels by turning down the television volume;
  - Eliminating the public address system;
  - Restricting shouting or loud talking by the staff members;
  - Removing pictures and mirrors, and replacing with carpet remnants;
  - Restricting unnecessary traffic;
  - Performing noisy activities in more remote areas;
  - Carefully monitoring TV to eliminate violent movies;



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- Playing relaxing music;
- Forming small dining groups rather than eating in a large dining room;
- Improving staffing for prompt attention to basic needs; and
- Limiting the use of restraining devices limited to those situations when it is mandated by safety considerations.

(Iyer, R.N., M.S.N., Patricia, *Nursing Liability Issues*, in Iyer, R.N., M.S.N., Patricia W., *Nursing Home Litigation: Investigation and Case Preparation*, 1999, p.178)



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- Abuse by Staff
  - Providing care can be physically and emotionally draining
  - Residents may be aggressive and physically attack the staff
  - Vicarious liability
    - *respondeat superior*
      - Negligent hiring
      - Negligent retention
      - Negligent supervision
      - Negligent entrustment
  - Facilities must perform background checks on all employees
  - Facilities must take appropriate action if an allegation of abuse has been reported or confirmed.



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- Federal regulations require that facilities report all “injuries of unknown origin.”
  - 42 CFR 483.13(c)(1)(iii)(2) states:

The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).



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## II. Controlling Law

- **Federal Law**
- **Medicare** is a voluntary federal program
  - Facility must enter into a provider agreement
  - Requires a multi-disciplinary team of “inspectors” 42 U.S.C. 1395i-3(g)(2)(C).
    - Conduct surveys using forms, procedures, methodologies and standards



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- **Medicaid** is a joint state and federal program for “needy” individuals
  - States enter into agreements with providers if the providers meet certain standards
  - To qualify, a state must establish an approved State Plan
  - Regulations can be found at 42 C.F.R. Part 488.



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- **Nursing Home Reform Act of 1987**
  - Congress passed the Omnibus Budget Reconciliation Act of 1987 (“OBRA”), contains the Federal Nursing Home Reform Act (FNHRA).
    - Oversight and inspection of facilities that participate in Medicare and Medicaid
    - Provides for greater sanctions and penalties for non-compliance.



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- **Part 483 (Federal Register)**

- Resident Rights
  - Free Choice
  - Privacy
  - Confidentiality
  - Grievances
  - Examination of survey results
  - Work
  - Access and visitation
  - Personal Property
  - Married couples
  - Self administration of drugs
  - Refusal of certain transfers
  - Exercise of rights
  - Notice of rights





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- **State Law**

- Alabama Medical Liability Act of 1975
- Medical Liability Act of 1987
  - Actions against a facility must be brought pursuant to these acts rather than as simple negligence actions.
  - Various provisions have been declared unconstitutional.



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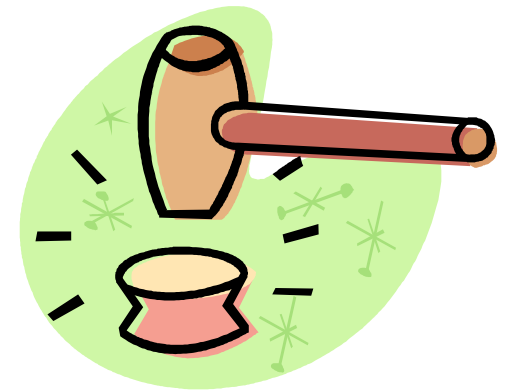
- Legal significance
  - Burden of proof is higher for Plaintiff
    - Code of Ala. § 6-5-548
  - Special Statute of Limitations guidelines (medical malpractice)
    - Code of Ala. § 6-5-482
  - Special venue requirements
    - Code of Ala. § 6-5-546



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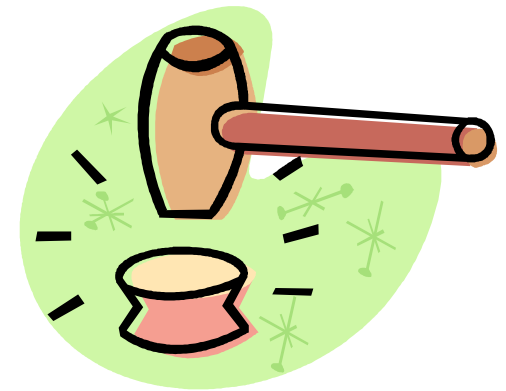
## III. Warning Signs of a Potential Lawsuit

- What should alert you?
  - Contact/Complaint from family member
  - Request for medical chart
  - Recent fall or injury
  - Use of restraints



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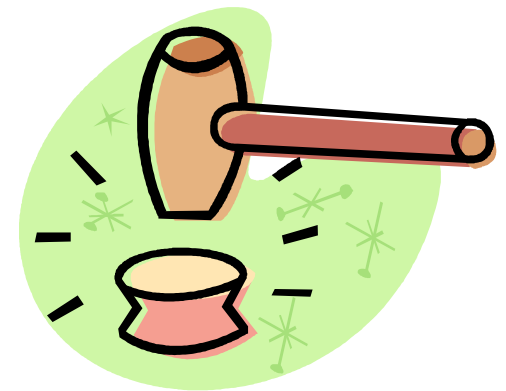
- What to do in the event you suspect that a claim is about to be made?
  - Each insurance company is different
  - Know the procedures
  - Much of the work can be done before suit is ever filed
  - Better safe than sorry



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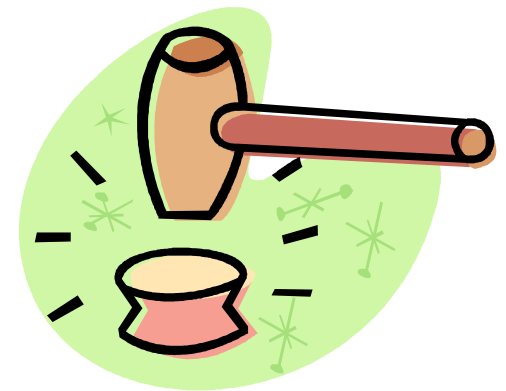
## IV. Nuts and Bolts of a Nursing Home/Assisted Living Lawsuit

- Pre-Suit Investigation
  - Resident's Chart
    - First thing resident's attorney will obtain
    - Vital for use at trial regarding care of resident
    - Resident can see records within 24 hours of request
    - Resident may obtain copies within two working days



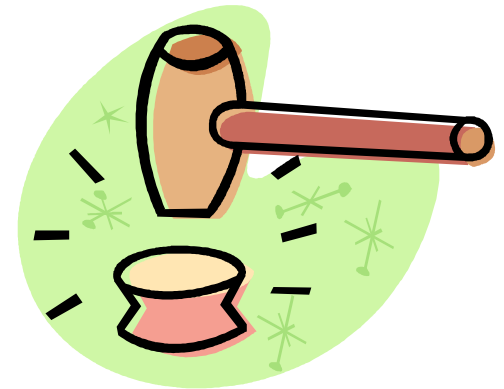
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- Deficiency Reports
  - Get copies of surveys conducted by state and federal agencies
  - Make sure appropriate responses have been made to the alleged deficiencies
- Former Employees
  - Residents love to use disgruntled employees for information
  - Since CNAs do a lot of the day-to-day work, first source



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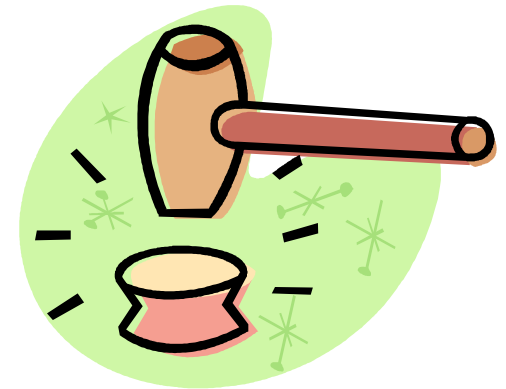
- Lawsuit
  - Complaint is filed
  - Registered agent for service of process
  - Deadline for response
  - Attorney for facility will file an Answer
- Discovery
  - Written discovery
  - Depositions
- Potential settlement
  - Mediation



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## IV. Discovery – Who, What, When, Where & Why?

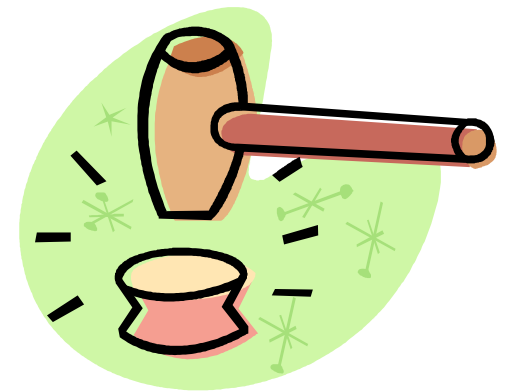
- What is Discovery?
  - Basically the tool that parties to a lawsuit use to “find out” information about the other party and the circumstances surrounding the lawsuit.
- What are the types of Discovery?
  - Pre-Suit Discovery
    - Resident's Chart
    - Medical chronology





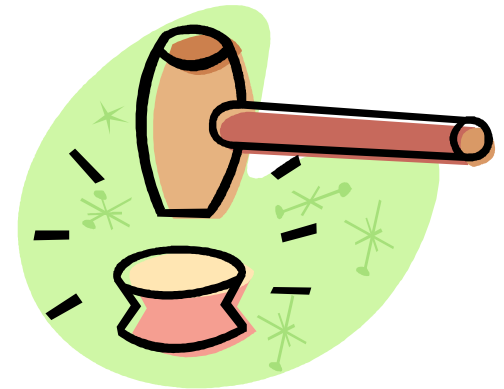
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- Administrative records
- “Other” incident reports
- Copies of policies and procedures
- Staffing records
- Personnel files
- Written Discovery
  - Interrogatories
  - Request for Production of Documents
- Discovery Depositions



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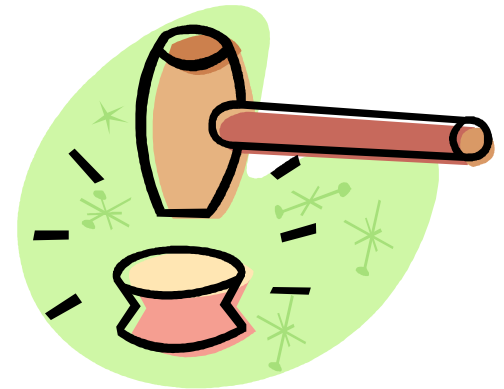
- Who participates in Discovery?
  - Counsel for facility will handle most everything
  - Will require cooperation from facility for information and documents
  - Likely that employees of the facility will be deposed
    - Deposition is when you are asked questions, under oath, regarding the information you have relevant to the lawsuit.



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## VI. What Can I Do to Prevent My Facility Being Sued?

- There is no set thing that can be done to ensure that your facility is not sued.
- Things that you can do to reduce the facility's exposure:
  - Not insurers of safety of resident, but do owe a duty of care and to protect
  - Comply with the “duty of care”
    - Case will be decided by a jury based on “expert” testimony.



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- Loss prevention is the best protection
- Be aware of what is going on with the residents
- Be quick to note and report any potential “issue” that may arise
- Communicate with the residents and their families
- Be responsive to the questions and concerns of the residents and/or their families

