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The State of Medical Director Liability in Alabama

Presenter

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Disclaimer

Information in this presentation is neither an official statement of position nor should it be considered professional legal advice to individuals or organization

Overview

- Arbitration
- Common law negligence claims
- Risk management considerations

Arbitration

Arbitration

- Method of private dispute resolution
- Federal Arbitration Act of 1926
- Parties must agree to arbitration in contract
- Contract must "substantially affect interstate commerce"

Community Care of America of Alabama, Inc. v. Davis, 80 So.2d 283 (Ala. 2002).

Arbitration

- Strategic benefits:
  - Knowledgeable trier of fact
  - Limit anomalous damages awards
- Speed and defense cost benefits questionable
- Plaintiffs dislike arbitration
  - Employ predictable avoidance techniques

Arbitration

- Case example
  - Patient hospitalized after stroke & heart attack
  - Later transferred to nursing home
  - Daughter completed admission paperwork (including arbitration agreement)
  - Agreement defined "Parties":
    - "the resident, [and] any and all family members who would have the right to bring a claim in state court on behalf of the resident or the resident's estate."

SSC Montgomery Cedar Crest Operating Co., LLC v. Bolding, 130 So.3d 1194 (Ala. 2013).

Arbitration

- Case example
  - Daughter signed own name under line for "Legal Representative or Family Member"
  - Patient hospitalized again
  - Patient's POA (not daughter) sues nursing home, alleging negligent care

SSC Montgomery Cedar Crest Operating Co., LLC v. Bolding, 130 So.3d 1194 (Ala. 2013).

Arbitration

- Case example
  - Nursing home moves to compel arbitration; what result?
  - Court refuses to enforce arbitration agreement
    - Patient lacked mental capacity to agree to terms
    - Daughter lacked legal authority to bind Patient
  - "Merely claiming to have legal authority on someone else's behalf or claiming to be someone else's legal representative does not make it so"

SSC Montgomery Cedar Crest Operating Co., LLC v. Bolding, 130 So.3d 1194 (Ala. 2013).

Arbitration

- Contract considerations
  - Arbitration agreement signed by resident?
  - Resident competent to sign agreement?
  - Representative with legal authority (POA, advanced healthcare directive, order of guardianship, etc.)?
  - Nursing home qualified to do business in Alabama?
    - "Door Closing Statute," Ala. Code § 10A-1-7.21 (1975)

Wausau Development Corp. v Natural Gas & Oil, Inc., 144 So.3d 309 (Ala. 2013).

Arbitration

- Medical Directors (MDs) have little control over resident admissions
- MDs impacted greatly by ineffective office administration of resident admissions

Arbitration

- Arbitration disadvantages for MDs:
  - Success rates defending claims in state court
  - Unable to maximize reputational benefits
  - Diversity in decisional authority
- Arbitration agreements rarely include MDs
- Increased risk to MDs when arbitration agreement unenforceable

Common Law Negligence

Common Law Negligence

- Most claims against "health care providers" governed by Alabama Medical Liability Act ("AMLA")
- AMLA claims require expert testimony
- Expert must be in same specialty as defendant and practicing within one year of alleged negligence

Ala. Code § 6-5-540 (1975), *et seq*

Common Law Negligence

- Common law claims of negligence not governed by AMLA
- Plaintiff must prove:
  - Defendant owed duty to plaintiff;
  - Defendant breached duty to plaintiff;
  - Plaintiff sustained damages; and
  - Breach was proximate cause of damages

Albert v. Hsu, 602 So.2d 895 (Ala. 1992).

Common Law Negligence

- Unlike AMLA, expert testimony not required to establish standard of care
- Negligence *per se*
- Industry regulated by Alabama Department of Public Health
- Consider these requirements . . .

Common Law Negligence

- Ala. Admin. Code § 420-5-10-.10(1):
  - "Each resident must receive and the facility must provide the necessary care and services to attain or maintain the **highest practicable** physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care" (emphasis supplied)

OR

Common Law Negligence

- Ala. Admin. Code § 420-5-10-.10(4):
  - "Based on the comprehensive assessment of a resident, the facility **must ensure** that - - 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 . . ." (emphasis supplied)

Common Law Negligence

How do facility staffing decisions affect potential liability?

Common Law Negligence

- Common law claims frequently focus on facility staffing levels
- Plaintiffs can join common law (staffing) claims with AMLA claims, and try both in same case
- MDs risk being tainted by negative facility evidence
  - Particularly problematic with jury trials

Common Law Negligence

- Why are joined claims problematic?
  - Many jurors have negative personal experiences with nursing home care
  - Public awareness of Medicare Star Ratings
  - Media attention to issue of nursing home staffing keeps issue in public consciousness

Common Law Negligence

- Understaffing may constitute evidence of wanton conduct
- Wantonness = conduct carried on with reckless or conscious disregard to rights or safety of others
- Punitive damages possible

Ala. Code § 6-11-20(3) (1975)

Common Law Negligence

- Case example
  - 88-YOF admitted to SNF with hx of:
    - Senile dementia,
    - Depression,
    - Hypertension,
    - Atrial fibrillation,
    - COPD,
    - Diverticulosis,
    - Osteoporosis,
    - Thoracic compression fracture, and
    - Left hip replacement

Scampone v. Grane Healthcare Co., 169 A.3d 600 (Penn. Super. 2017).

Common Law Negligence

- Case example
  - Patient diagnosed with UTI, hospitalized for three days, treated and returned to SNF
  - Patient readmitted to hospital two weeks later and diagnosed with UTI, dehydration, malnutrition, and bed sores
  - Patient died of heart attack ten days later

Scampone v. Grane Healthcare Co., 169 A.3d 600 (Penn. Super. 2017).

Common Law Negligence

- Case example
  - Estate sued SNF, alleging UTI, dehydration, and malnutrition caused heart attack
  - Estate alleged SNF was liable for chronic understaffing at the facility
    - Employees incapable of complying with care plan
  - Evidence indicated that understaffing prevented delivery of food, water, and medicine to Patient

Scampone v. Grane Healthcare Co., 169 A.3d 600 (Penn. Super. 2017).

Common Law Negligence

- Case example
  - Witnesses stated facility avoided state sanctions for understaffing because it had advance notice of inspections
  - Facility did not address multiple staffing complaints by employees who could not complete work
  - Appeals court later held chronic understaffing was sufficient to state a claim for punitive damages

Scampone v. Grane Healthcare Co., 169 A.3d 600 (Penn. Super. 2017).

Risk Management Considerations

Risk Management Considerations

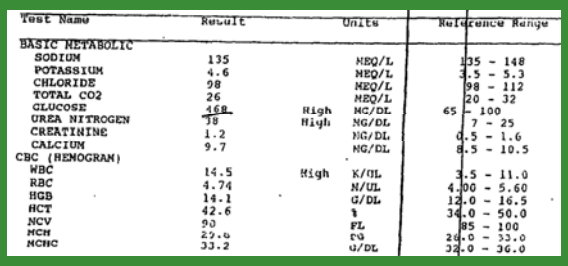
- Topic overview
  - Policies and procedures
  - Tracking and follow-up
  - Communication with Residents and their Representatives

Policies and Procedures

Tracking and Follow-up

Risk Management Considerations

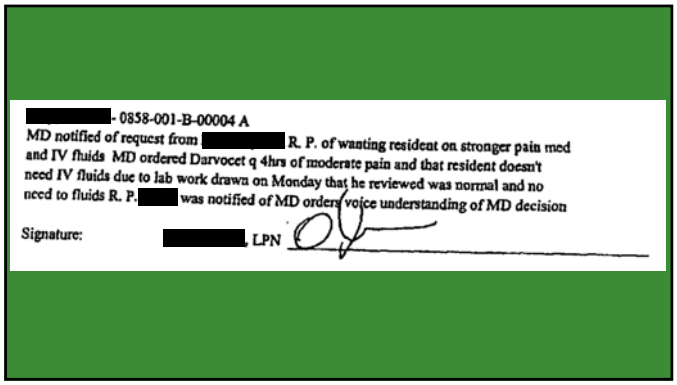
- Case example
  - 78-YOF admitted to SNF after hospitalization for stroke
  - Discharge summary noted creatinine levels of 1.0 (0.5-1.6)
  - "At the rehab facility [Patient] will get weekly CBC and basic metabolic panels with results to be followed up by the medical director at the rehab."
  - MD at SNF agrees, orders weekly tests



Test Name	Result		Units	Reference Range
BASIC METABOLIC				
SODIUM	135		MEQ/L	135 - 148
POTASSIUM	4.6		MEQ/L	3.5 - 5.3
CHLORIDE	98		MEQ/L	98 - 112
TOTAL CO2	26		MEQ/L	20 - 32
GLUCOSE	168	High	MG/DL	65 - 100
UREA NITROGEN	38	High	MG/DL	7 - 25
CREATININE	1.2		MG/DL	0.5 - 1.6
CALCIUM	9.7		MG/DL	8.5 - 10.5
CBC (HEMOGRAM)				
WBC	14.5	High	K/UL	3.5 - 11.0
RBC	4.74		M/UL	4.00 - 5.60
HGB	14.1		G/DL	12.0 - 16.5
HCT	42.6		%	34.0 - 50.0
MCV	90		FL	85 - 100
MCH	29.6		PG	28.0 - 33.0
MCHC	33.2		G/DL	32.0 - 36.0

Risk Management Considerations

- Case example
  - Lab report stamped “faxed” with LPN’s initials
  - LPN testified she faxed report to MD
  - MD denies receiving report
  - MD examines Patient one week later, but new tests not yet available
  - Another week later, MD contacted by LPN about lab work



[redacted]- 0858-001-B-00004 A
MD notified of request from [redacted] R. P. of wanting resident on stronger pain med and IV fluids MD ordered Darvocet q 4hrs of moderate pain and that resident doesn't need IV fluids due to lab work drawn on Monday that he reviewed was normal and no need to fluids R. P. [redacted] was notified of MD orders voice understanding of MD decision

Signature: [redacted], LPN

Risk Management Considerations

- Case example
  - MD again denied having reviewed lab results at time of conversation
  - MD testified he relied solely on verbal reports from SNF staff that labs were normal
  - Patient died one week later
  - Cause of death, aspiration pneumonia “as a consequence of urosepsis”

Risk Management Considerations

- Case example
  - Family sued MD, SNF
  - Plaintiffs' expert testified BUN to creatinine ratio of >20 consistent with kidney failure
  - Plaintiffs alleged MD failed to recognize and act on signs of sepsis
  - MD & SNF pointed fingers about MD's knowledge
  - Case settled

Risk Management Considerations

- Tracking and Follow-Up
  - Test/order performed?
  - Facility received results?
  - MD reviewed results?
    - Normal vs. abnormal
  - Resident or representative notified?
- Documentation paramount

This sample form will assist you in creating a unique form for your practice. Effective forms address the specific circumstances of each practice.

Sample Tracking & Follow-Up Log

Date Ordered	Patient & Patient Identifier	Test/Consultation	Date Results Received	Reviewed By Physician	Patient Notified of Results/ Follow-Up Actions	Initials*	Date Completed
__/__/__			__/__/__				__/__/__
__/__/__			__/__/__				__/__/__
__/__/__			__/__/__				__/__/__
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Communication with Residents and Their Representatives

Risk Management Considerations

- Communication with Resident family
- Patient perspective
  - Survey of 969 patients and family members, self-identifying as harmed from medical error
  - Reported experiences categorized, e.g., adverse surgical procedure, infection, adverse medication event
  - Leading category: failure in diagnosis & treatment

Nicole M. Cranley, Julia A. Hallisy, Frederick S. Southwick, "A Patient-Initiated Voluntary Online Survey of Adverse Medical Events: The Perspective of 696 Injured Patients and Families," *BMJ Qual. & Saf.*, June 19, 2015.

Risk Management Considerations

- Patient's perspective
  - 1/3 indicated physician/provider refused further communication after adverse event
    - Some even hostile
  - 90% believed physician/provider failed to respond appropriately to patient suffering
  - 34/450 expressed need for answers that never came

Nicole M. Cranley, Julia A. Hallisy, Frederick S. Southwick, "A Patient-Initiated Voluntary Online Survey of Adverse Medical Events: The Perspective of 696 Injured Patients and Families," *BMJ Qual. & Saf.*, June 19, 2015.

Risk Management Considerations

- Patient perspective
  - Open narratives from participants revealed:
    - Providers curt and authoritarian
    - Perceived loss of dignity

Nicole M. Cranley, Julia A. Hallisy, Frederick S. Southwick, "A Patient-Initiated Voluntary Online Survey of Adverse Medical Events: The Perspective of 696 Injured Patients and Families," *BMJ Qual. & Saf.*, June 19, 2015.

Risk Management Considerations

How can informal communication with residents' families be problematic?

Risk Management Considerations

- Case example
  - MD gives deposition, asked about changing death certificate
  - MD frustrated and angered about being misrepresented
  - Angry deposition clips used against MD in arbitration
  - Case settled
- Contact malpractice carrier for guidance

Thank You