

Suits (Not the TV Show). What to Do.

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Topics

- Arbitration
- Discovery
- New theories of liability
- Staffing
- General risk areas



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Arbitration

- Pros:
 - Simpler (can typically limit the scope of discovery)
 - Lessens risk of runaway jury
 - Less expensive
 - Faster than waiting for a trial date
 - More private than a trial

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Arbitration

- Cons:
 - No appeals
 - Relying on judgment of one individual: the arbitrator
 - May not be enforced pursuant to the terms of the agreement as written

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Enforceability of Arbitration Agreements

- Since the U.S. Supreme Court upheld an arbitration agreement in *Kindred Nursing Ctrs. Ltd. v. Clark* in 2017, Kentucky courts have upheld pre-dispute arbitration clauses in nursing home admission contracts executed by
 - #1 the resident**
 - OR**
 - #2 the resident's attorney-in-fact**as enforceable.

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Enforceability of Arbitration Agreements

- To meet the definition of an “attorney-in-fact” the person signing the arbitration agreement on behalf of the resident must have Power-of-Attorney status at the time the agreement is executed.

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Arbitration is Not a Magic Bullet

“Any additional discovery shall be conducted to agreement by the Parties. It is the Parties’ intent that the Arbitrator limit discovery to only issues related directly to the resident in question and that written discovery and depositions be limited to only the information necessary for a fair hearing.”

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Discovery

- Goal = profits > resident care
- Examples of common document requests:
 - Budgets
 - Profit & loss statements
 - Emails
 - Timecards
 - Cost reports
 - Corporate documents

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Policies and Procedures

- Know which employees are trained on which categories of policies and procedures
- ALL policies and procedures should be accessible to ALL employees
- Streamline and simplify!
- Review and revise on a regular basis



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Depositions

- Focus has shifted away from hands-on care providers toward administrators and directors of nursing
- Mock questioning



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Federal Quality Assurance Privilege

- Subsection of 1987 Federal Nursing Home Reform Act
 - Requires skilled nursing facilities to establish a quality assessment and assurance committee in an attempt to ensure nursing homes are vigilant about the quality of care their residents are receiving

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Federal Quality Assurance Privilege

- What about the privilege?
 - “A State or the Secretary **may not require disclosure** of the records of such committee except insofar as such disclosure is **related to the compliance of such committee** with the requirements of this paragraph.”

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Federal Quality Assurance Privilege

- Two interpretations
 - Missouri Rule
 - Narrow approach
 - Documents must be actually authored by QA Committee members for privilege to apply
 - New York Rule
 - Broad approach
 - Privilege applies to documents created by *or at the behest of* QA committee

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Federal Quality Assurance Privilege

- *Henderson Cty. Health Care Corp. v. Wilson* (Ky. 2020)
 - Kentucky Supreme Court adopted the New York rule
 - FQAP extended to nurse consultant reports created by a third-party consultant to evaluate the facility's quality of care and advise on areas of improvement
 - Documents protected generated by an outside source

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Federal Quality Assurance Privilege

- Examples:
 - Incident Reports
 - Fall tracker reports
 - QI/QM reports and flags
 - Any kind of “root cause analysis”
- Should be stamped “QUALITY ASSURANCE,” “CONFIDENTIAL,” and stored separately from the medical record

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If you mark a document as QA . . .

- You must be able to explain:
 - Why the document was created
 - How the document will be used
- Store documents in a designated area outside of the chart

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Documentation

- Response to initial medical records request MUST be complete
- MAR/TAR charting
- Clearly indicating when resident is out-of-facility
- Consistency – Braden scale/fall risk assessments/etc.
 - Auditing medical records regularly

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Audit Trails

- Provides information about who accessed a system or application, the time of access, what that individual did (e.g. open, create, read, edit, or delete a particular data file) and what device the individual used to access the system.
- NOT a part of the resident's medical record; not entitled to a copy under state or federal law
- All EMR systems have an audit trail system built in

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Audit Trails

- Used to manufacture fraudulent charting claims and support claim for punitive damages
- Know how to use your EMR system!!!
- Use of EMR experts increasing

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New Theories of Liability

- Breach of Contract
- Kentucky Consumer Protection Act
- Class action for failure to sufficiently staff facility
- Separate lawsuits against various healthcare providers arising from the same alleged injuries/death

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Breach of Contract

- “Implicit in the agreement between the nursing home and Mrs. Doe was the condition that the nursing home would provide the basic hygienic and sanitary needs required by Mrs. Doe, including proper wound care.”
- “The nursing home breached its contract with Mrs. Doe by failing to provide these basic services for which Mrs. Doe had contracted in good faith, leading to infection and suffering.”

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Breach of Contract

- KRS 304.40-300
 - No malpractice liability shall be imposed on a health care provider based on the alleged breach of any contract unless such “contract” is in writing and signed by the provider
 - Any contract purporting to guarantee or provide a warranty for medical services must do so expressly
- *Patel v. Game*, 2017, Ky. Court. App.

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Kentucky Consumer Protection Act

- “The nursing home undertook to provide rehabilitation services to Mrs. Doe. These services constituted services primarily for personal, family, and household purposes. Therefore, the transaction is a consumer transaction subject to the terms of the Kentucky Consumer Protection Act, KRS 367.170, *et seq.*”
- “The estate of Mrs. Doe has been monetarily damaged by the nursing home’s conduct, in that it has been required to incur past medical expenses, in addition to having been deprived of the benefit of its bargain with the nursing home.”

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Kentucky Consumer Protection Act

- *Barnett v. Mercy Health*, 2007, Ky. Court App.
 - “In order for the Act to apply, there must be some allegations that the actions complained of were part of the business aspect of the practice of medicine. Such actions would include advertising for a particular procedure then failing to advise the patient of the risks involved or of alternative treatment; or entering into a financial agreement advertising services at a particular cost then charging at a different rate.”
 - Medical negligence is not included in the *business aspect* of the practice of medicine

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Staffing

- Winning based on the medicine is difficult
- Strategy instead focuses on the operations of the facility
- Understaffing is THE key component of putting the facility's operations on trial

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Examples of How Refute Understaffing Allegations

- Staffing Budgets
 - Begin budget process by looking at historical acuity and making adjustments as needed
 - Create staffing budgets with input from DON and MDS Coordinator
 - Budget should take resident acuity into account

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Examples of How Refute Understaffing Allegations

- Daily Staffing Levels
 - Decisions should be based on census and acuity
 - To determine acuity, look at examining resident limitations, use of complex services, feeding tubes, Hoyer lifts, etc. as well as discussions with staff providing hands-on care (including nurse aides)

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Understaffing Class Actions

- Not based on allegations of substandard care or medical negligence
- Instead, based only on violation of statutes requiring “sufficient staff” and alleged pecuniary harm suffered by class members as a result

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Understaffing Class Actions

- Allege that class members were deprived of the value of payments made to the facility for skilled nursing services when those services were not actually rendered consistent with federal and state staffing standards
 - Example:
 - Provided 79% less RNs and 6% less total nursing hours than that which was required for the resident population in 2019
 - Provided 74% less RNs and 9% less total nursing hours than that which was required for the resident population in 2020

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Understaffing Class Actions

- Filed in federal court
- Motions to dismiss are pending in each of these cases
- If they survive the motion to dismiss phase, the use of staffing experts will be critical in the defense of such cases

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Surveys

- Admissible at trial?
- Top F-Tags Cited in 2022
 - F884: Reporting to National Health Safety Network
 - F880: Infection Control and Prevention
 - F689: Accidents, Hazards, Supervision, and Devices
 - F812: Food Procurement
 - F684: Quality of Care

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QUESTIONS?

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Receive credit for attending!

