



Ethical Considerations in Nursing Home Cases

by Jordan S. Powell

The representation of injured nursing home residents is a complex area of personal injury law. Due to the nature of nursing home litigation, you typically have contact with multiple generations of a family, and there may often be conflicting interests regarding medical and financial decision-making. This conflict may create unique ethical considerations not typically encountered in other kinds of injury cases.

This article focuses on common ethical considerations that arise in nursing home cases that are not typical in other types of injury cases. Some sections of the Model Rules of Professional Conduct offer guidance on how to address these issues, but as nursing home practitioners will often find, it can be difficult just realizing an ethical problem exists.

I. Who is your client?

First and foremost, when considering whether to accept a nursing home case, you must identify who your client is. Consider this hypothetical:

You receive a call from Sue Jones, the niece of Jane Adams. Sue explains to you that her beloved aunt just passed away, and that there are suspicious circumstances surrounding the death. She explains that her aunt suffered a stroke a couple of years ago, leaving her unable to speak and perform activities of daily living. Sue explains to you that due to difficulty swallowing normal food following the stroke, her aunt required a

mechanically altered diet, meaning that her food was chopped into small pieces.

Sue explains that after the stroke, her aunt had to move into a nursing home for rehabilitation. She goes on to explain that three days after her aunt was admitted to the nursing home, she was called and informed that her aunt was rushed to the hospital after dinner. When Sue got to the hospital, she learned that her aunt was accidentally given a large piece of steak. She learned that the piece of steak got stuck in her aunt's throat, causing her to choke to death.

After hearing this simple fact pattern, you are ready to meet Sue, sign up the case and get it filed. But before doing so, there are several other pieces of information you need to learn and consider.

After questioning Sue a little more, you learn that Jane was married to Horace, but Horace predeceased Jane and they did not have any children. You also learn that Jane had three siblings, all of whom are deceased and had their own children. You realize that Sue was married to one of Jane's siblings, so she in fact is not a blood relative of Jane.

Who is your client?

The first thing you need to do is meet with Sue and clearly

explain the process of investigating and filing a lawsuit. Explain to her that you do not represent her individually; rather, you represent Jane's estate. You need to explain the differences between the Survival and Wrongful Death Acts, and how they would apply to this case.

You need to find out if Jane had a will, and get the names and addresses of the potential beneficiaries. I recommend sending a letter to all potential beneficiaries, informing them of your involvement in investigating Jane's death, and asking them to come in for a meeting. The goal is to make sure that everyone is aware of your involvement, and hopefully, determine who is best suited to be the representative of Jane's estate.

It is often very difficult to get all family members to come in for a meeting. Often, family members are spread far and wide, are estranged, or are resentful of the close relationships between certain family members. Make your best efforts to inform all family members of your involvement and plan moving forward. The best way to do this is to speak with all beneficiaries regularly, but since this is often impracticable, send letters updating them on the status of the lawsuit.

Now, consider the following situation:

Mary Smith walks into your front door and seems visibly upset. You soon learn that her mother is in the hospital for an allergic reaction. After further investigation, you learn that Mary's mother



was living in a nursing home and was accidentally given another resident's medication. Mary's mother, suffering from a mild form of dementia, unfortunately did not recognize that she was given the wrong medication.

Luckily, after a two week hospitalization, Mary's mom was discharged from the hospital and returned to the nursing home. However, the extended hospitalization resulted in significant medical bills. Further, the allergic reaction and hospitalization resulted in a real setback for Mary's mom, and worsened her dementia.

You have Mary sign an attorney-client agreement to begin your investigation. Mary is the power of attorney for healthcare and property, but she has never been appointed as the legal guardian.

Who is your client?

Since Mary approached you and signed the contract, it would be easy to think of Mary as your client. The client, however, is not Mary, it is her mother. The key is to think about your client as the injured person whose rights you are protecting.

Now, take Mary's hypothetical a step further:

Shortly after meeting Mary at your office, she contacts you and informs you that she has lost her job and is having car trouble. She asks about the status of the case and when a settlement will occur. She explains that she just needs a little money to get back on her feet.

Regardless of Mary's financial pressures, you need to explain to Mary that the case is for her mother, not her. It is imperative that you protect the interests of the injured party; always remember your contact person may not be the client.

Because of a nursing home resident's age and medical conditions, your initial contact about a case is likely from a family member or friend. The key inquiry is who has standing to assert the claim. If the injured nursing home resident is still alive, the resident can assert a claim for damages. If the injured nursing home resident is deceased, then the Estate and surviving beneficiaries can assert a claim for damages.

Practice Tip: If you are concerned about the interests of certain beneficiaries, send them a letter to sign, agreeing that the guardian or personal representative will be the spokesperson and make decisions for the family.

II. Competency

After you have established that your client is the living nursing home resident, the next question you need to answer is whether your client is competent. Can the client actually enter into an attorney-

ethical considerations continued on page 56

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client relationship? Can the client give a deposition? Can the client make informed decisions?

Rule 1.14(a) of the Model Rules of Professional Conduct provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, **maintain a normal client-lawyer relationship with the client.**¹ (Emphasis added)

This means that wherever practicable, you must try to maintain a normal relationship with the client. If the client is hard of hearing in one ear, make sure that during all meetings, you speak into the client's good ear. If your client is unable to meet at your office, go visit the client. As an advocate for your client, you need to communicate with the client and keep him or her well informed, regardless of any disability.

When there is suspected injury to a living nursing home resident, you typically will be contacted by a family member or friend. Make sure that this individual is present to help answer questions at your initial meeting with the client. Find out if the client has already seen an attorney for any reason. If not, ask if there is a power of attorney for either healthcare or property. If there are such documents, get a copy. Carefully read the documents to determine the scope of the powers granted.

As a cautionary note, make

sure that you represent everyone present at any meetings with the client, excluding all unrepresented persons from meetings where you are discussing the case, your investigation, and strategies. This includes even initial meetings, since the claim is likely going to involve litigation. Always expect a defense attorney will try to pierce the attorney-client privilege.

However, if it is necessary or makes good sense to have other trusted family or friends present, the commentary to Rule 1.14 does make reference to "joint consultation":

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.²

In Illinois, all individuals are presumed competent, unless adjudicated otherwise. If you suspect that your client is not able to make legally binding decisions, consider having a guardian appointed. Rule 1.14(b) of the Model Rules of Professional Conduct provides:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability

to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.³

When a client's competence is in question, the best practice is to bring in the services of a probate attorney as soon as possible, to help assess whether an objective third party—guardian *ad litem*, conservator, or guardian—should be appointed. By doing so, you are not only serving your client's best interests, but preventing potential future problems for yourself.

III. Confidentiality

When representing nursing home residents, unique confidentiality issues often arise that are not present in typical injury cases. The most common situation occurs when other family members call for information about the lawsuit. If your client is living and competent, you cannot provide this information without your client's consent. If a guardian has been appointed, you must communicate with the guardian to obtain the client's informed consent to speak with others about your client's case.

Rule 1.6(a) of the Model Rules of Professional Conduct provides:

(a) A lawyer **shall not reveal information relating to the representation of a client unless the client gives informed consent**, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

The key to maintaining client confidentiality is to clearly identify your role at the outset of the attorney-client relationship. Explain to all family members that simply because they are family, this does not mean they are entitled to all information about the lawsuit or the client's medical

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conditions. This is particularly important in situations where you believe all family members may not be in agreement with the decision to file a lawsuit, and you are concerned some may try to jeopardize the case, or only have their own financial interest in mind.

IV. Referral Arrangements

Apart from the ethical considerations unique to nursing home cases, these cases present unique issues that attorneys specializing in this area of law are best equipped to handle. For this reason, the Model Rules of Professional Conduct encourage attorneys to refer cases to attorneys in their area of expertise.

Rule 1.5(e) of the Model Rules of Professional Conduct provides:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement,

including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.⁴

When considering whether to refer a nursing home case, remember this rule, and most importantly, that you are assuming joint responsibility for representing the client. This means that when referring cases, always make sure you are referring the case to a competent firm that you trust will handle the case appropriately. Also, it is important to verify the firm accepting the referral has malpractice coverage.

Finally, remember that the referral agreement must be disclosed to the clients, and should be in writing as a part of the initial contract signed by the client. If it is not part of the initial contract, consider having the client sign a new contract or a separate referral agreement outlining the fact the attorneys' fees will be shared.

V. Communications with Nursing Home Employees

Because of the transient nature of nursing home staff, attorneys prosecuting nursing home cases will often be speaking with former and current employees. Lawyers must be

careful not to take advantage of an unrepresented witness, and make sure not to invade the attorney-client privilege. Because these witnesses often provide key testimony about your client's injury, inadequate staffing, and how corporate pressures result in injuries; these witnesses must not be forgotten.

Rule 4.2 of the Model Rules of Professional Conduct provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.⁵

This rule applies even if the witness contacts the attorney and consents to speaking with the attorney.⁶

Rule 4.3 of the Model Rules of Professional Conduct provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.⁷

Once you determine the witness is unrepresented, you next need to assess if the information you are seeking is

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privileged. If the individual is a former employee and is not represented, you may speak with him or her. For current employees, Illinois is one of a small minority of states that prohibits *ex parte* contacts with a current employee only when that employee is a member of the "Control Group."⁸ Under the Control Group test, communications that are ordinarily privileged are those that are made by top management who have the ability to make final decisions, rather than those employees whose positions are merely advisory.⁹ Ultimately, this test is focused on the status of the employee within the corporate hierarchy.

Though former employees often have key information advantageous to your client's cause, be sure you are not invading on the attorney-client privilege to get this information. If you are in doubt, err on the side of caution, and issue a subpoena for the witness' deposition.

VI. Conclusion

The prosecution of nursing home cases is by no means a simple task; adding multiple ethical considerations creates additional obstacles for the attorney to navigate. With a clear identification of your client and adequate communication with all interested parties, a practitioner is able to advance the client's best interests, and simultaneously avoid ethical violations.

Endnotes

- ¹ Model Rules of Professional Conduct, Rule 1.14(a)
- ² See Comment [3] to MRPC Rule 1.14
- ³ Model Rules of Professional Conduct, Rule 1.6(a)
- ⁴ Model Rules of Professional Conduct, Rule 1.5(e)
- ⁵ Model Rules of Professional Conduct, Rule 4.2
- ⁶ See Comment [3] to MRPC Rule 4.2

⁷ Model Rules of Professional Conduct, Rule 4.3

⁸ See *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill2d 103 (1982) followed by *Fair Automotive Repair, Inc. vs. Car-X Service Systems, Inc.*, 128 Ill. App. 3d 763 (2d Dist. 1984)

⁹ See *Consolidation Coal Co. and Midwesco-Paschen Joint Venture for Viking Projects v. Imo Indust., Inc.*, 638 N.E.2d 322 (Ill. App. 1st Dist. 1994)

Jordan S. Powell was hired as a litigation associate with Levin & Perconti in August 2007. Jordan's diligence, drive and dedication have led to notable results on behalf of clients who have suffered from tragic and catastrophic injuries. Recently, Jordan was named to the Law Bulletin Publishing Company's list of the "40 Attorneys Under Forty to Watch" in Illinois for 2012. He was also named to the list of Illinois Rising Stars by Super Lawyers in 2012 and 2013.

Jordan earned his J.D. from Chicago-Kent College of Law where he focused his studies on developing a well-rounded

litigation background, earning high honors in both trial advocacy and litigation technology courses. Prior to law school, Jordan attended the University of Michigan where he was on the dean's list and graduated with academic distinction. While there, he earned two degrees: a B.A. in Political Science and a B.A. in Organizational Studies.

Additionally, Jordan is an active member of the Illinois State Bar Association where he serves on the council for the Young Lawyers Division. He is a member of the Decalogue Society, Chicago Bar Association, American Bar Association, Illinois Trial Lawyers Association and the American Association of Justice's Nursing Home Litigation Group. He has been asked to speak on nursing home litigation to a number of groups including fellow lawyers, senior advocates and long-term care ombudsmen.

Jordan volunteers at both Chicago-Kent College of Law and John Marshall Law School, judging trial advocacy and moot court competitions.

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