


**THE MEDICAL
MALPRACTICE LAWSUIT:**

**WHAT YOUR LAWYER WANTS
YOU TO KNOW**

Presented by
Angie Cameron
Johnston Barton Proctor & Rose LLP
205-458-9489
acc2@johnstonbarton.com

**The Alabama
Medical Liability Act
“AMLA”**

Alabama Code § 6-5-480 *et seq.*



The AMLA

- Alabama has a specific statute dealing with claims against health care providers.
- “In any action for injury, damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or in the hiring, training, supervision, retention, or termination of care givers, the Alabama Medical Liability Act shall govern the parameters of discovery and all aspects of the action.” Ala. Code § 6-5-551

AMLA Applies to SNF's

- A "health care provider" as defined by the statute is "a medical practitioner, dental practitioner, medical institution, physician, dentist, **hospital**, or other health care provider" as those terms are defined by Sections 6-5-481 and 22-21-20 of the Alabama Code.
- Ala. Code § 22-21-20 includes nursing facilities, assisted living facilities and specialized care assisted living facilities within the definition of "hospital."

What's covered under the AMLA?

- The AMLA covers all claims alleging a breach of the standard of care including:
 - ◆ Personal injury
 - ◆ Wrongful death
 - ◆ Contract
 - ◆ Negligent hiring, training, supervision, retention or termination of care givers.

What's required under the AMLA?

- The person suing must prove two things:
 - ◆ A breach of the standard of care by an act or omission causing injury or death to the resident, and
 - ◆ That the breach was the proximate cause of the resident's injury or death.

What's required? (continued)

- Expert testimony is required to establish both the breach of the standard of care and that the breach caused the injury.
- Exception to the requirement of expert testimony:
 - ◆ Lack of care or skill is so obvious that any layperson with common knowledge and experience could comprehend it.

What's required? (continued)

- Exception to the requirement of expert testimony (continued):
 - ◆ Failing to answer a call light and provide assistance to a resident who was "at risk for falls" was within a layperson's common knowledge and did not require expert testimony to establish a breach. See *Heath v. HealthSouth Medical Center*, 851 So. 2d 24 (Ala. Civ. App. 2002).

AMLA: Statute of Limitations

- Statute of Limitations
 - ◆ The time limit for bringing actions under the AMLA is two years from the act or omission.
 - ◆ There is an extension if the act or omission was not discovered until later but in no case may the action be brought after 4 years.
 - ◆ Wrongful death – 2 years from death



AMLA- Other acts or omissions

- An important provision of the AMLA is the prohibition against discovery or admissibility of other acts or omissions. Ala. Code § 6-5-551.
- This provision should generally exclude statements of deficiencies – except for a deficiency involving the injured party.

AMLA- Other acts (continued)

- The statute was revised in 2000 to add negligent hiring, training, and supervision.
- Some cases upholding this provision include:
 - ◆ Ex parte Coosa Valley Health Care, Inc., 789 So. 2d 208 (Ala. 2000).
 - ◆ Ridgeview Health Care Center, Inc., 786 So. 2d 1112 (Ala. 2000).

What Constitutes Malpractice?

- Breach of the standard of care
 - ◆ Established by an expert
 - ◆ Similarly situated health care provider
- “Probably caused”
 - ◆ Established by an expert
 - ◆ Medical probability

Standard of Care

- What is the standard of care?
- “The standard of care is that level of such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases.”
 - ◆ Community standard of care- refers to the national community
 - ◆ Similarly situated health care provider must establish the standard of care and that it has been breached.

Standard of Care (continued)

- A similarly situated health care provider means someone who:
 - ◆ Is licensed by the appropriate regulatory board or agency of this or some other state.
 - ◆ Is trained and experienced in the **SAME** discipline or school of practice, i.e. a registered nurse must testify as to a breach by another registered nurse.

Standard of Care (continued)

- Similarly situated (continued)
 - ◆ Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach occurred.
- Courts have generally held that state and federal regulations **DO NOT** alone define the standard of care.

Other advantages of the AMLA

- Advance payment for injury suffered - not admission of liability
- Substantial evidence rule
- Structured payout
- Collateral Source Rule abolished
- Venue- action must be brought where act or omission occurred.

Alternative Dispute Resolution ("ADR")

- "Alternative" to litigation
 - ◆ Mediation
 - ◆ Arbitration



What is arbitration?

- Arbitration is a method for resolving disputes in which the parties agree to submit their claims to a neutral third party for a binding decision in lieu of filing a lawsuit in court.
- The terms of the written agreement determine the scope of, and procedures for, arbitration.

Arbitration

- Alabama only enforces post-dispute arbitration agreements.
- Federal Arbitration Act (“FAA”) enforces pre-dispute arbitration agreements.
- Supreme Court of Alabama has held that the FAA applies in nursing home cases.

Arbitration

- Basics of the FAA
 - ◆ Motion and Stay
 - ◆ Procedure
 - ◆ Discovery
 - ◆ Hearing
 - ◆ Decision
 - ◆ Costs

Arbitration

- Advantages of Arbitration
 - ◆ Different forum (no jury)
 - ◆ Less Expensive
 - ◆ Arbitrator with specialized knowledge

Arbitration – AL case law

- Community Care of America of Alabama, Inc. v. Davis
- McGuffey Health & Rehabilitation Center v. Gibson
- Owens v. Coosa Valley Health Care, Inc.
- Briarcliff Nursing Home, Inc. v. Turcotte
- Springhill Nursing Homes, Inc. v. McCurdy

Arbitration – AL case law

- Noland Health Services v. Wright
 - ◆ Authority of third party to execute agreement on behalf of resident
- Carraway v. Beverly Enterprises Alabama, Inc.
 - ◆ Authority of brother to sign
 - ◆ Unconscionability
- Other cases outside long term care
 - ◆ Non-signatory ability to enforce agreement

Arbitration Services Provider

- National Arbitration Forum no longer provides pre-dispute arbitration
- JAMS provides services
- Does not make the contract void if calls for NAF to serve as arbitration services provider

Arbitration- practical considerations for facilities

- Education of staff and family
- Waiver of arbitration
- Fairness of agreement
- Explanation of terms
- Time to review agreement
- Language and print of agreement
- Terms of the agreement
- Authority to Sign

Arbitration – Authority to sign

- Who should sign agreement?
 - ◆ Resident
 - ◆ Power of Attorney
 - ◆ Judicially appointed guardian or Legal Representative
 - ◆ Healthcare surrogate
 - ◆ Spouse
 - ◆ Adult Child
 - ◆ Adult Sibling
 - ◆ Other relative (closest degree of kinship preferred)

Mediation

- Mediation is a voluntary, non-binding procedure in which the parties submit a Dispute to a neutral third-party (the mediator) who works with the parties to arrive at a settlement of the Dispute which is mutually agreeable to the parties.
- Mediation not a condition precedent to arbitration.

Mediation

- The Mediation Services Provider
- The mediation process starts when either party files a request for mediation with the Mediation Services Provider.
- Information about how and where to file a request for mediation is available from the Facility.

What is Quality Assurance?



Quality Assurance

- Quality Assurance is a formal peer review process used to :
 - ◆ Determine levels of professional competency;
 - ◆ Assess quality measures and address deficiencies;
 - ◆ Investigate accidents and incidents for system or procedural failure.

Quality Assurance (continued)

- Properly conducted quality assurance is generally protected from discovery or introduction as evidence in lawsuits- Both

- ◆ QA materials
- ◆ Testimony



Ala. Code § 22-21-8 Materials



- All quality assurance and similar materials shall be held in confidence and shall not be subject to discovery or introduction in evidence in a civil action against a health care professional or institution arising out of matters which are the subject of evaluation or review for quality assurance or similar functions, purposes or activities.

Protected Materials

- Those developed by a QA committee
 - ◆ Minutes
 - ◆ Reports
 - ◆ Corrective action
 - ◆ Maintained in a confidential file



Unprotected Material

- Any parts of the resident record
- Any information available from other unprotected sources

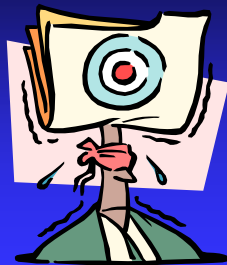


For Example

- The fact a fall occurred, a resident is injured, or treatment is given is not privileged, but the discussions and investigation that follow are privileged.
- Notes made by the nurse in a chart regarding an accident- NOT QA.
- Determination during an investigation of whether the employees understand risk assessment and accident prevention- QA!

Ala. Code § 22-21-8 Testimony

- No person involved in preparation, evaluation, or review shall be permitted or required to testify in any civil action regarding such materials.



Protected Testimony

- Persons involved in QA
 - ◆ Committee Members
 - ◆ QA consultants
- Information involving the preparation of QA materials.

Unprotected Testimony

- Independent knowledge of care



CASES- QA Materials



- Ex parte Krothpalli, 762 So.2d 836 (Ala. 2000).
 - ◆ Documents that are available from the original source are not privileged simply because they were used for quality assurance.
 - ◆ If the facility is in possession of QA documents that would otherwise be discoverable from the original source, they are not required to produce them.
 - ◆ The party seeking such information must obtain it from the original source. See also Ex parte Qureshi, 786 So. 2d 374 (Ala. 2000).

CASES (continued)

Testimony

- Ex parte Burch, 730 So. 2d 143 (Ala. 1999)
 - ◆ The court
 - ◆ Excluded testimony of a doctor who sat on a peer review committee
 - ◆ Recognized, however, that independent personal knowledge of a situation would not be protected even if it later became the subject of quality assurance.

CASES (continued)

Discoverability of QA Materials

- Cryer v. Corbett, 815 So. 2d 239 (Ala. 2001).
 - ◆ Notes made by a doctor in preparation of a meeting to discuss another doctor's job performance were not privileged.
 - ◆ The one claiming the privilege has the burden of proving the documents were used for quality assurance purposes.
 - ◆ The court in this case found insufficient evidence to conclude the meeting was for purposes of credentialing or quality assurance.

CASES (continued)

Discoverability of QA Materials

- Kingsley v. Sachitano, 783 So. 2d 824 (Ala. 2000).
 - ◆ The purpose behind the privilege is to allow for self-regulation.
 - ◆ Deposition of the President and CEO of the hospital stating that he had reviewed the documents requested and that they were the subject of quality assurance was sufficient to establish the privilege.

Applicability



- Nursing Home regulations provide Quality Assurance guidance. See 42 CFR § 483.75 (o).
 - ◆ Formal Committee
 - ◆ RN consultant or Clinical Services Coordinator
 - ◆ Dietary
 - ◆ Social Service/Activities
 - ◆ Regular Meeting- at least quarterly
 - ◆ Keep minutes

Do's and Don'ts

- Do's
 - ◆ Develop independent reports
 - ◆ Set measurable quality guidelines
 - ◆ Develop regular QA schedule
 - ◆ Test competency
 - ◆ Knowledge of policies and procedures
 - ◆ Technical skills
 - ◆ Maintain Minutes
 - ◆ Institute remedial measures

Do's and Don'ts

- Maintain QA materials in a confidential file, separate from incident reports and an investigative file

Do's and Don'ts (continued)

- Don'ts
 - ◆ Stamp normal resident records QA.
 - ◆ Permit access to QA minutes by non-QA personnel.
 - ◆ Maintain all the evidence of an accident or incident under QA.

Waiver of the Privilege

- Who is the holder of the privilege?
 - ◆ “[The privilege] does not protect just one person but rather the entire peer review process and all those involved. No one physician can waive the privilege...perhaps an entity responsible for general oversight or the court.”
Marshall v. Planz, 145 F.Supp. 2d 1258 (M.D.Ala. 2001)

Waiver (continued)

- In Marshall v. Planz, the court stated that Alabama's privilege statute has a limited view of waiver and held that Alabama does not recognize a necessity exception.
- However, Ex parte St. Vincent's Hospital, 652 So. 2d 225, mentions the possibility of allowing for such an exception where the party would essentially be denied its right to due process.

Waiver (continued)

- How to prevent waiver of the privilege:
 - ◆ It should be raised at the first possible moment.
 - ◆ If the privilege is not available but later becomes applicable, the individual has not waived the privilege. See *Marshall v. Planz* (federal claims prevented the applicability of the privilege until after depositions were taken, the privilege was not waived.)

Waiver (continued)

- How to prevent (continued)
 - ◆ Disclosure to others may act as a waiver-relating information outside the QA committee

Surveyors Access to QA

- Under the Nursing Facility guidelines for survey procedures, surveyors
 - ◆ SHOULD NOT
 - ◆ Review committee minutes or reports that address actual quality deficiencies
 - ◆ If QA minutes are the only record of an incident, surveyors shall have access to them.

Surveys and QA (continued)

- ◆ Surveyors should determine if
 - ◆ QA committee exists;
 - ◆ The QA committee meets at least quarterly;

Surveys and QA (continued)

- ◆ Surveyors should determine if: (continued)
 - ◆ The committee has a formal method to identify and respond to QA issues by:
 - Asking how the committee functions
 - Asking for samples of deficiencies and how the QA committee dealt with those deficiencies
 - However, QA committee records and/or minutes should not be reviewed.

Insurance Company Claims Investigation



- Under Rule 26(b)(3) of the Alabama Rules of Civil Procedure, reports to and from insurance companies concerning investigations are not discoverable.
- Such information may also be protected under the attorney work-product privilege if compiled in anticipation of litigation.

Tips for maintaining the privilege

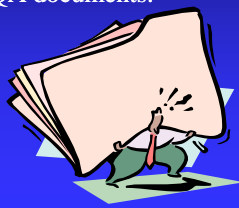
- Mark materials as “Confidential: For Internal Management and Quality Assurance Purposes.”
 - ◆ **WARNING:** Be sure that what you mark as QA is used for that purpose- making an overall qualitative analysis of patient care.
 - ◆ If you mark non-QA materials as QA, you may cast doubt on the privilege applying to any of the materials.

Tips for QA (continued)

- Identify a Quality Assurance Committee.
 - ◆ Those materials marked QA should be used by the committee in making its qualitative analysis.
 - ◆ Minutes from QA committee meetings should reflect the use of QA materials.
 - ◆ Have a formal QA process.

Tips for QA (continued)

- Maintain QA materials separately from other documents.
- Restrict access to QA documents.



Other considerations

- Contact from attorneys or investigators
- Request for records
- E-discovery
- Medical Records/Documentation
