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**RECOGNIZING AND COMBATING STANDARD DEFENSES
IN A NURSING HOME CASE**

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BY

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Introduction:

One of the most favored and frequent defensive maneuvers employed by defense counsel in an attempt to exonerate a nursing home is the full scale attack upon the credibility of the family or responsible party for the resident/victim [hereinafter referred to as the family or plaintiff]. In advancing this position during the investigative and deposition phases of the case, defense counsel will frequently and specifically inquire into the subjects identified hereinbelow. The testimony provided by plaintiff in response to these inquiries will ultimately provide defense with the underpinnings for the argument that "plaintiff has fabricated, fantasized and exaggerated and therefore is not to be believed." The ground work for implementation of plaintiff's and defendant's plan of attack in a nursing home case is laid during the investigative and pre-deposition phases of the litigation. Accordingly, this article will deal with key points and preparatory decisions which will ultimately influence plaintiff's battle position on the field of play.

Below is a comprehensive attack plan by the defendant nursing home consisting of: (1) the predicate testimony sought by defendant and necessary to launch the assault; (2) the simple formula defendant will attempt to employ in attacking the family's credibility; and (3) exemplars of final argument by defense counsel designed to exploit this testimony.

[1.0] Defense Predicate # 1: Deplorable Conditions Frequently Observed by Plaintiff Do Not Trigger Relocation of Resident to Another Facility.

The following testimony lays the groundwork for an assault upon credibility of plaintiff by defendant: (1) she visited her mother, Jane Doe, "almost daily" during the six month period Jane was a resident of defendant nursing home; (2) that during these daily visits, plaintiff observed her mother subjected to deplorable conditions such as "constantly" lying in urine and feces; and, (3) plaintiff made no attempt to relocate Jane Doe to another facility.

Note: Defense counsel will often attempt to goad plaintiff into exaggerating the scope and frequency of these conditions in an attempt to demonstrate the willingness of plaintiff to fabricate or fantasize the atrocious conditions which defendant will subsequently argue never existed. Leading questions by defense counsel such as those which follow commonly signal this form of defense attack. "You constantly found her wet and dirty? I would imagine that these conditions which you claim you observed were shocking? Would you describe these conditions as unconscionable?"

[1.1] Attack Formula #1:

Frequent visits by family + frequent deplorable conditions + no attempt to find new home = impaired credibility.

[1.2] Defense Argument #1:

"Let's talk about the credibility...probably the key issue in this case. Let's first examine the witnesses that the plaintiffs have brought you. Witness No. 1, Edith Doe. What she wants you to believe and they want you to believe that she, or someone from her family, visited the nursing home nearly every day for six months and witnessed their mother subjected to deplorable living conditions for an extended period of time because of insufficient staff. They want you to believe that the reason their mother suffered falls and wandered was because of insufficient staffing. They want you to believe that their mother itched and scratched and clawed until she bled for four months and that nothing was done. They want you to believe that they found her almost every day subjected to inhumane conditions, lying in her own urine and feces. Why is that unbelievable, why is that incredible, because if that really were true and if that really existed she nor her family members would have left their mother in this facility. It's plain or simple. Nor would any of us."

[2.0] Defense Predicate #2: No Outcry By The Family To Director Of Nursing.

Although the family of the nursing home resident observed deplorable conditions on their frequent visits to the facility, they make no complaint to the Director of Nursing. During deposition, the family has acknowledged that the nursing staff in the facility had a boss whose title was "the Director of Nursing."

[2.1] Attack Formula #2:

Frequent visits + frequent deplorable conditions + no complaints to Director of Nursing = impaired credibility.

[2.2] Defense Argument #2:

"If this deplorable, filthy, inhumane environment existed, don't you know, ladies and gentlemen, that plaintiff would have complained to the Director of Nursing--which she didn't. If these conditions existed, she would have gone to the head of the Nursing Department and shouted, "I want my mother taken care of!" If her helpless mother was being ignored, she would not have failed to make outcry, and now, three years after the fact, she makes outcry to you, ladies and gentlemen of the jury. Why is that? The simple reason she made no outcry then was there were no deplorable conditions. These are either a figment of her fantasies, her lawyer's fantasies, or her own fabrication."

[3.0] Defense Predicate #3: No Outcry by Family to the Administrator.

The testimony sought by defendant under this topic is similar to that described above under *No Complaint by Family to Director of Nursing*. Essentially, what defense counsel

would like to extract from plaintiff is the testimony that plaintiff made no outcry to the Administrator of the nursing home despite witnessing "constant deplorable and repugnant conditions."

[3.1] Attack Formula #3:

Frequent visits + frequent deplorable conditions + no complaint to Administrator = impaired credibility.

[3.2] Defense Argument #3:

The argument of defense counsel with respect to this point would mirror that set forth under Failure to Make Outcry to Director of Nursing..."if this deplorable, filthy, inhumane environment existed, don't you know ladies and gentlemen that plaintiff would have complained to the Administrator which she didn't. Someone in her family would have complained to the Administrator which they did not. What plaintiff and her family want you to believe is that they visited the nursing home nearly every day and witnessed their mother subjected to deplorable living conditions for extended periods of time and they made no outcry about this. Why is this incredible? Why is this unbelievable? Because if these conditions really existed, neither plaintiff nor any of her family would have sat silent. It's plain and simple. Nor would have any of us."

[4.0] Defense Predicate #4: No Outcry to the State Department of Health.

Although the family claims to have visited almost every day and observed their mother subjected to prolonged neglect, they made no outcry to the Department of Human Services or Department of Health (the responsible agency for monitoring nursing home care within the state). They acknowledged, however, that when their mother was admitted to the nursing home, they received a document which instructed them on how to register a complaint about inadequate care or neglect of a nursing home resident. The document even contained a toll free number which this family was given to call if they suspected mistreatment of their mother.

[4.1] Attack Formula #4:

Frequent visits + frequent deplorable conditions + no complaint to health department = impaired credibility.

[4.2] Defense Argument #4:

"Don't you know that if Jane Doe was laying in dried feces and urine on an almost constant basis as this family has suggested, that they would have complained to the State Department of Health. They would have been on the phone to the State Department of Health describing all these terrible problems that they observed. Would they have made no outcry when they had a toll free number and information provided to them in writing

stating how they could have made a complaint? If these deplorable conditions existed on such a constant basis don't you think their intolerance for this type of mistreatment would have caused them to pick up the phone in a heartbeat and say "Help me help my mother." Yet that was never done. Suspiciously, the only outcry made by this family is after they meet this lawyer and he files a lawsuit for millions of dollars."

[5.0] Defense Predicate #5: Non-relevant and Trivial Outcry by Family.

Although the family claims to have observed their mother constantly laying in urine and feces and exposed to deplorable conditions on a frequent basis, the only complaint they made to the State Department of Health, the Administrator or the Director of Nursing was that there was an odor in the carpet. They did not complain that their mother was "constantly found in urine and feces," or "that their mother developed huge sores," or "that their mother was deprived of any care." The only complaint lodged was that the carpet didn't smell right.

[5.1] Attack Formula #5:

Frequent visits + frequent deplorable conditions + non relevant/trivial outcry by family = impaired credibility.

[5.2] Defense Argument #5:

"Don't you know that if Jane Doe was laying in dried feces and urine on an almost constant basis as they have suggested, that the family would have done more than complain about the odor in the carpet. They would have been on the telephone with the State Department of Health...Don't you know they would have mentioned these other problems, the lack of care, the urine and feces, the sores, but no one does anything. You bet they would have said something. Yet that wasn't even discussed with the Department of Health. That wasn't even looked into because it didn't exist."

[6.0] Defense Predicate #6: Failure to Clean Mother Upon Discovery.

Testimony that plaintiff's mother or father was frequently found lying in urine and feces often stimulates defense questions regarding plaintiff's response to this situation. Not only is defendant interested in whether plaintiff complained but, also whether plaintiff was concerned enough about the problem to make sure that the resident was cleaned up. Did plaintiff personally clean up the incontinent episode? If not, did plaintiff remain in the building until the problem was corrected? Obviously, if plaintiff reported the condition and then left the facility before it was cleaned up, defendant will argue that plaintiff couldn't have been very concerned about the problem.

[6.1] Attack Formula #6:

Frequent urine and feces + lack of concern for correction = impaired credibility.

[6.2] Defense Argument #6:

"Plaintiff wants you to believe that she found her mother constantly laying in urine and feces while she was there. She wants you to believe that these constant repugnant conditions were a symptom of her mother's neglect. And yet, what is her response? Because of her purported concern for this "constant problem" does she assist in cleaning up her mother's incontinent episode? Does she even remain in the building to assure that this purported concern is corrected? No. She simply goes on her way leaving her mother laying there in urine and feces. If this really was occurring, if this really had been a concern, does she or do any of us, when our mother is laying there, simply walk up to the nurses' station and tell them about it and just leave? Don't you stay there to make sure it gets taken care of, especially, if this is a repeated pattern as plaintiff claims. You bet you do. The simple truth is, folks, this is not believable testimony. This is yet another example of either fabrication or fantasy on the part of the plaintiff."

[7.0] Defense Predicate #7: Plaintiff Placed Other Family Members in the Same Facility.

If other relatives of plaintiff also reside in the facility and plaintiff has made no attempt to remove these relatives from the defendant nursing home, this fact will most assuredly be underscored by defense counsel. The emphasis on this attack will depend upon: (1) the relationship between the plaintiff and the other nursing home resident; (2) the control which plaintiff has over the placement of this other resident; (3) if plaintiff has control, the attempts that have been made to place the resident in another facility; and, (4) the length of time the resident has remained in the facility after plaintiff became aware of the neglect inflicted upon Jane Doe, her mother.

[7.1] Attack Formula #7:

Claims of neglect + placement or failure to remove other family from same facility = impaired credibility.

[7.2] Defense Argument #7:

"Plaintiff wants you to believe that this was a deplorable nursing home, yet she left other family members in this facility up to the year when her own mother died. She left her own grandmother and great aunt in this same facility which she claims so deplorable even after she filed this lawsuit, ladies and gentlemen. In fact, her grandmother and great aunt are still in this facility today. Don't you know if this nursing home did the things to her mother that she claims they have done...if they had subjected her to the continual and constant gross neglect which she has testified to and her attorney has claimed existed in this facility...Don't you know if this were the case, she would not allow someone she loved to stay in this place another minute. And yet, she openly admits that she has not attempted to find another place for them. She openly admits that her own family has never really seriously considered moving her grandmother and great aunt from this facility."

[8.0] Defense Predicate #8: Capacity of Family to Care for Resident at Their Home.

In probing plaintiff's claims that the conditions and care at the facility were continually deplorable, defense counsel will inquire why didn't some member of the family take the resident in question home. Defendant will seek to establish that someone with a close relationship with the resident was not working and available to provide care to the alleged victim.

[8.1] Attack Formula #8:

Continual deplorable conditions + available family to care for resident + failure to bring resident home = impaired credibility.

[8.2] Defense Argument #8:

"Don't you think that if the conditions were as deplorable and filthy as described by family witnesses that one of them would have taken her home? There was no medical reason why Jane Doe couldn't go to their home. Don't you think one of this family, who for some reason filled this courtroom today, would have taken her home? If these deplorable conditions existed, wouldn't this family have shown their true interest in Jane Doe's care? A reasonable person would do that. You or I would do it if faced with these circumstances. Why didn't they? The failure of her many family members to come to her rescue reveals that deplorable conditions just did not, in fact, exist. Why didn't one of her many family members come to her rescue and take her to their home until they found a better place? The reason is simple. They were not faced with the circumstances which they now claim. The fact is, these deplorable conditions did not exist."

"Let me talk a minute about the credibility of Jane Doe's grand daughter. She wants you to believe that she visited every week and that she saw her grandmother living in filthy conditions, yet every time, she left her grandmother, month after month, wet and in urine. There was no medical reason Jane Doe couldn't have gone to live with her grand daughter. Her grand daughter was a homemaker and had the time to care for Jane Doe. Don't you think if these conditions existed, this person who was so disturbed when she testified, would have taken some action? There is no medical reason why Jane Doe couldn't have gone to the grand daughter's or any of the other family members' home. Ms. Doe didn't require constant nursing attention. In fact, that is just exactly what Jane Doe wanted to do--to go to one of the family's home. This witness, I submit, came in here with a well rehearsed story which was designed to support this lawsuit, not to reflect reality."

[9.0] Defense Predicate #9: Readmission of Jane Doe to Defendant Nursing Home After Plaintiff was Aware of Neglect.

The groundwork for this attack is laid by establishing: (1) after allegedly being subjected to defendant's tort, the resident in question was readmitted/transferred back to defendant's

nursing home from the hospital; and, (2) prior to such readmission/transfer back, plaintiff believed the resident had been neglected. Defendant's inquiry will focus upon when plaintiff developed the belief that the resident was being neglected. If plaintiff testifies that her awareness of neglect predates readmission/transfer back to the nursing home, defendant will utilize this paradox to question plaintiff's credibility.

[9.1] Attack Formula #9:

Readmission to nursing home + prior knowledge of neglect by family = impaired credibility.

[9.2] Defense Argument #9:

"This woman came here with a well rehearsed story. She came here and told her story under oath. Part of that story was that the nursing home allowed her grandmother to lie in urine and feces day after day. That's either fantasy or fabrication. If this neglect occurred, would she take her grandmother from the hospital back to this same nursing home who had subjected her to these deplorable conditions? Would she simply drop her off, staying in the facility less than one hour and go on her way! Would a reasonable person who suspected that this nursing home was neglecting their grandmother or mother bring their loved one back to this terrible place? And then, stay less than one hour and go about their way if they truly believed these type of repugnant acts were occurring?"

[10.0] Defense Predicate #10: Failure of the Family to Attend Care Plan Meetings.

Frequently, defendant will attempt to attack the credibility of plaintiff's position by questioning plaintiff about his or her attendance at the health care plan meetings. These meetings are held on a regular basis. Documentation reflects the persons attending the care plan conference. Generally, the family is advised in writing or orally that a care plan conference will occur on a given date and are invited to attend. Defendant will want to focus upon plaintiff's lack of attendance at these meetings.

[10.1] Attack Formula #10:

Claims of neglect and continual deplorable conditions + failure to attend care plan meetings = impaired credibility.

[10.2] Defense Argument #10:

"If these deplorable conditions existed, why did the family attend less than one-half of the health care plan conferences they were invited to? If these deplorable conditions existed, isn't this the time to express your concerns if you were in fear of your mother's health and safety? Isn't this the time to show your real true interest? I would submit that a reasonable person, if exposed to these alleged atrocities, would not have missed the opportunity to make outcry at a meeting which was designed to focus on any problems

that their mother was having. The purpose of these care planning conferences are to discuss care problems. Yet, when these problems were being discussed, where was the family--nowhere to be found. The facility sent them letters asking them to attend these conferences in which problems were to be discussed. If these conditions really existed and they were so concerned, why didn't they attend the meetings they were invited to?"

[11.0] Defense Predicate #11: Removal of Phone from Room.

If during the course of residency, the family has elected to remove the telephone from their mother's room, defendant will obviously attempt to show that such occurrence is inconsistent with claims neglect. Defendant will attempt to establish that plaintiff voluntarily chose to remove the phone from their mother's room thereby limiting their mother's ability to communicate her condition, her state of neglect and request for help.

[11.1] Attack Formula #11:

Removal of phone from resident's room + prior knowledge of neglect = impaired credibility.

[11.2] Defense Argument #11:

"Plaintiff wants you to believe that she visited her mother almost every day and that witnessed her subjected to deplorable conditions for extended periods of time. She wants you to believe she laid continually in her own urine and feces for at least a four month period. Why is this incredible? Why is it unbelievable? Because if it was true, would this family who claims to have seen these repugnant events on a continual basis have removed the phone from their mother's room? Would they have removed the very means by which their mother could call and request help? Would a reasonable person, if these conditions existed, respond by cutting off and limiting the ability of the victim to communicate about the problem? Absolutely not. If she were so concerned with their mother's health and condition, why does she then take her mother's phone away so her mother can't contact her?"

[12.0] Defense Predicate #12: Resident Deterioration Does Not Trigger Increased Visitation.

One of the central areas of focus by defendant during the deposition of plaintiffs will be upon the frequency plaintiffs visited the nursing home and the timing of such visits. Defendant will probe when plaintiff became aware that the resident's condition began to markedly deteriorate. When did plaintiff become aware of severe infections, dehydration, malnutrition, and other injuries which plaintiff believed were caused by defendant's lack of care? After establishing plaintiff's awareness of the onset of these injuries/deterioration, defendant will make inquiry into whether plaintiff's visitation frequency increased in response to heightened concerns for the well-being of the resident.

[12.1] Attack Formula #12:

Claims of continual neglect + awareness of deteriorating condition + no modification of visitation schedule = impaired credibility.

[12.2] Defense Argument #12:

"What this family wants you to believe is that they visited at least three or four times a week throughout their mother's stay at defendant nursing home. They want you to believe that their mother was continually subjected to deplorable care and condition. They want you to believe that they were aware of these deplorable conditions from the beginning and aware that during the last two months of their mother's stay in defendant nursing home, that she markedly deteriorated. That she was in pain. Why is that unbelievable? Why is that incredible? Because if these deplorable conditions existed, wouldn't a reasonable person modify their visitation schedule? Wouldn't they come more frequently in response to these known problems? Of course you would and so would any other reasonable person. If you believed that your mother was subjected to these types of conditions and as a consequence, began to deteriorate and develop sores and infections, certainly your level of involvement would increase in response to these problems. But there was no response here, ladies and gentlemen of the jury. Plaintiff's absence of response at the time shows us there was no stimulus. There was no deplorable condition or reason to increase her rates of visits."

NOTE: This same argument could be employed with respect to the length of visits, i.e. in the face of intensifying deplorable conditions or increased deterioration of the resident, one would expect a reasonable person to increase the amount of time spent with the resident. It would be reasonable to expect that the amount of time (length of visitation) spent with the resident during this critical phase would increase.

[13.0] Defense Predicate #13: Failure to Call Physician in Response to Neglect.

Just as defendant will make inquiry into whether plaintiff's visitation schedule was modified and increased in response to alleged knowledge of neglect, defendant will also probe the subject of plaintiff's calls to the attending physician. Did plaintiff ever attempt to contact the attending physician and express concerns about the nature of the care being rendered to the resident? Did plaintiff ever contact the attending physician and complain about the deplorable conditions and the neglect perceived by plaintiff? The failure to make outcry to the physician or to intensify communication efforts with the physician as deplorable conditions intensified, provides the underpinnings for the argument which follows.

[13.1] Attack Formula #13:

Awareness of deplorable conditions and neglect + failure to make outcry to physician = impaired credibility.

[13.2] Defense Argument #13:

"Plaintiff wants you to believe that he witnessed his mother subjected to inhumane and undignified treatment. He wants you to believe that he discovered his mother almost every day wet and filthy, laying her own feces. I submit to you ladies and gentlemen, this is either fabrication or fantasy brought on by this lawsuit. Because if these conditions existed as plaintiff claims, wouldn't he have called his mother's attending physician and made outcry? He never once picked up the phone and attempted to get in touch with Dr. Rogers. He wants you to believe that these conditions were continual and upsetting, and yet, never communicates one word to the physician who is responsible for her care and responsible for being her advocate in the medical world. What would a reasonable person have done had they been exposed to these conditions? If they existed, they would have picked up the phone in a heartbeat and called the attending physician and complained. Not just one time, but every time. The reality, ladies and gentlemen? There never was a stimulus to evoke such a response until this lawsuit was filed."

[14.0] Defense Predicate #14: Plaintiff's Failure to Increase Phone Contact with Physician.

Defendant will attempt to establish the baseline rate of communication plaintiff had with the attending physician. More specifically, defendant will inquire into each and every communication plaintiff had with the attending physician at the nursing home. Defendant will next attempt to probe plaintiff's awareness of neglect and the timing of such neglect, contrasting the same to plaintiff's efforts to contact the physician. The underpinnings for this argument are provided by Plaintiff's failure to intensify attempts to communicate with the physician in light of his/her knowledge of intensifying neglect and deterioration of the resident provides.

[14.1] Attack Formula #14:

Awareness of deplorable conditions and neglect + failure to increase the rate of communication with physician = impaired credibility.

[14.2] Defense Argument #14:

See Defense Argument #13.

[15.0] Defense Predicate #15: Family's Refusal to Move Resident Closer to Nurses' Station.

In order to be in a position to launch this attack, defendant must first have made the offer to plaintiff to move the resident closer to the nurses' station which plaintiffs then refused. If such offer was made, defendant will inquire of plaintiff as to when such offer was made;

who made such offer to plaintiffs; what were the reasons explained to plaintiffs as to why this move was important and in the best interests of the resident; and, why plaintiffs refused to allow the move. Defendant will also ask plaintiff if he or she understands that the nursing staff can be more responsive to the needs of the resident if moved closer to the nursing station.

[15.1] Attack Formula #15:

Claims of continual neglect + refusal to allow room change closer to nurses' station = impaired credibility.

[15.2] Defense Argument #15:

"If these atrocious and deplorable conditions really existed and if Plaintiff was so concerned about them, why didn't she agree to move her mother to a room next to the nurses' station? Why didn't she agree to allow her mother to be moved where she could get more attention? This story just is not reasonable and not believable. A reasonable person who believed that her mother was being neglected would have jumped at the opportunity to have her mother moved closer to the nurses where she could get more attention. The reason this family didn't accept the nursing home's offer is simply because there was no deplorable condition to stimulate such a concern. It was not until this lawsuit that their concern for deplorable conditions appears."

[16.0] Defense Predicate #16: Refusal of Family to Agree to Medical Treatments.

The predicate for this argument consists of establishing that the family of the nursing home resident refused to permit medical intervention which was recommended by the physician. A prime example of this is the refusal of the family to permit the placement of a nasal gastric tube down the resident despite the physician's and nursing home's communication that such tube was necessary to assure the resident obtained adequate nutrition. Defendant will inquire as to how many occasions the physician and the nursing home attempted to persuade plaintiff to agree to the treatment and the reason that such treatment was necessary for the resident.

[16.1] Attack Formula #16:

Claimed concern for well-being + refusal to allow necessary treatments = impaired credibility.

[16.2] Defense Argument #16:

"This plaintiff wants you to believe that she suffered emotional trauma and mental anguish because of deplorable conditions which she has either fabricated or fantasized. Let's examine the credibility of this claim as well as what the reality is in this case. Who is responsible for the fact that her mother did not receive adequate nutrition? The only

person in this courtroom responsible for this fact is the plaintiff herself. She refused to allow the doctor and the nursing staff to feed her mother the only way she could receive nutrition, through a nasal gastric tube, despite the fact that the doctor and the nursing staff on more than one occasion begged the plaintiff for permission to put this tube down, and she refused it. She wouldn't allow her mother to receive this nutrition, and now, she comes in here claiming that the injuries/deterioration which resulted as a consequence, were the fault of the nursing home. Furthermore, she claims that these injuries to her mother have resulted in emotional scars to herself. I would submit to you, ladies and gentlemen of the jury, her purported concern for these injuries which her mother developed, which she now claims to have caused her mental anguish, did not exist until she decided to file this lawsuit seeking money from this nursing home. If she was so concerned about her mother's condition at the time, why did she not permit the doctor to place the nasal gastric tube down her mother? If she was so concerned about her mother's condition, why did she not allow the nurses to provide nutrition to her mother through this nasal gastric tube? The truth of the matter is, ladies and gentlemen, she and she alone chose to deny her mother this care. She alone is responsible for any emotional trauma, if such truly exists. Is her testimony the product of fantasy and fabrication, brought on by this lawsuit or is it the product of transferred guilt for her own failures? Ladies and gentlemen, you decide."

NOTE: This same argument applies where a family has refused to allow the nursing staff to turn and reposition the resident because such care makes her uncomfortable. It also applies where the family has refused to allow physical therapy to be provided to the resident because such care also makes the resident uncomfortable. Plaintiff's counsel must be very careful to inquire as to whether plaintiff interfered in any way with the treatment and care offered by defendant. Did plaintiff ever advise or instruct defendant staff to not perform any nursing activity or treatment? By the same token, plaintiff's counsel must also inquire as to whether or not the nursing home resident ever refused any nursing care and/or treatment. A thorough examination of the nursing home record must be conducted to determine if the resident refused such care as turning and repositioning, food, medication, or water.

[17.0] Additional Defenses.

In addition to the above defensive strategies designed to attack the credibility of the family, plaintiff's counsel and client may possibly encounter five other defense inquiries.

[17.1] Lack of Visitation by the Family.

If the family of the resident has not visited regularly, defendant will obviously argue that plaintiff's claim for grief, bereavement and mental anguish arising out of the neglect and death of their loved one is a highly questionable claim. Moreover, if plaintiff has a history of abusing, neglecting or mistreating the nursing resident, such facts obviously impact upon plaintiff's claim for interruption of family relationship or personal emotional trauma.

[17.2] Unrealistic Expectations on the Part of the Family.

Another ploy utilized in defending nursing cases is for defense counsel to bait the family into making unrealistic and exaggerated statements about the life expectancy and health status of the resident at the time of admission to the nursing home. Defense counsel will typically ask plaintiff for his or her understanding of the medical problems, functional disability and dependencies of the resident at the time of admission to the facility. These questions will be followed up by Plaintiff's understanding of changes in the condition of the resident as well as changes in functional and dependency status. If Plaintiff attempts to put icing on the cornbread by downplaying the medical problems and level of disability presented by the resident at time of admission as well as any changes indicating deterioration after admission, the groundwork is laid for defense counsel to simply argue that plaintiff was unwilling to accept the reality of the resident's medical condition. This lawsuit, defendant will argue, is a reflection of plaintiff's unrealistic assessment and unwillingness to accept the inevitability of the disease process.

[17.3] Confronting the Family with Pleading Allegations and Ultimate Issues of Fact.

In preparing Plaintiff for deposition, counsel should not overlook specific claims contained within the petition as a focal point of defense inquiry. Not only should Plaintiff be prepared for questions regarding observations of pain and suffering but also regarding the emotional distress, guilt, and anguish experienced by Plaintiff as a consequence of the wrongdoing by defendant. Questions about the intensity, duration and timing of pain, suffering and mental anguish are common along with inquiries as to whether Plaintiff has sought professional help from a psychiatrist, psychologist or clergy. Additional subjects of interest include Plaintiff's opinion as to the cause of injury or death and specific "criticisms" about defendant's care which form the basis of Plaintiff's complaint. Failure to prepare a plaintiff for such fundamental inquiries derived from the allegations contained in the pleadings can lead to significant problems.

Example:

Defense Question to Plaintiff:

Let me show the petition in this case where you, Mrs. Doe, have alleged that defendant caused the death of your mother.

Plaintiff's Answer:

I have not alleged defendant caused my mother's death. I believe they caused her to suffer.

Defense Question to Plaintiff:

You do not believe defendant caused your mother's death by allowing her to fall in the nursing home and break her hip?

Plaintiff's Answer:

No, I have never said they caused her death, just her broken hip and pain.

Defense Question:

No further questions.

NOTE: At the very minimum, Plaintiff's counsel in this situation should have: (1) prepared client for these key questions; and (2) objected to defendant's questions on the basis that Plaintiff was not a medical expert and any opinion as to cause of death would have derived from discussions with her lawyer which is privileged under attorney client communications. Defendant's inquiry as to Plaintiff's beliefs is, of course, legitimate. Be prepared!

Defense Final Argument:

"No one in this courtroom believes that my client (nursing home) caused Mrs. Doe's death. Not even Mrs. Doe's daughter, the plaintiff, believes that Jane Doe's death was caused by Loving Arms Nursing Home or the staff at this facility. I take that back. There is one person in this courtroom who chooses to ignore the sworn testimony in this case. There is one person who stands before you and says my client caused the death of Mrs. Doe and that is this lawyer over here (indicating to Plaintiff's attorney.) I can only imagine what would motivate him to disagree with his own client's sworn testimony and adamant belief that Jane Doe's death was not caused by defendant. I can only imagine what would motivate him to disregard the truth of his own client's sworn testimony and argue otherwise. Just as I can imagine the same motivation which would cause this lawyer (plaintiff) to either mistakenly or purposefully draw inaccurate conclusion about the nature of the care delivered by the nursing home to 93 year old Mrs. Doe. And what is the motivation which accounts for these contradictory, unrealistic and erroneous arguments? Money."

[17.4] Miscellaneous Defenses.

In addition to the above defensive tactics, the following strategies are commonly employed by nursing home defense counsel in questioning Plaintiff.

A] Good Things at the Nursing Home: Not only will defense counsel inquire about each and every criticism Plaintiff had about the nursing home, but also will inquire as to "good things" which the family observed at the facility.

Sample Questions:

1. Did you ever observe anything at the facility which you thought indicated good care or which you approved?"
2. "Did the staff appear to care about the residents?"

3. “Did the staff appear professional?”
4. “Were the staff pleasant and polite to you?”

The dilemma that Plaintiff must confront in responding to these questions is twofold: (1) If the facility was so deplorable, why didn't Plaintiff intervene? and, (2) If Plaintiff perceived the facility as good, defendant argues that Plaintiff's claims are inconsistent with his/her observations.

B] Quality of Life.

Commonly, defense counsel will confront Plaintiff with the subtle questions about the quality of the nursing home resident's life and seek an admission that “Jane Doe really had very little quality of life for the past few months (or years).” By obtaining such an acknowledgment, defendants hope to create a platform from which they can argue that Plaintiff's emotional trauma stems from the natural loss of the resident's quality of life as opposed to defendant's conduct.

Sample Questions:

1. Was the resident able to:
 - a. control bowel/bladder;
 - b. recognize you;
 - c. talk with you;
 - d. feed self;
 - e. other basic functions.
2. Could resident do the things that she used to enjoy doing?
3. Do you believe she enjoyed life in this condition?
4. Do you believe she wanted to live like this?
5. Wouldn't you agree that for the past several years she had been in this state and very little quality of life?
6. Was it painful for you to see this deterioration of her life over the years?

Conclusion

This paper is submitted for the purpose of assisting plaintiff's counsel in preparing family members for deposition and trial by identifying common strategies employed by defense attorneys in litigating a nursing home case. All too often plaintiff's counsel believes that the family of the alleged victims in a nursing home case must establish all elements of the lawsuit. Consequently, both plaintiff and plaintiff's counsel mistakenly believe that the lawsuit is being aided by

exaggerated claims of deplorable conditions and prolonged neglect. In reality, such testimony may leave plaintiff open to the attacks detailed above. If family members testify to knowledge of deplorable conditions and prolonged neglect, there must be credible explanations of why the family did not intervene on behalf of their loved one.

Over years of litigation, defendant's attack on the credibility of family members has evolved from the "*Why didn't you move her if it was so bad?*" defense to more subtle and specific attacks based on the failure of the family to intervene as a reasonable person would in a similar situation. To make these attacks, defense lawyers have constructed a "laundry list" of possible actions that an interested and loving family could have taken. The attack formulas and defense arguments described above represent a significant portion of this defensive "laundry list." The failure of family members to take the actions identified within the "laundry list," absent any credible explanation, gives rise to the argument that the deplorable conditions which plaintiff claims to have observed are simply the product of fabrication or fantasy. Accordingly, it is important for the attorney to fully understand the implications of the answers which family members will give to these "laundry list" questions and take steps to assure that the family does not exaggerate or make inflated statements. Plaintiff's attorney should carefully scrutinize the use by any potential witness of words such as "constantly," "always," "everyday," and "every time" when describing defendant's neglect, to assure that such language is not the product of emotion but rather is founded upon solid fact.

While the attack points set forth above represent a significant portion of the defensive "laundry list," it should not be considered as an exhaustive list. Plaintiff's counsel should construct his own "laundry list" of possible family interventions based upon the particular facts of his case.