LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

July 2005 Volume 13 Number 7

Incident Reports: Court Points Out Exception To Quality-Review Confidentiality Rules.

The elderly patient was discharged from the hospital to an extended care nursing facility with pneumonia, anemia, confusion and depression.

He fell in his room ten days into his stay at the nursing facility, sustained a subdural hematoma and died the next day.

His next of kin sued the nursing facility for wrongful death, negligence, and violation of the nursing home residents' bill of rights. The court has not passed judgment on those allegations.

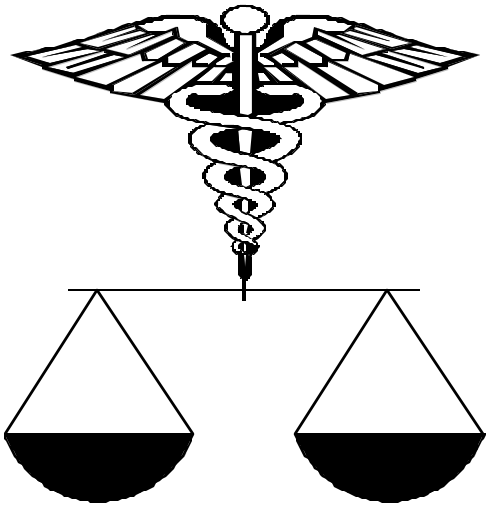
Family's Lawyers Want To See The Incident Report

The issue right now is whether the family's lawyers will get access to the facility's internal incident report to use against the facility in this lawsuit.

The Court of Appeals of Ohio has ruled the family's lawyers do have the right to a copy of the incident report.

Quality Review Confidentiality Is The General Rule

State and Federal statutes say that all information, data, reports or records made available to or generated by a quality-assurance, utilization-review or peer-review committee in a hospital or nursing home are confidential and cannot be opened up during pre-trial discovery or used against the facility in a patient's malpractice lawsuit.



As a general rule the information in a quality-review incident report is confidential and it cannot be used in court against the facility.

However, if the event behind the incident report is not properly explained in the patient's medical record, the judge can open up the portions of the incident report which describe basically what happened.

COURT OF APPEALS OF OHIO
May 26, 2005

The rationale for confidentiality is to improve patient care by promoting full and candid investigation, examination, discussion and remedial measures after an adverse incident without legal liability considerations getting in the way. But the general rule of quality-review confidentiality is not absolute.

Facts Must Be Available To Patient Or Confidentiality Is Set Aside

Looking at it from the patient's or family's point of view, the patient's legal representative will insist upon full knowledge of the facts of the incident to be able to present a civil case to the judge or jury in the best light that all the evidence will allow.

If the basic facts are not fully set out in the patient's medical chart the court can order the facility to turn over the quality-review incident report for private inspection by the judge.

The judge can turn the incident report over to the lawyers if the report does not contain quality-review work-product. Or the judge can delete, in legal parlance redact, quality-review work product from the incident report, leaving only the basic facts, and turn it over, protecting the patient's right to sue as well as quality-review confidentiality. **Brzozowksi v. Univ. Hosp., 2005 WL 1245631 (Ohio App., May 26, 2005).**

Inside this month's issue ...

Faulty Respiratory Assessment: Patient's Death Tied To Nursing Negligence.

The Superior Court of Connecticut upheld the jury's verdict of $827,000.00 for the widow of a patient who died in a nursing facility, based on a finding of faulty respiratory nursing assessments.

Patient's Medical History

The sixty-seven year-old patient was hospitalized with Guillain-Barre syndrome to be intubated and mechanically ventilated.

A month later he was extubated and sent to a skilled nursing facility.

A month and a half after that he was sent to the long-term, sub-acute facility where he died.

Nursing Negligence

The evidence in the trial was that the sub-acute facility's nurses did not provide proper tracheostomy care, including assessment of breath sounds by ascultation of the lungs with a stethoscope to rule out the presence of fluid in the lungs, every two hours or more frequently as needed.

The court ruled this was sufficient evidence of negligence to sustain the jury's verdict in the widow's favor.

Although the fluid found post-mortem in his lungs was ruled hemorrhagic, that is, related to his underlying ischemic heart disease rather than upper respiratory secretions, the nurses' failure to do complete and timely assessments was ruled a substantial factor causing his death.

A substantial factor, by law, is something which sets in motion the final injurious force which immediately produced or preceded the ultimate injury.

Loss of Chance of Survival

Many states, like Connecticut, allow the family to recover damages for wrongful death when a patient who is already very seriously ill experiences some percentage loss of a chance of a successful treatment outcome, even when a successful outcome was far from certain in the absence of a caregiver's negligence. **Osiecki v. Bridgeport Health Care Center, Inc., 2005 WL 1331225 (Conn. Super., May 12, 2005).**

The court accepts the opinions of the patient's widow's expert witnesses.

The nursing standard of care calls for tracheostomy care and respiratory assessments, which would include assessment of breath sounds by ascultation, to be done every two hours at a minimum, or as needed.

Further, the court accepts the widow's medical expert's opinion that failure to assess the patient properly was a substantial factor in bringing about his death.

The patient died of cardiac arrest brought about by pulmonary congestion.

It is true that the primary purpose of ascultation of a tracheostomy patient's lungs by the nurse is to detect the presence of upper-respiratory secretions in the lungs.

However, had the nurses stayed on top of this patient's care they most likely would have detected the presence of fluid in the lungs related to his ischemic heart disease so that appropriate medical care would have been started before he died.

SUPERIOR COURT OF CONNECTICUT
May 12, 2005

Understaffing: Large Verdict Against Nursing Home.

A nursing home resident was in and out of the hospital with pneumonia, dehydration, anemia, urinary tract infections and pressure sores that progressed to Stage IV decubitus ulcers.

After she died her family sued the nursing home. The family was able to prove that the nursing home was so critically and chronically understaffed that the deceased did not and could not have been given anything approaching proper personal care.

The jury's verdict was $1,600,000.00 for compensatory damages.

The judge was in error not to allow the jury to consider awarding punitive damages on top of that.

COURT OF APPEALS OF ARKANSAS
June 1, 2005

The jury awarded substantial monetary damages to the family.

According to the court record, aides at the facility did not even have time to fill residents' water pitchers and they had to cry out for water. Residents were left lying in beds saturated with urine and feces. Dressings were not properly changed; one dressing was simply placed over an older, soiled dressing. This resident's call light was intentionally placed out of her reach. I/O charting was completely neglected. On at least one occasion janitors were required to pose as aides when state inspectors were on the premises.

The Court of Appeals of Arkansas ruled the verdict was in error, but only because the jury was not allowed to consider awarding additional punitive damages. **Rose Care, Inc. v. Ross, __ S.W. 3d __, 2005 WL 1283679 (Ark. App., June 1, 2005).**

Sign-Language Interpreters: Court Reviews Hospital Patients' Legal Rights Under Americans With Disabilities Act, Rehabilitation Act.

The issue was whether certain hearing-impaired patients could sue a particular hospital for a court order requiring the hospital to step up its efforts to provide sign-language interpretation services.

The US District Court for the District of Maryland ruled that the patients who could show they had received inadequate care in the past due to inadequate sign-language services at the hospital, *and who would likely continue to receive inadequate care at the same hospital due to the absence of such services*, had legal standing to ask for a court injunction requiring the hospital to raise the level of its services.

Other patients, who had received sub-standard care in the past, but who lived out of state and would not likely ever be going back to the particular hospital, had no right to participate in the lawsuit.

The patients' complaint was that a camera/monitor video conferencing setup for interpreter services provided such poor visual quality that it was virtually useless and the monitor could not be seen by a patient lying on his or her back.

The Americans With Disabilities Act and the Rehabilitation Act prohibit hospitals from discriminating against disabled persons.

That means that hospitals must provide patients with appropriate auxiliary aids necessary to ensure effective communication.

Federal statutes allow a disabled person to sue for a court injunction requiring a hospital to provide effective sign-language interpretation, if it is likely the disabled person's right to effective communication will be impaired in the future by the lack of such services at that particular hospital.

The patients now living out of state may have had grounds to be dissatisfied with their past care, but that is not likely to continue at this hospital so they cannot participate in this suit.

UNITED STATES DISTRICT COURT
MARYLAND
May 16, 2005

The court expressed a willingness to consider whether the hospital was fulfilling its legal duties not to discriminate against the disabled and not to deny the disabled the opportunity to communicate effectively and to participate meaningfully in their care as required by the US Rehabilitation Act.

There is no hard and fast rule what is right under all circumstances. The court did not specifically rule the video/monitor conferencing system was inadequate. **Gillespie v. Dimensions Health Corp.. __ F. Supp. 2d __, 2005 WL 1147830 (D.Md., May 16, 2005).**

Editor's Note: The patients in this case were suing only for a court injunction to force the hospital to upgrade its sign-language capability.

None of the patients who filed the lawsuit claimed to have suffered personal injury as a result of inadequate communication with their healthcare providers.

However, the US Rehabilitation Act does allow a patient to sue any healthcare facility for damages, much like medical malpractice, if the facility receives Federal funding and the patient's care has been compromised by a failure to provide appropriate auxiliary aids to permit effective communication and meaningful participation in the patient's own care.

See *No Interpreted For Deaf Patient: Court Lets Suit Go Forward.* Legal Eagle Eye Newsletter for the Nursing Profession (9)6, Jun. '01 p. 2.

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E. Kenneth Snyder, BSN, RN, JD
Editor/Publisher
12026 15th Avenue N.E., Suite 206
Seattle, WA 98125-5049
Phone (206) 440-5860
Fax (206) 440-5862
info@nursinglaw.com
http://www.nursinglaw.com

Macrosomal Fetus: Court Says Physicians, Nurse Midwives Followed The Standard Of Care.

The patient gave birth vaginally to 12 pound 4 1/2 ounce baby. She had previously delivered a 6 pound 8 ounce baby vaginally.

Due to the size of this baby, she had a partial third-degree laceration of the perineum right below the area of her episiotomy, which was promptly and properly repaired.

Due to shoulder dystocia, her baby experienced a shoulder dislocation resulting in a brachial plexus injury with associated mild Erbs palsy.

She sued the US Government under the Federal Tort Claims Act, alleging negligence by the nurse midwives who provided her prenatal and perinatal care at a Federally-funded clinic and the physician who delivered her baby. The US District Court for the District of New Jersey saw no negligence and dismissed the case.

Prenatal Care

The nurse midwives saw to it she got three ultrasounds at sixteen, twenty and thirty weeks, which showed appropriate interval growth. Except for 20/20 hindsight there was no basis for her to claim another ultrasound was indicated right before she went into labor.

The nurse midwives did two glucose tests to confirm she was not diabetic or suffering from gestational diabetes.

An amniocentesis was done which revealed no chromosomal abnormality.

Four days before her expected due date the nurse midwives palpated the uterus (Leopold's maneuver) and estimated an 8 to 8 1/2 pound fetus. There was no proof, absent 20/20 hindsight, this was done incorrectly.

No one discussed a cesarean with her during prenatal care and it was not done emergently during labor. Given her seemingly normal prenatal course, the fact she had delivered vaginally once before, a cesarean was not indicated and would have posed a whole host of unnecessary risks of its own, the court believed. **Campbell v. U. S., 2005 WL 1387652 (D. N.J., June 10, 2005).**

The patient received care at a Federally-funded clinic.

She can sue the Federal government just like she could sue a private individual under the law of the state where it occurred.

To sue for professional negligence the patient has to prove through her expert witnesses to a reasonable degree of medical certainty that failure to perform certain tests during pregnancy increased the risk of harm to her and her infant.

To sue for lack of informed consent the patient must prove that her caregivers withheld pertinent medical information concerning the risks of the procedure or treatment and the alternatives and concerning the potential outcomes if the procedure or treatment was not undertaken.

For her to sue them, her caregivers must not have met the reasonably-prudent standard for disclosure, an undisclosed risk must have occurred, a reasonable person would not have consented if that risk had been disclosed, and injury occurred as a result.

UNITED STATES DISTRICT COURT
NEW JERSEY
June 10, 2005

Nursing Home Liability: State Investigation Proves Nothing, Court Rules.

The daughter of a deceased nursing home resident sued the nursing home for negligence.

The daughter's lawsuit alleged the resident was placed sitting upright for extended periods of time without proper and frequent re-positioning and as a result developed extensive decubitus ulcers which progressed and led to his death.

The nursing home argued for summary dismissal on the grounds that the state had investigated the daughter's allegations and state investigators had decided the allegations could not be proven.

The Texas Department of Human Services investigated the daughter's allegations of inadequate care and gross neglect.

The mere fact the agency conducted an investigation and found that the daughter's allegations could not be substantiated does not prove that no negligent acts or omissions occurred.

A jury could still find that abuse or neglect did occur and could award damages.

UNITED STATES DISTRICT COURT
TEXAS
June 7, 2005

The US District Court for the Northern District of Texas ruled that that argument is not valid grounds for summary dismissal of the lawsuit in the nursing home's favor. A jury will decide the case. **Redden v. Senior Living Properties, L.L.C., 2005 WL 1356441 (N.D. Tex., June 7, 2005).**

Informed Consent: Case Dismissed, In Part Due To Nurse's Actions.

The US District Court for the Eastern District of Pennsylvania reviewed in detail the factors leading to the court's decision to dismiss a patient's case against a US Veterans Administration Hospital over an allegedly faulty podiatric procedure.

The surgical consent form had been filled out by the physician and had been discussed with the patient two weeks before the operation itself was scheduled.

On the day of surgery, a nurse took the surgical consent form out of the patient's chart and asked the patient which foot and which toe it was on which he was about to have surgery and had him explain to her in his own words what the surgery he was going to have was going to be.

It was clear that his informed consent was obtained beforehand, the court ruled. **Dandy v. U.S., 2005 WL 1388019 (E.D. Pa., June 7, 2005).**

Online Edition Still Available.

The online edition of our newsletter is available to all paying subscribers at no additional charge beyond the basic subscription price.

Each month, about ten days before the print copies go out, we send you an e mail containing a link to the online edition's location on the Internet.

Each month a certain number of current subscribers' e mail addresses on file turn up no longer valid.

If you want to receive the online edition by e mail and are not receiving it, please update your e mail address.

Please e mail your e mail address to info@nursinglaw.com and identify yourself by name and postal mailing address.

Skin Care: Patient Dies From Sepsis, Jury Returns Verdict For Nursing Home.

The instructions the judge gave to the jury right before they went out to deliberate were taken directly from the Federal regulations for long term care facilities:

Based upon 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.

Based upon the comprehensive assessment of a resident the facility must ensure that a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

Assessments must be conducted promptly after a significant change in the resident's physical or mental condition.

Each resident must receive, and the facility must provide, the necessary care and services to attain and maintain the highest practical physical, mental and psychological wellbeing.

SUPREME COURT OF ARKANSAS
March 24, 2005

The eighty-three year-old patient was admitted to a long-term care facility from the hospital where she had been treated for pneumonia, congestive heart failure, insulin-dependent diabetes, renal insufficiency, end-stage Alzheimer's disease, peripheral vascular disease, amputated toes and pressure sores on her coccyx, shoulder and heels.

While at the nursing facility her condition deteriorated. She was afflicted with additional pressure sores and urinary tract infections and lost weight. She went back to the hospital for surgery to debride her pressure sores and then went back to the nursing facility.

Back at the nursing facility she was diagnosed with a yeast infection, confirmed by two blood cultures, went back to the hospital and died as a result of overwhelming sepsis.

The family sued the nursing facility. The jury returned a verdict exonerating the nursing facility from responsibility for substandard care and ruled the nursing home was not liable for wrongful death.

The Supreme Court of Arkansas found technical errors in the trial judge's conduct of the case and ordered a new trial on some of the allegations.

Care Found Adequate

The family doctor testified the patient had serious chronic illnesses when she was admitted to the nursing facility, making it not unlikely her condition would deteriorate even with the best of care.

She had her skin lesions on admission. Throughout her stay many treatments were tried, including Duoderm, Betadine and Saf-Clens, according to the court. Her yeast infection would not necessarily imply poor care. The timing of the appearance of systemic infection made it reasonable to conclude it was related to a central line placed at the hospital, not inadequate skin-lesion care, the court noted. **Koch v. Northport Health Services, __ S.W. 3d __, 2005 WL 675752 (Ark., March 24, 2005).**

Confidentiality: Court Rules When Patient's Name May Be Revealed.

A former patient was suing her rehab facility for negligent handling during treatment which allegedly caused a neck injury.

Her lawyers sought a court order requiring the facility to divulge the name of her roommate who was allegedly present during the events in question. The facility refused, citing Federal and state medical confidentiality laws.

As long as the other patient's medical condition or the nature of her treatment is not indirectly revealed in the process, the patient's name itself is not protected by the medical confidentiality laws.

NEW YORK SUPREME COURT
NEW YORK COUNTY
May 13, 2005

The New York Supreme Court, New York County, ordered the facility to divulge the roommate's name as a potential witness in the lawsuit.

This was a general rehab facility. The court reasoned that the other patient's admission to such a facility, in and of itself, did not indirectly imply anything that was confidential about her medical condition or the treatment she had received.

On the other hand, the court said a different facility, for example "... Cardiac Institute," could never reveal another patient's name as a potential witness, as that would necessarily indirectly reveal the other patient's medical condition in violation of Federal and state medical confidentiality laws. **Rogers v. NYU Hosp. Center, 795 N.Y.S. 2d 438 (N.Y. Super., May 13, 2005).**

Medical Devices, Adverse Event Reporting: FDA Revises Rules.

On June 15, 2005 the US Food and Drug Administration (FDA) adopted in final form, effective July 13, 2005, the revisions of existing rules for reporting of adverse events related to medical devices which were first reported in the Federal Register on February 28, 2005.

According to the FDA, these revisions do not change the substance of existing regulations, but merely express the existing regulations in language that is easier for the public to understand.

The FDA's medical-device reporting regulation revisions announced February 28, 2005 take effect in final form on July 13, 2005.

FEDERAL REGISTER June 15, 2005
Page 34652

The FDA's medical-device adverse-event reporting regulations apply, in part, to hospitals and other healthcare facilities which fall under the FDA's definition of users of medical devices.

These revised rules from the FDA are far too lengthy and complex for summarization.

We have placed the full text of the FDA's February 28, 2005 Federal Register announcement on our website at http://www.nursinglaw.com/medicaldevices.pdf. The rules themselves start at Page 9561 of the announcement. Readers' attention is directed to Subpart C which deals with user-facility reporting.

The FDA's regulations published in the Federal Register are an original US Government work which we cannot copyright. Anyone can download, print and/or redistribute this material from our website.

FEDERAL REGISTER June 15, 2005
Page 34652

Tissue/Cell Donors: New FDA Rules.

On May 25, 2005 the US Food and Drug Administration (FDA) issued an interim final rule to amend existing FDA regulations regarding the screening and testing of donors of human cells, tissues and cellular and tissue-based products and the associated labeling.

The FDA will accept public comments on the interim final rule until August 23, 2005 and at that time may issue a revised rule in final form.

The FDA's interim final rule takes effect May 25, 2005.

The rule applies to screening and testing of donors of stem/progenitor cells, bone marrow, sperm, ovaries, cytopreserved embryos, etc.

The rule also covers labeling requirements for tissue intended only for autologous use and tissue that has not been tested for infectious agents.

FEDERAL REGISTER May 25, 2005
Pages 29949 – 29952

These new FDA rules are too complex for summarization.

We have placed the full text of the FDA's May 25 Federal Register announcement on our website at http://www.nursinglaw.com/humancells.pdf. Anyone can download, print and/or redistribute the FDA's announcement from our website, as it is an original US Government work which we cannot copyright.

We review the Federal Register daily for pertinent content and will advise our readers of any new developments.

FEDERAL REGISTER May 25, 2005
Pages 29949 – 29952

Race Bias: Nurse Must Identify Non-Minority For Comparison.

The US District Court for the Northern District of Illinois has reiterated the accepted test for race and age discrimination in employment.

A racial minority or person over forty years of age must show not only that he or she was treated adversely, but also that he or she was treated differently than a non-minority or younger person who was similar to him or her in all important respects.

There is no evidence that the hospital treated similar employees who were not African-American and/or under forty years of age more favorably that the nurse in question.

Instead, emergency room personnel on the physician's "hit list" of whom he wanted to eliminate were both African-American and Caucasian.

Whether that was right or wrong, it was not race discrimination.

UNITED STATES DISTRICT COURT
ILLINOIS
May 16, 2005

The court threw out an African-American nurse's discrimination lawsuit on the grounds that she could not identify a non-minority similar to her who was treated better. In fact, the physician/department director seemed to have it in for persons regardless of their race and actually did eliminate one Caucasian nurse as part of his strategies, the court said. **Morris v. Michael Reese Hosp., 2005 WL 1162953 (N. D. Ill., May 16, 2005).**

Medication Allergy: Nurse Gives Med, Court Finds No Medical Battery.

Medical battery is the common-law term for unauthorized medical treatment. Medical battery is wrongful conduct for which patients traditionally have been allowed to sue their caregivers for damages in civil court.

In a recent case a nurse gave codeine to a sixteen year-old PICU patient for intense pain six days after major surgery for spinal trauma. The parents had told the physician he was allergic to codeine, and that was red-flagged in his chart, on his ID bracelet, bed rails, room door, etc.

The nurse, when the parents objected, checked with the physician and gave Tylenol with codeine anyway, explaining that the patient had been getting codeine and nothing bad had been occurring. No adverse reaction occurred. The parents sued anyway for medical battery.

Treatment was authorized. The parents had signed a valid blanket medical authorization form which allowed caregivers to use their own judgment in treating the patient.

COURT OF CIVIL APPEALS
OF OKLAHOMA
April 1, 2005

The Court of Civil Appeals of Oklahoma upheld dismissal of the parents' lawsuit. Surgery and post-op care were authorized. No exclusions, restrictions or limitations were noted on the surgical consent form. Patients trying to substitute their judgment during the course of treatment is not the same as not having authorized treatment in the first place. **Applegate v. Saint Francis Hosp., Inc., __ P. 3d __, 2005 WL 1124588 (Okla. App., April 1, 2005).**

Fall In Nursing Home: Court Says Someone Should Have Been Given Responsibility.

During the day, there was always a specific member of the housekeeping staff who had the duty to inspect the nursing home's hallways for spills or anything else that posed a fall-risk hazard and to take care of the problem promptly.

The rest of the time, however, it was just up to the nurses and aides in general to keep the hallways free of slip-and-fall hazards like liquids spilled on the floor.

After the housekeeping staff went home at 3:00 in the afternoon, some specific person should still have been given the responsibility to inspect the floors in the hallways and to deal with any spills or other foreign substances present.

COURT OF APPEAL OF LOUISIANA
Rehearing Denied May 18, 2005

In a recent case, the Court of Appeal of Louisiana found fault with a nursing home's policy only during the day shift to nominate a specific person with responsibility to see that the hallways remained free of new slip-and-fall hazards such as liquids spilled on the floor.

The faulty policy was ruled to be the root cause of a family member's accident.

The court upheld an award of $50,000.00 for negligence against the nursing home for a resident's brother who fell and was injured in the hallway at approximately 6:00 p.m. after leaving his brother's room. **Williams v. Finley, Inc., 900 So. 2d 1040 (La. App., Rehearing Denied May 18, 2005).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Arbitration: Parent Can Lawfully Agree On Behalf Of Child.

The District Court of Appeal of Florida has ruled that parents, by signing nursing-home admission papers on behalf of a minor child, can lawfully agree to arbitration and are bound by arbitration as a means of alternative dispute resolution. The child had to go into a nursing home for care for catastrophic injuries not specified in the court record. After the child died the parents wanted to sue the nursing home in court. They did not want to go to arbitration.

As a general rule a minor cannot lawfully sign a contract and can disaffirm a contract once signed without incurring any legal obligations. The traditional common law made an exception for contracts for medical services, which minors or those who sign on their behalf cannot disaffirm. Otherwise it might be difficult for minors to obtain necessary care. In this case the court extended the logic of the common-law rule to the issue of binding arbitration. **MN Medinvest Co. v. Estate of Nichols, __ So. 2d __, 2005 WL 1225432 (Fla. App., May 25, 2005).**

No Legal Right Of Control: Nurse Anesthetist Ruled Independent Contractor.

The Court of Appeals of Texas has ruled that a nurse anesthetist associated with a physicians' anesthesia group is an independent contractor and not an employee of the physicians' group. The question of negligence has not yet been decided for the patient's death in this case, but the court did rule that the medical group will not be liable if negligence is established.

The crux of the legal test for employee status is the right of an employer to control the manner and progress of an employee's work. Because of the high degree of independent professional judgment inherent in his work, the nurse anesthetist is his own boss and he is an associate rather than an employee of the physicians in the group. **Cook v. Nacogdoches Anesthesia Group, __ S. W. 3d __, 2005 WL 1303300 (Tex. App., May 31, 2005).**

Arbitration: Patients Entitled To Full Range Of Legal Remedies, Arbitration Clause Thrown Out.

The District Court of Appeal of Florida has ruled that the arbitration rules of the National Health Lawyers Association (NHLA) are contrary to the legislature's intent expressed in the Nursing Home Residents Act and are therefore void and unenforceable.

The court sided with the family of a deceased nursing home resident and ruled that they are entitled to sue in civil court and are not required to go to arbitration under the NHLA rules.

Clear and Convincing Evidence Of Intentional or Reckless Misconduct

According to the court, the arbitration rules of the NHLA, the ground rules for arbitration under the arbitration clause contained in the nursing home's admission papers, permit a resident or the family to claim damages only when there is clear and convincing evidence of intentional or reckless misconduct, language specifically crafted to make it very difficult to prove a claim against the nursing home.

If nursing home residents were forced to arbitrate under NHLA rules, some of the legal remedies provided by law for negligence would be substantially affected, that is, to all intents and purposes eliminated.

The arbitration clause requiring arbitration under those rules is accordingly contrary to the public policy behind the law and is therefore void.

DISTRICT COURT OF APPEAL
OF FLORIDA
May 25, 2005

On the other hand, the Nursing Home Residents Act permits nursing home residents, and the families of deceased residents, to claim damages when it is more likely than not that a violation of a resident's rights or negligence has caused injury or death.

The court voided the NHLA arbitration rules. It runs contrary to public policy for patients and their families not to be fully able to claim damages as per the Nursing Home Residents Act. **Blankfeld v. Richmond Health Care Inc., __ So. 2d __, 2005 WL 1226070 (Fla. App., May 25, 2005).**