Nursing Home Malpractice

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Successful Strategies in Defending Illinois Nursing Home Malpractice Actions

I. Introduction

It is an undeniable fact that as each year passes, the number of senior citizens in this country increases. Further, the number of “older” senior citizens – those over 75 – is also increasing. One effect of this demographic change is a greater demand for nursing home services. And, with an increase in the use of nursing home care, there will undoubtedly be an increase in litigation regarding that care.

Some of the statistics regarding nursing homes and the care they provide are eye-opening. In 1989, there were about 41,000 licensed nursing homes in the United States, with a total of about 563,000 beds. Together, Medicare and Medicaid pay about half of the nation’s nursing home costs. In 1985, the total bill for nursing home care came to $35.2 billion dollars. In 1986, the total rose to $38.1 billion: $15.9 billion from Medicaid, $6.0 billion from Medicare, $19.4 billion from private, out-of-pocket spending, and the balance from all other sources. The average stay in a nursing home is 408 days, and almost one-third of nursing home stays (31%) are for a month or less. Only 11% of nursing home stays last for more than three years. At any given time, about 6% of the over-65 population are nursing home residents. Projections for 2020 estimate that there will be over 14 million dependant, elderly persons in the United States, of whom about four million are projected to be nursing home residents.

With these changing demographics, and vast resources at stake, the claims and suits against long-term health care facilities are likely to proliferate. To effectively defend nursing home malpractice matters, defense attorneys must understand the importance of various provisions of the Nursing Home Care Reform Act, discovery and trial techniques specific to these malpractice actions, and special defenses available in these cases. The purpose of this article is to provide defense attorneys with the ammunition they need to successfully defend these claims.

II. The Nursing Home Care Reform Act

In 1979, the Illinois General Assembly passed the Nursing Home Care Reform Act, 210 ILCS 45/1-101 et. seq. According to the historical and statutory notes, the Nursing Home Care Reform Act was passed “to revise the law in relation to the reform of nursing home care and long-term care facilities ...” One of the Act’s more controversial measures is the provision that makes the owner and licensee liable for any intentional or negligent act or omission of their agents or employees which injures a resident. Further, there is a provision which states that the licensee shall pay three times the actual damages, or $500, whichever is greater, as well as costs and attorneys fees to any resident whose rights are violated.

Some commentators have noted that this Act is one of the few Illinois legislative enactments of the last 20 years that explicitly encourages victims of negligence and abuse to pursue civil remedies. And, as the “strict liability” for intentional conduct and treble damages provisions attest, in many respects these plaintiffs’ remedies are broader than those available for other types of health care
malpractice. For example, plaintiffs cannot recover punitive damages in a healing arts malpractice case.5 Defending these cases can be a challenge, but armed with an effective blueprint, defense counsel can be successful.

III. Defense of a Nursing Home Malpractice Case

A. Notification of a Pending or Future Suit

An effective defense to these claims begins the moment the defendant learns of an incident that may lead to a lawsuit being filed. Nursing home owners may turn to their personal attorneys upon learning of potential claims when served with a summons. The owners or personal counsel should immediately tender indemnity and defense obligations to the appropriate insurance carrier(s) to avoid a late notice defense.

B. Early Witness Identification

Identification of witnesses at the earliest opportunity is critical to the defense. Because many of the potential witnesses may be ill and/or elderly residents, perpetuating their anticipated favorable testimony is of particular concern. If there is a witness who is in ill health and helpful to the defendant’s case, defense counsel may want to file a petition with the court to depose that person in order to perpetuate his or her testimony. 6 If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it should order that the individual be deposed.

This course of action is not without pitfalls, and the decision to petition the court should not be made lightly. Although the defendant may anticipate litigation, the need to perpetuate testimony should be balanced against the risk of unnecessarily encouraging litigation. By taking such a deposition, the nursing home may be alerting all interested parties that it believes something may have occurred for which the nursing home could be liable. In addition, the defendant may be revealing its strategy before the complaint has been filed. In short, the decision to depose a potentially favorable witness to perpetuate testimony should be made only after undertaking a risk-benefit analysis which weighs the value of such testimony against any risks that the taking of such testimony may present.

C. Analysis of Agency Allegations

The complaint will undoubtedly include allegations referencing the improper conduct of employees of the nursing home. Since the Act specifically provides that the owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures a resident,7 the defense attorney must be especially careful when answering allegations of agency. This is especially true in those cases where the nursing home has hired independent contractors to provide services at the nursing home. Agency may be easily admitted by the unwary defense attorney. And, if the agency admission is included in a verified answer, the plaintiff will likely not need to advance any further evidence to support the agency allegation. Obviously, such judicial admissions could be catastrophic. They could also be the grounds for a legal malpractice action against the defense attorney.8 Even if the admission of agency is made in a non-verified pleading, it may be used against the answering defendant at a later time in the litigation.

When presented with allegations that the Act has been violated, the defendant’s lawyer will want to pay particular attention to a few fine points when answering the complaint. If a section of the Act is cited in the complaint, defense counsel should admit that the Act is properly cited but deny that it applies to the instant litigation. In addition, particular attention must be paid to denying that the plaintiff is entitled to attorney’s fees and treble damages, for there are constitutional arguments that may be raised in opposition to the applicability of the treble damages and attorney’s fees provisions of the Act.9

D. Must an Expert’s Affidavit be

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Attached to the Complaint?

The plaintiff’s complaint may also contain allegations of medical negligence. If the allegations sound in medical negligence, rather than ordinary negligence, the complaint may be dismissed if the plaintiff has failed to attach the written report of a health care professional as required by the Illinois Code of Civil Procedure. The case of *Owens v. Manor Health Care Corporation*, 159 Ill.App.3d 684, 512 N.E.2d 820 (4th Dist. 1987), is instructive on this point.

In *Owens*, the guardian of a resident who was injured in the defendant’s facility filed an action naming the facility as a defendant under the Act. The resident was injured after falling from his wheelchair. The guardian claimed that the resident had been negligently restrained in his wheelchair at the time of the fall. The defendant nursing home was successful in having the complaint dismissed because the plaintiff had failed to attach a written report of a health care professional to the complaint.

On appeal, the *Owens* court determined that the defendant nursing home had not engaged in a “healing art” with respect to the patient, and a health professional’s report was unnecessary. The court opined that the specific act of negligence alleged in the plaintiff’s complaint did not arise from a medical diagnosis or treatment. Since the final determination to be made regarding the defendant’s alleged negligence was not one involving medical judgment, Section 2-622 was inapplicable, and therefore, a medical affidavit was not necessary.

When presented with the complaint, defense counsel should carefully examine the allegations to determine if the *Owens* case applies. If proof of the allegations may require expert analysis regarding a medical condition, treatment, procedure, or diagnosis, and the complaint fails to attach a medical affidavit, a motion to dismiss should be pursued. Incidentally, just because the *Owens* court declared a restraint decision is not a “healing art,” do not concede this point. The record in *Owens* apparently failed to include any expert affidavit or other basis for the appellate court to conclude its lay reaction to whether a restraint decision is a “healing art” was erroneous.

E. Preservation of Documents and Other Evidence

Nursing home malpractice cases, like medical malpractice cases, tend to be document intensive. A special effort must be made to identify and preserve those documents which have some bearing on the case. Documents to retain include: the patient’s entire medical file; the patient’s chart; any incident/accident reports that might exist; any physical evidence or equipment involved as a potential cause or result of the incident; all letters, notes and other correspondence that may deal with the allegations (including those from any official investigative agencies that may have inquired about the incident); work schedules for all days in question; time cards for the days in question; and all personnel files for those employees working on the days in question.

The defense attorney should give specific instructions to the nursing home concerning the retention and storage of documents and equipment. All documents must be placed in a secure location. All document storage containers should be properly marked so as to avoid future destruction. Defense attorneys cannot count on the fact that the employees of the nursing home will still be employed at the time of trial. Nursing homes not only have a constantly changing resident population, but also a constantly changing employee population. This revolving door pattern holds true for management employees as well as hourly employees, and defense counsel may well find that the administrator of the nursing home has left the defendant’s employ well before trial. Proper labeling and storage will ensure that documentary evidence remains secure long after those who gathered it are gone.

F. Early Witness Interviews

The need to conduct interviews at an early stage of the litigation is important for several reasons. First, employees tend to forget the facts surrounding unpleasant allegations. Second, it may be difficult to determine whether a seemingly insignificant fact will prove helpful at trial.
Conducting witness interviews allows the defense attorney to record minor facts which may play an important role in the later stages of litigation. Finally, the trial may not be conducted for four to five years after the complaint is filed. Employees who are loyal to the defendant nursing home at the beginning of the case may later become disinterested or even disgruntled, and therefore, less inclined to be helpful in developing the defense of the case. By conducting witness interviews at an early stage, defense counsel may be able to secure helpful facts and properly evaluate the merits of the plaintiff’s claim.

G. Discovery

While the types and methods of discovery in actions against nursing homes may be similar to discovery undertaken in other civil actions, there are some areas that require particular attention. Defense counsel must be particularly sensitive to discovery issues in four areas: (1) the ramifications of the physician-patient privilege; (2) the plaintiff’s right to free access to his or her medical records; (3) the need for full disclosure of all expert and fact witnesses; and (4) the need to take a thorough deposition of the plaintiff.

Of particular importance is the far reaching effect that the physician-patient privilege has on the discovery process in actions against nursing homes. Defense counsel must remember that just because a resident’s treating physician has a title at the nursing home, that does not mean that the attorney is permitted to discuss the suit with him or her.12 Numerous arguments have been advanced as to why a defense attorney should not be able to discuss a case with a treating physician outside of the presence of plaintiff’s counsel. Principally, there is a fear that defense counsel may be able to exert undue influence over the treating physician, especially in those cases where the defense attorney is representing the treating physician’s employer. In addition, there is the concern that the physician-patient privilege will be damaged if such contact is allowed, and patients may be less likely to fully discuss their medical condition with their treating physicians. Without debating the merits of such arguments, the authors advise that the defense lawyer go through the proper discovery channels to obtain information from the resident’s treating physician, i.e., subpoenas and depositions. Failure to do so will most likely result in an inability to call the treating physician as a witness at trial or other sanctions.13

Defense counsel must always be mindful that the patient has an independent right to access his or her medical records under the Act.14 While this should not hamper the defendant’s preparation of the case, it should put the nursing home on notice that anything that is recorded in the records – and any notes that are kept in the file – are discoverable and could help the plaintiff develop his or her case.

Defense counsel must also take seriously his or her responsibility to properly disclose all witnesses who may testify at trial. Witness disclosure in these cases is crucial for the simple reason that there may be a limited number of witnesses available at the time of trial to testify regarding the alleged negligent conduct. In order to avoid having a witness barred from testifying, full disclosure of all witness identities, locations, and expected testimony must be made pursuant to Illinois Supreme Court Rules 213 (f) and (g). Many attorneys simply refer the opposing side to a witness’ deposition transcript when describing the testimony or opinions that will be offered. Although Revised Rule 213(1) specifically allows a party to disclose opinions by simply referring to deposition testimony, this approach should be disfavored. Merely referencing deposition testimony may result in the non-disclosure of vital opinions and invites needless arguments at trial regarding the nature and extent of opinion witness disclosures. Instead, when disclosing the expected testimony and opinions of witnesses, a summary of the expected testimony and opinions should be offered, along with a
complete listing of all bases for the opinions, and of course, a reference to the witness’ prior deposition testimony.

The final element to pay particular attention to during the discovery process is the effective questioning of the plaintiff in his or her deposition. The plaintiff’s attorney will undoubtedly attempt to inject emotion into the plaintiff’s case. As the jury ponders the defendant’s guilt, the plaintiff’s attorney will want the jurors to be thinking of the defenseless resident at the mercy of the nursing home employees. Defense counsel must do everything in his or her power to not get caught up in his or her emotions. The plaintiff’s deposition should be taken as quickly as possible in order to commit the plaintiff to a specific set of facts and list of injuries and restrict the plaintiff in the development of his or her case. Remember, the plaintiff has brought the claim in hopes of receiving treble damages and attorney fees. The plaintiff’s attorney will certainly not hesitate when questioning the defendant’s employees at deposition or trial, and defense counsel should not hesitate either.

IV. Evidentiary Issues

There are many evidentiary issues that can and do arise during the defense of nursing home malpractice cases. One of the most common is admissions by nursing home employees. Sometimes employees of the nursing home, in an effort to provide comfort and support to relatives of an alleged victim of negligence or abuse, make statements that the plaintiff’s attorney later attempts to admit into evidence as statements which constitute party admissions. Defense counsel should be mindful that in order for a statement to qualify as an admission of a party against interests, the party offering the statement must establish that: (1) the declarant was an agent or employee of the defendant; (2) the statement was made about a matter over which he had actual or apparent authority; and (3) the declarant spoke by virtue of his authority as an agent or employee. Bafia v. City of International Trucks, Inc., 258 Ill.App.3d 4, 629 N.E.2d 666 (1st Dist. 1994); Jenkins v. Dominick’s Finer Foods, Inc., 288 Ill.App.3d 827, 681 N.E.2d 129 (1st Dist. 1997).

The foregoing criteria can be crucial in keeping statements of employees out of evidence. For example, assume that a housekeeper told the plaintiff’s relatives, shortly after the plaintiff fell out of her wheelchair, that a restraint was improperly employed by the nursing home. Defense counsel will most likely be able to keep this statement out of evidence as admissions by a party since it is doubtful that a housekeeper would have actual or apparent authority as to safety issues or patient care at the nursing home. Alleged admissions should be carefully scrutinized using the Jenkins criteria set forth above in an effort to keep potentially damaging statements out of evidence.

Defense counsel must also remember that admissions are not limited to oral statements. Notations within a plaintiff’s chart or other medical records kept at the nursing home could be submitted by the plaintiff’s attorney as admissions of a party. The same criteria which apply to oral statements would apply to written statements, and again, written statements in a plaintiff’s nursing home records must be carefully scrutinized to identify and, if possible, eliminate potential admissions which could prove to be harmful to the defendant’s case at trial.

V. Other Defense Strategies

A. Competency

In nearly all nursing home malpractice cases the plaintiff will be elderly or, in some cases, mentally disabled (some nursing homes even have wards set aside for mentally and physically handicapped individuals). One of the issues that the involvement of elderly or mentally handicapped plaintiffs raises is competency. Defense counsel should not assume that the plaintiff is competent to testify. If after taking the plaintiff’s deposition, good grounds exist, defense counsel should move to have the plaintiff declared incompetent to testify.
Before moving to have the plaintiff declared incompetent, defense counsel should keep in mind that every person is presumed competent to testify, and the burden is on the party challenging competency to show that a witness is incompetent. See, *People v. Velasco*, 216 Ill.App.3d 578, 575 N.E.2d 954 (4th Dist. 1991). Although there is no rigid formula for courts to apply in determining whether a witness is competent, the appellate courts have held that the trial judge should consider four factors. They are the ability of the witness to: (1) receive correct impressions from the senses, (2) recollect those impressions, (3) understand questions, and (4) appreciate the moral duty to tell the truth. *People v. Puhl*, 211 Ill.App.3d 457, 570 N.E.2d 447 (1st Dist. 1991).

A motion to declare the plaintiff incompetent to testify may not be entertained by a judge other than the trial judge. The trial judge’s decision whether the plaintiff is competent to testify will be made either through a preliminary inquiry or by observing the demeanor of the plaintiff and his or her ability to testify at trial. See, *Clark v. Otis Elevator Co.*, 274 Ill.App.3d 253, 653 N.E.2d 771 (1st Dist. 1995). Having the plaintiff declared incompetent to testify can have a major impact on the defense of the case and should be seriously considered, especially if the plaintiff was the only witness to the incident which allegedly caused his or her injuries.

One other point deserves to be mentioned in regard to attempts to have the plaintiff declared incompetent to testify. The attorney for the plaintiff may, in response to a declaration that the plaintiff is incompetent to testify, move that the court prohibit the defendant – or the defendant’s representative – from testifying at trial. See, *Clark v. Otis Elevator Co.*, 274 Ill.App.3d 253, 653 N.E.2d 771 (1st Dist. 1995). Essentially, the attorney for the plaintiff would argue that the defendant cannot present testimony of any conversation with the plaintiff or any event which occurred in the plaintiff’s presence because the plaintiff has been adjudicated a disabled person. The Dead Man’s Act is far too complicated a subject to be discussed in detail in this article. However, defense counsel must be aware of the Act and its possible application to disputes over competency.

### B. Legality

Many times those who are employed to take care of nursing home residents in unskilled or semi-skilled jobs, such as aides, dietary assistants, janitors, or launderers, are not native born Americans. Sometimes employees of the nursing home may not even speak the English language. It is imperative that defense counsel determine if the allegations of abuse or neglect at issue are made against non-English speaking or non-American born employees and whether those employees are in the United States legally.

Defense counsel must be aware of the residency status of its employees in order to take steps to mitigate the prejudicial effect of an employee’s illegal status. If the defense attorney learns that the plaintiff’s caretakers were not in the United States legally at the time of their employment, the defendant’s lawyer should move in limine to bar any reference to the fact that the employees in question were “illegals.” The basis for the motion is that such evidence is irrelevant and highly prejudicial to the defendant nursing home. At the same time, the attorney should consider limited circumstances where he or she may wish for a jury to know that an employee of the nursing home was an “illegal.” One example is where the employee has fled the country because of a failure to comply with residency requirements and not because of the commission of a negligent act. The fact that the employee was an illegal alien at the time of the act which gave rise to the plaintiff’s lawsuit can be used to explain the employee’s flight from the jurisdiction.

### C. Applicability of the Nursing Home Care Reform Act to Individual Employees of the Nursing Home

If the defense attorney is representing both the nursing home and the employee accused of wrongdoing, defense counsel can and should file a motion to dismiss or motion for summary judgment on behalf of the individual employee. Individual employees of a nursing home are not liable
for civil damages under the Nursing Home Care Reform Act. The Nursing Home Care Reform Act imposes civil liability only on the “individual or entity licensed by the department to operate the facility.” See 210 ILCS 45/3-601; Wills v. DeKalb Area Retirement Center, 175 Ill.App.3d 833, 530 N.E.2d 1066 (2d Dist. 1988).

The elimination of individual liability under the act was addressed by the Wills court:

Finally, defendants raise the argument in their brief that the individual defendants are not subject to liability under the Nursing Home Care Reform Act of 1979 because section 3-602, dealing with plaintiff’s treble damage claim, specifies that only the ‘licensee shall pay 3 times the actual damages, or $500.’ The statute does not state ‘the licensee and his agents or employees’ shall pay.

Further, the term ‘licensee’ is defined in the Act as ‘the individual or entity licensed by the Department to operate the facility.’ ... We believe that this definition excludes agents and employees, and we find support for our position in section 3-601 of the Act which, as defendants point out, renders licensees liable for the conduct of their agents or employees. As defendants note, such a provision would be unnecessary if those who work in nursing homes were included within the definition of a ‘licensee.’ Therefore, we agree with defendants that the legislature in enacting section 3-602 did not intend that anyone other than a ‘licensee’ shall bear civil liability for treble damages.

On the other hand, the legislature has specifically provided for the imposition of potential criminal liability upon individuals who work in nursing homes by setting forth in Section 12-19 of the Criminal Code of 1961 that:

(a) Any person or any owner or licensee of a longterm care facility who abuses a longterm facility resident is guilty of a Class 3 felony. Any person or any owner or licensee of a longterm care facility who grossly neglects a longterm care facility resident is guilty of a Class 4 felony. (Emphasis added.) (Ill.Rev.Stat. 1985, Ch.38, Par.12-19(a).)

We infer, as do the defendants, that the apparent absence of any similar language in the liability generating portion of the Nursing Home Care Reform Act of 1979 indicates the legislature’s intent not to impose civil liability under that statute against the nursing home’s agents or employees. We conclude that Counts III and IV brought under the Act were properly dismissed as to the individual defendants. Wills, 530 N.E.2d at 1073-1074.

The above language should be cited in support of a motion to dismiss or for summary judgment filed on behalf of the individual employees of the nursing home.16

D. Constitutionality of the Treble Damages Provision of the Nursing Home Care Reform Act

To date, the Illinois Appellate Court and the Illinois Supreme Court have not addressed the constitutionality of the treble damages provision of the Nursing Home Care Reform Act. As a result, at some point during the preparation of the case, the defendant’s attorney may want to consider filing an affirmative defense and subsequent motion attacking the constitutionality of the Act. Such a motion would attack the Act as violative of the provision against special legislation found within the Illinois Constitution and the Equal Protection and Due Process Clauses of the Illinois and United States Constitutions. Such a motion should argue that the Act violates Article I, Section 2 of the Illinois Constitution which provides that all persons are entitled to the equal protection of the laws. It should also argue a violation of the Fourteenth Amendment to the United States Constitution which entitles
all persons to due process of law before they can be deprived of life, liberty or property, and to the equal protection of the laws. The motion should further set forth that Article IV, Section 13 of the Illinois Constitution prohibits the passage of special legislation and contains a blanket prohibition against special legislation whenever a general law is or can be made applicable.

The motion attacking the constitutionality of the Act should point out that although the provision contained within the state Constitution prohibiting special and local legislation is not identical to the equal protection clause, it supplements that clause, and both provisions must be judged according to the same standards. *Maldonado v. License Appeal Commission of the City of Chicago*, 100 Ill.App.3d 639, 427 N.E.2d 225 (1st Dist. 1981). Special legislation discriminates in favor of a select group, whereas a violation of equal protection consists of arbitrary and invidious discrimination against a person or class of persons. *Illinois Polygraph Society v. Pellicano*, 83 Ill.2d 130, 414 N.E.2d 458 (1980).

Whether a law is attacked as special legislation or as violative of equal protection, it is still the duty of the courts to decide whether the classification contained within the law is unreasonable in that it preferentially and arbitrarily includes a class (special legislation) to the exclusion of all others, or improperly denies benefits to a specific class (equal protection). *Illinois Polygraph Society*, supra. In short, the court must determine whether there is some real difference between those classified by the law that rationally explains the disparate treatment accorded to them. *Jenkins v. Wu*, 102 Ill.2d 468, 468 N.E.2d 1162 (1984).

In this case, defense counsel should argue that the Act does indeed discriminate against nursing homes and treats them differently from any other person, entity, or health care facility. Likewise, residents of nursing homes are given special privileges that no other individuals in this state have. The case law indicates that the Act allows for the trebling of any verdict against a nursing home, regardless of fault, regardless of the nature of the injury, and regardless of the nature of the act which caused the injury. As such, the Act discriminates against nursing homes, treats them differently from any other person, entity, or health care facility located within the state, and gives residents special privileges, i.e., the ability to recover three times the actual damages regardless of fault.

There is a second, more technical motion which defense counsel should consider. The Act specifically provides that the owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which *injures* the resident. A complaint filed by a plaintiff may include allegations of intentional or negligent acts or omissions which do not result in injury. For example, a plaintiff may allege that a nursing home employee intentionally refused to assist her in getting out of bed, changing her clothes, moving her to the lunchroom or the day room, or in accessing the bathroom. A plaintiff may also allege physical or psychological abuse that does not produce a physical injury. In such cases, the employee may well be guilty of an intentional act or omission, however, that intentional act or omission may not have resulted in a physical injury to the resident. As a result, the nursing home arguably should not be liable for damages since the act or omission did not produce an injury. Absent clear evidence of a definite physical injury to the plaintiff, he or she should not be allowed to invoke the Act to impose liability.

**VI. Conclusion**

Based on recent demographic trends, it is safe to say that defense counsel will see more and more nursing home malpractice cases. The preparation of a successful defense for these cases begins early in the litigation. The defense must be vigorous. Although reviewing the information contained in this article is no guarantee of a defense verdict, the authors hope that the information provided will
certainly go a long way toward eliminating specious claims and increasing the successful resolution of legitimate claims.

**Endnotes**

3. The treble damages provision of the Act was repealed in 1995. Section 3-602 of the Act, which previously allowed for the imposition of punitive damages, through tort reform legislation was revised to state that the “licensee shall pay the actual damages and costs and attorney’s fees to a facility resident whose rights . . . are violated.” However, the Illinois Supreme Court recently declared the entire Tort Reform Act of 1995 unconstitutional. Accordingly, the repeal of the treble damages provision of the Nursing Home Care Reform Act is void ab initio due to its unconstitutionality.
5. See 735 ILCS 5/2-1115.
6. Such a petition would be filed pursuant to Illinois Supreme Court Rule 217.
8. See, Glei cher v. *University of Health Sciences*, 224 Ill.App.3d 77, 586 N.E.2d 418 (1st Dist. 1991) (stating that no further evidence need be advanced if judicial admission is found in verified pleading).
9. See Section V, D, infra.
10. See, 735 ILCS 5/2-622 (West 1992).
11. This constant change in employee composition is another reason why defense counsel should interview and take sworn statements from nursing home employees as soon as possible. See Section F below.
15. Section 8-201(a) of the Dead Man’s Act provides that it can be applied to evidence submitted against a disabled person as long as that person is “adjudged by the court in the pending civil action to be unable to testify by reason of mental illness, mental retardation or deterioration of mentality.” 735 ILCS 5/8-201(a) (West 1992).
16. The *Wills* court also held that a plaintiff can recover treble damages under the Nursing Home Care Reform Act or punitive damages under common law, but not both. *Wills*, 530 N.E.2d at 1073. Accordingly, if a plaintiff files a complaint seeking treble damages under the Act and common law punitive damages, a motion to dismiss should be made to dismiss the prayer for common law punitive damages.
17. When making a constitutional challenge, defense counsel must be sure to comply with Illinois Supreme Court Rule 19. Supreme Court Rule 19 requires that “in any cause or proceeding in which the constitutionality of a statute, ordinance or administrative regulation affecting the public interest is raised . . . the litigant raising the constitutional issue shall serve an appropriate notice thereof on the Attorney General, State’s Attorney, municipal counsel or agency attorney, as the case may be.”

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