

HANDLING SEXUAL ASSAULT CASES IN HOSPITAL SETTINGS

What do you do when a new client calls relating a story about being sexually assaulted while in a hospital or other healthcare facility? Unfortunately, these types of assaults are becoming more and more prevalent. Equally unfortunate are the application of many “tort reform” laws that consider this type of case subject to liability limits and caps. The challenge is that most of these cases will involve extreme degrees of emotional and mental anguish damages, while the actual physical or medical expense damages may be low. Approaching these cases requires an attention to ways to keep it out of the medical malpractice environment.

Traditionally sexual assaults in a healthcare setting were not considered to be medical malpractice cases. But activist judges in numerous states have tried to expand the definition to take away a patient’s right for justice. Investigating a sexual assault claim is like a CSI television show. The assault at first blush appears pretty simple. A patient or an employee of the facility commits the assault. Not the end of story. How did the patient or employee get to be in a position where the assault could occur? What evidence is there that the employer had any notice prior to the assault of the employer patient’s dangers? What steps could have been taken to prevent the assault? How did the perpetrator get access to the patient in the first place?

Researching the Employee Perpetrator Case

The place to start should include a review of the employee’s personnel file. Find out where the employee came from, how the employee got to the hospital, how long the employee had been working at the hospital, who was his or her supervisor. It is especially important to look for any prior discipline involving the employee. A good

place to start is to get the employee's application. Typically these applications include some type of request for references or prior work history. Anyone committing a sexual assault usually has something in their past that indicates that this was a problem. In my own experience I have found that calls to prior employers and job reference people can be very helpful. For example, in a recent case calls to the prior employer revealed that the nurse involved in the assault had been fired from a prior hospital. His co-workers considered him to be mentally unstable and suffering from mental illness. The employee had a history of run-ins with prior female supervisors and a history of a suicide attempt. This information was used to counter the picture that the hospital defense tried to portray that the employee was a stellar model nurse. I think it is a safe assumption that if someone is committing sexual assaults on helpless patients that they have something in their past that reflects where this type of behavior originated from. The challenge has defined it. In most of these cases, if criminal charges have been filed, the police can be a wonderful source of information. Collect any police reports concerning the incident. Most of the time this will include witness statements taken at the time of the assault from hospital employees and other witnesses to the incident. These can be very helpful when it comes time to depose those employees in a civil case who may conveniently forget the facts of what happened. This is also helpful to avoid the ploy where hospital defendants sweep everything into a "pure review" committee and then refuse to turn that over based on a privilege assertion. Get to this information as soon as possible and find out if any of the employees that were interviewed are no longer members of the hospital staff. Get to those folks as soon as possible before the hospital has a chance to gather the wagons and provide a story for their defense.

Most of the time hospitals will argue that an employee's actions involved in the assault were outside the course and scope of the employment. You can use this as a foil to build the case that this is not a medical malpractice case. I suggest sending interrogatories and admissions that indicate that the employee's actions are outside the course and scope of the employment and that they do not involve any kind of medical treatment or deviation from any kind of medical standard of care. You can use this testimony or these answers later when the inevitable motion for summary judgment seeking to apply medical malpractice limitations arises. Most of the time hospitals are willing to throw the employee under the bus immediately in an effort to distance themselves from their actions. The alternative is equally impalpable arguing that the assault involved some kind of medical care would be very difficult to support and create a difficult storyline for the defendants to carry off.

Perpetrator is a Patient or Outside Person

If the sexual assault perpetrator is not an employee of the hospital, the inquiry must start with how did that person get into a position to cause the assault. Again, police records and investigation will be a helpful source of information in this regard. Find out who that person was and why that person was on the premises and try as best you can to trace his or her path from outside of the facility to your patient's room or wherever the assault took place. Then look for ways to show how that person's access could have been interrupted. This type of analysis can reveal a lack of proper security by the facility. This security can take several different forms including failure to have proper guards, failure to maintain proper locks or a simple failure to restrict admittance. With an outside perpetrator look for physical plant deficiencies. For example, if windows were open or

doors left unlocked, the focus of your case should be on that condition making it easier for you to avoid application of arguments claiming it as medical malpractice.

Dealing with Sexual Assault Patient Clients

It is very important when dealing with sexual assault patient clients to be very sensitive to what they have been through. Lawyers typically become somewhat immune to the horrible things we see every day. Look for the average sexual assault client. Many times just thoughts of the attack will trigger very strong and uncontrollable emotions. The client in these types of cases needs to be handled with kid gloves. You need to spend extra time prepping them for deposition and you need to spend as much time as you can keeping them aware of what will or won't happen to them during the course of the case. For example, many of these plaintiffs worry that they will have to confront their attacker or that they will have their past sexual history laid bare during the course of the case. These anxieties if not addressed early on, can grow out of control as the case progresses and if left unchecked, will make your client afraid to go through the litigation process. This can take away a card that you will need to want to have of being ready to go to trial if the defendant senses that your client is not because of the emotional trauma that will affect their analysis of what the case is worth and will influence the way they treat you prior to trial. One thing to watch out for is media coverage of the incident. Typically, these types of cases generate a lot of local media attention. At a minimum make sure that the media has a policy that they will not use your client's name in the course of the story. This is usually not a problem because most media outlets refuse to publish the name of a sexual assault victim. But, make sure your client knows beforehand that the case may be covered by the press and prepare them accordingly. You do not want to have your client

call you after seeing the story on their case air on the ten o'clock news and have them learn about it there for the first time.

Tricks for Tracking Down Information on Perpetrators

If the perpetrator of the assault has been arrested and charged, look to see if they have made bail. If they have made bail, subpoena the bail bonds file regarding the individual. Many times these files will contain very important information about the perpetrator and people who know the perpetrator. Bail bonds men typically collect information so they know how to track down the individual that they have bonded out. Most of the time they require an application to be filled out which includes addresses of the client along with closest relatives, friends, and other contacts in the area. This can be an incredible source of information when trying to do research on the individual. Most of the time the individual if the criminal proceedings have not been concluded will not talk with or allow you to depose them or if they do, will assert the Fifth Amendment. Because of this you have to find other sources of information about the perpetrator and these types of things can be some of the best ways to find it.