



TRIAL

# Notes

## Medical Malpractice Law

A SERVICE FROM THE LAW OFFICES OF



FREUND FREEZE & ARNOLD A LEGAL PROFESSIONAL ASSOCIATION

Volume VII, Issue 2

**DAYTON OFFICE:**

(937) 222-2424

FAX: (937) 222-5369

E-MAIL: [ffalawda@ffalaw.com](mailto:ffalawda@ffalaw.com)

**CINCINNATI OFFICE:**

(513) 665-3500

FAX: (513) 665-3503

E-MAIL: [ffalawci@ffalaw.com](mailto:ffalawci@ffalaw.com)

**COLUMBUS OFFICE:**

(614) 827-7300

FAX: (614) 827-7303

E-MAIL: [ffalawco@ffalaw.com](mailto:ffalawco@ffalaw.com)

**KENTUCKY OFFICE:**

(859) 292-2088

FAX: (859) 292-2514

E-MAIL: [ffalawky@ffalaw.com](mailto:ffalawky@ffalaw.com)

### Medical Record Keeping

## Legalease, A Jargon Free Zone

BY MARK L. SCHUMACHER

"A

TIME TO BE BORN, A TIME TO DIE..." IT'S MORE THAN scripture, more than a song lyric. It's a reality soon to be faced by ever-larger numbers as baby boomers start seeing a bit more detail "through the glass darkly." Right along with them will be their health care providers. And, of course, close behind will follow a baying pack of lawyers, ever alert to the possibility of trading the infirmities and indignities of old age for cold cash.

Time will tell whether this generation's pursuit of healthy lifestyles, no smoking, exercise, and proper food habits, will result in measurable gains in meaningful, independent living at the end of life or, if these laudable habits will instead result in a longer senescence marked by extended physical and mental disease. One thing for sure is that all the tofu, botox, and free weights in the world can't cheat the conquering worm, they can merely and perhaps delay it.

For increasing numbers, that delay will take place in nursing homes. For the doctors charged with their care, powerful riptides lurk. We often do not value age, and the time has long since passed where family care in the home for the elderly is an option.

We feel guilty about these placement decisions. We are shortsighted, expect much from health care and tend to think the happening of a bad thing occurs only when someone was asleep at the switch. While in many other health care settings, the doctor typically gets the benefit of the doubt, not so in nursing home care.

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## LEGALEASE *Continued from page 1*

**Make use of standing orders directing staff to report changes in vitals, skin integrity, level of consciousness, behavior and feeding, and document your responses to the information.**

If there is prejudice in the mind of the typical juror hearing such a case, it is prejudice against the health care providers, fueled by horror stories of abuse cases, guilt over parental placement decisions, and a lingering suspicion that geriatric medicine is a backwater practice for the marginally competent. Such perceptions are fertile soil for the “send a message” verdict – a fact not underappreciated by the aforementioned baying pack.

Add this to the fact that happy outcomes are not in the cards in end-of-life care and that medical problems in the elderly have a perverse predilection for becoming life-threatening without producing much in the way of dramatic symptoms until it’s almost over, you begin to appreciate the size of the problem. Doctor survival in such a practice depends not merely on providing attentive care, but sadly, on being able to prove it.

Be aware that much nursing home charting is done after the fact, frequently with outcome knowledge and always including the phrase “MD informed of above.” Nothing looks worse in court than the phrase “no orders received” after that notation. Keep in mind that many nursing homes keep doctor contact logs which are not a part of the medical record and which, by their nature, are usually contemporaneous and can tell quite a different story from notations in the patient’s record.

Be prepared to prove your side of the story. If information comes to you by faxes, by all means save them, for they are critical records, as are your responses. If information comes by phone, make a record of: who called; what was reported; and what response was made.

Do not make the cardinal error of merely responding to symptoms without documenting your thoughts about the diagnosis. Require and document follow up information about the patient’s response to new orders.

Keep in mind always that the elderly are diagnostic foolers, with serious disease often producing minimal symptoms. Be suspicious and always err on the aggressive side, for it is better to over-than under-respond.

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## WE OFFER VIDEO-TELE CONFERENCING



**DID YOU KNOW** that *Ohio Lawyer's Weekly* recently named FF&A as the 28th largest law firm in the State of Ohio? FF&A's growth is a by-product of our commitment to delivering value to our clients. For instance, FF&A now offers video-tele conferencing, which reduces discovery costs to our clients.

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FOR MORE INFORMATION

# FIRM *news*

The attorneys and staff at Freund, Freeze & Arnold are committed to providing the highest quality legal representation for businesses, physicians, municipalities and insurance companies. We are happy to report some recent examples of cases in which we vigorously defended the interests of our clients and obtained favorable results. We are also proud to share with our friends and clients news of our honors, community activities, growth and achievements.

## FIRM GROWTH

FREUND, FREEZE & ARNOLD is pleased to welcome **W. Frederick Fifner** as a shareholder in our Columbus office. FF&A is also pleased to announce that **Jennifer L. Hill** has joined the firm as an associate in our Columbus office; **Matthew D. DiCicco** and **Rory E. Garrity** have joined the firm as associates in our Dayton office; and **Ruth T. Kelly** has joined the firm as an associate in our Cincinnati office.

**W. Frederick Fifner** was born in Lakewood, Ohio. Fred attended Florida Southern College and went to the Cleveland Marshall College of Law. He began practicing law in Cleveland in 1973. Fred moved to Columbus in 1988 and continued working as a defense litigation attorney. In 1995 Fred started his own defense firm in Columbus. He brings significant medical malpractice, general liability, excess and surplus lines, and reinsurance experience to FF&A.

**Jennifer L. Hill** was born in Jackson, Ohio. She attended the University of Dayton where she obtained both her undergraduate and law degrees. Jennifer started her career as a plaintiff's attorney. She then practiced as a defense attorney for four years in the areas of medical malpractice, commercial litigation, and insurance defense before joining FF&A.

**Matthew D. DiCicco** was born in Clovis, New Mexico. He obtained his undergraduate degree in psychology from Gannon University, cum laude. Matt obtained his law

degree from the University of Dayton School of Law, graduating cum laude. Matt served as the Web Page Editor and as a Staff Writer for the University of Dayton Law Review. He practiced as a partner in a local general litigation firm before joining FF&A.

**Rory E. Garrity** was born in Panama City, Panama. She graduated from the University of Colorado in 2000. In 2004 Rory graduated from the University of Dayton School of Law, where she served on Law Review and was a member of the Moot Court team.

**Ruth T. Kelly** was born in Cincinnati, Ohio. She obtained her undergraduate degrees from Ohio Wesleyan University in Economics and Spanish. She obtained her law degree from Salmon P. Chase College of Law in Kentucky. Ruth served as an editor on the law review.

## TRIALS, DECISIONS, AND VERDICTS

**Neil F. Freund** and **Leonard J. Bazalak** obtained a defense verdict in Montgomery County Common Pleas Court in a business dispute case that lasted almost six weeks. The plaintiff company alleged that Neil and Len's client and its parent company, a co-defendant in the case, breached a non-compete agreement, tortiously interfered with the plaintiff's relationship with a primary customer, and conspired with a third-party to cause the termination of that relationship. The jury not only found for both defendants, but awarded Neil and Len's client \$205,000 on its coun-

terclaim for work performed for the plaintiff.

**Christopher W. Carrigg** and **Jennifer Kirkpatrick Nordstrom** recently obtained a favorable result in Hamilton County Common Pleas Court. The plaintiff alleged a local pharmacy dispensed the wrong prescription drug for a child. The plaintiff claimed this caused the child to sexually assault another child.

**Mark L. Schumacher** obtained a directed verdict in a Montgomery County Common Pleas Court medical malpractice case. The plaintiff alleged the doctor failed to diagnose deep vein thrombosis which led to the death of a 43 year old female.

**Christopher W. Carrigg** obtained a favorable result in Warren County Common Pleas Court. The plaintiff had been ordered out of defendant's van after being an unruly passenger. Plaintiff alleged he was struck by defendant's van as she pulled back onto the highway. The defendant claimed plaintiff threw a beer bottle at her van, which startled her, and the van bumped the plaintiff. The plaintiff had left knee surgery to repair a torn meniscus. The jury apportioned negligence at 50 - 50 and awarded \$20,000. The net verdict was \$10,000.

**Neil F. Freund** and **Wayne E. Waite** obtained a defense verdict in Montgomery County Common Pleas Court for a legal malpractice insurance company. A personal injury plaintiff sued his lawyer for legal malpractice. The lawyer reached a settle-

ment agreeing to confess judgment for \$750,000 plus interest, but limiting the lawyer's liability to \$4,000. The personal injury plaintiff filed a supplemental action to enforce the judgment against the lawyer's insurance company. Neil and Wayne obtained a defense verdict in favor of the insurance company based on the lawyer's failure to give timely notice to the insurance company.

**Neil F. Freund** obtained a favorable result in Greene County Common Pleas Court. The plaintiff claimed she had unsightly scarring as a result of an infection after bilateral mastectomies, one being a simple breast removal and the other a modified radical. The doctor had an excellent consent form. The jury concluded the patient was informed about the material risks.

**Bryan J. Mahoney** obtained an excellent result in Greene County Common Pleas Court. The plaintiff claimed personal injuries and property damage to her antique show car in a car accident. Bryan obtained a directed verdict on the property damage claim and a defense verdict on the personal injury claims.

**Michael N. Rhinehart** obtained a verdict in a subrogation case in Montgomery County. Mike alleged the defendant's negligence caused \$3,479 damage to the insured's vehicle. The defendant filed a third-party complaint against the insured's daughter for damages to the defendant's car. Mike obtained a judgment in favor of the insurance com-

## FIRM NEWS *Continued from page 3*

pany and its insured for the full amount of property damage. The court also found no negligence on the part of the insured's daughter.

**Jennifer K. Nordstrom** obtained a directed verdict in Clermont County Common Pleas Court in defense of a personal injury claim. The plaintiff alleged the defendant failed to pay attention and observe his truck stopped in the road and caused the car accident. Plaintiff was in a coma for 28 days.

**Bryan J. Mahoney** obtained a directed verdict on the plaintiff's claim and a verdict on his client's counterclaim in Dayton Municipal Court. The plaintiff and Bryan's client were in a car accident. Both cars had property damage. Bryan filed a counterclaim against the plaintiff for property damage to his client's car. The plaintiff's claim was dismissed on directed verdict and Bryan obtained an award in favor of his client for the full amount of damage to the car.

**Timothy B. Schenkel** recently obtained a defense verdict in Miami County Common Pleas Court in an employment discrimination case. The plaintiff, a waitress, alleged a number of male workers sexually harassed her. She claimed she reported this harassment to her supervisors, but nothing was done. She claimed constructive discharge. Tim defended one of the supervisors to whom plaintiff had allegedly reported the harassment. Tim received a defense verdict on behalf

of his client after the jury deliberated for more than eleven hours.

**Shawn M. Blatt** obtained a defense verdict in Montgomery County Common Pleas Court. Plaintiffs claimed they suffered personal injuries and property damage from a car accident on a darkened residential street. The accident occurred when the plaintiffs pulled away from the curb into the path of the defendant's car. Witnesses testified the defendant drove too fast and without lights. The defendant admitted speeding, but claimed her lights were on. The jury returned a verdict for the defendant.

### PRESENTATIONS AND SPEAKING ENGAGEMENTS

**Carl A. Anthony** recently gave a presentation to OACTA on changes to Ohio law regarding evidence on admissibility of the failure of a plaintiff to wear a seatbelt under Ohio's new tort reform legislation.

**Susan Blasik-Miller** spoke at the Dayton Bar Association's Domestic Relations seminar. Her presentation included use of experts, impeaching and attacking experts, Daubert challenges and motions in limine


**Dee Sheriff-MacDonald** was given the honor of introducing the Honorable William O. Bertelsman at a Federal Bar Association awards dinner honoring Judges Bertelsman, Herman Weber, Arthur Spiegel, Walter Rice and John Holshuh for 25 years of service on the federal bench. 

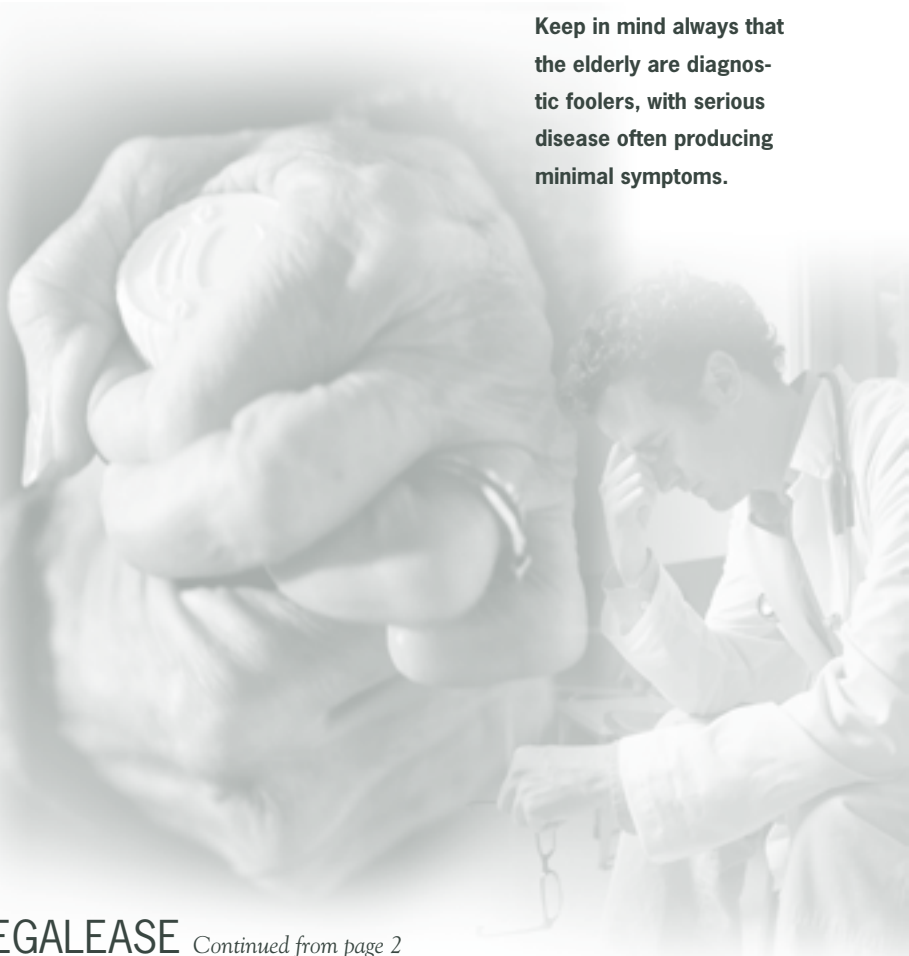
**Keep in mind always that the elderly are diagnostic foolers, with serious disease often producing minimal symptoms.**

## LEGALEASE *Continued from page 2*

Remember that you are not dealing with an acute care hospital, and that nursing home staff tend to compare less favorably with their hospital brethren. Make use of standing orders directing staff to report changes in vitals, skin integrity, level of consciousness, behavior and feeding, and document your responses to the information. Remember that you are, in all likelihood, new to the patient and family and therefore initially have no rapport or reservoir of good will.

When the tide shifts, and palliation and hospice loom, know that it is never, ever safe to initiate DRN/CCO orders without a good note documenting a proper examination, review of history, and family discussion. Telephone orders in such cases just don't cut it; and, if done under circumstances where the underlying process is possibly reversible, they can quickly lead to a indefensible lawsuit, shot through with moral condemnation, as you become a cold-hearted monster, did not care enough to see the patient before signing off.

Remember, finally, that you can make a difference in improving quality at of end of life and providing it at death. So long as you take basic precautions, the hounds can be kept at bay and you can do what you intended—serving the most weak and vulnerable members of our population. 



## Nursing Home Reporting Requirements

# Centers for Medicare and Medicaid Services Issues Formal Clarification

BY ROBERT N. SNYDER

**T**HE CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS), Department of Health and Human Services, previously promulgated nursing home reporting requirements on resident mistreatment, neglect, and abuse. These requirements are codified in 42 C.F.R. §483.13(c)(2)&(c)(4).

Section 483.13(c)(2) required all nursing homes to “ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law... (including to the state survey and certification agency).” The original regulation did not, however, define mistreatment, neglect, abuse, injuries of unknown source, or misappropriation of resident property. Nor did it define “immediately.”

CMS in December 2004 issued a formal clarification of these reporting requirements. The CMS clarifi-

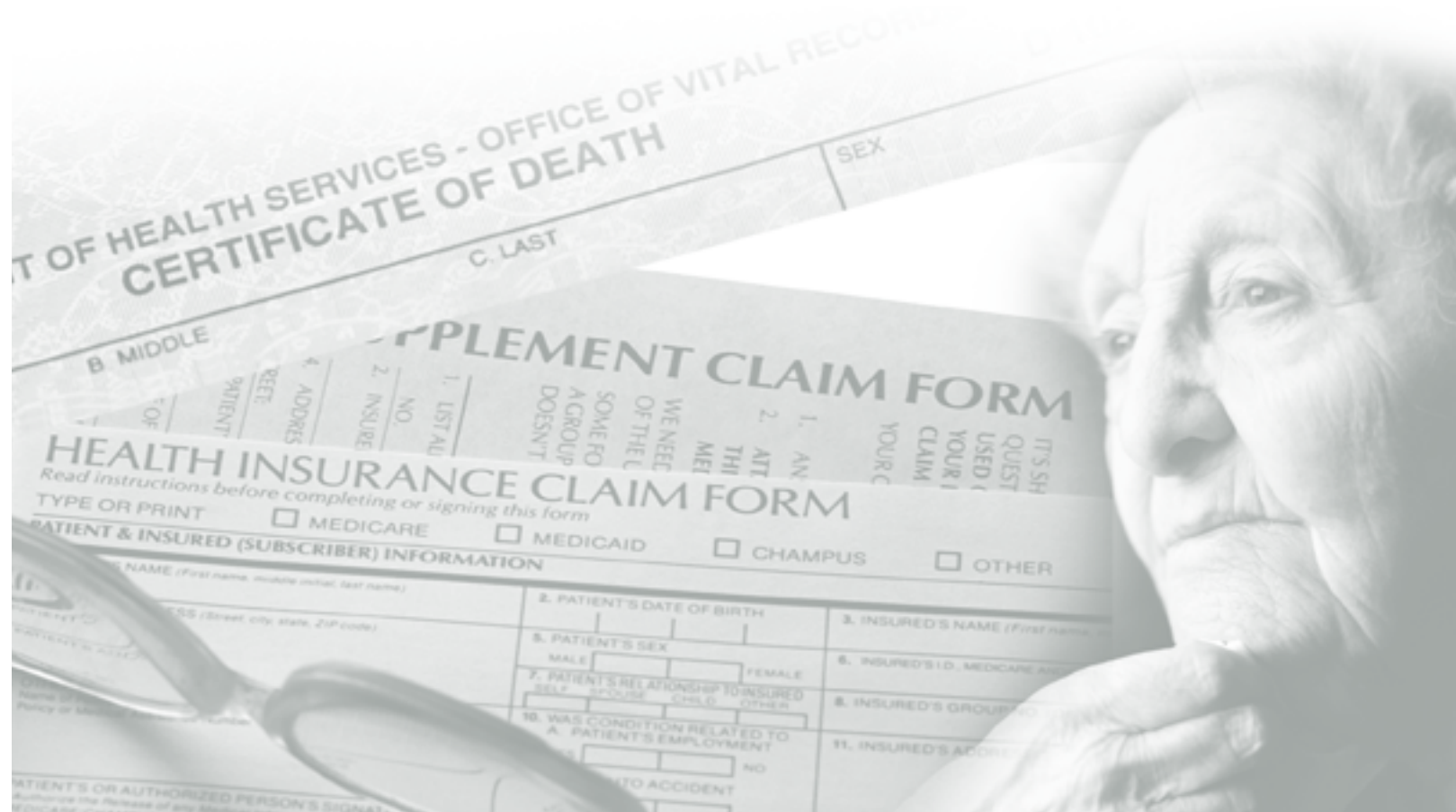
fication required all nursing homes to come into compliance with the clarification effective January 15, 2005.

The CMS clarification set forth definitions of “neglect,” “abuse,” “injury of unknown source” and “misappropriation of resident property.” It also defined the requirement that nursing homes report alleged incidents “immediately.”

“Failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness” amounts to neglect. “Willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish” amounts to abuse.

The CMS clarification mandated nursing homes classify an injury as “of unknown source” if the cause of the injury was not observed or the resident could not explain the injury, and the injury is either suspicious because of the extent of injury, location of injury, the number of injuries observed at one time, or incidence of injuries over time.

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## NURSING HOME *Continued from page 5*

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“Misappropriation of resident property” includes any “deliberate misplacement, exploitation, or wrongful use of a resident’s belongings or money without the resident’s consent.” The CMS clarification did not provide a definition for “mistreatment.”

Section 483.13(c)(4) always required investigation of allegations of such incidents and formal reporting on the results of the investigation to the nursing home administrator and officials as required by State law, including the Ohio Department of Health, within five working days of learning about the incident. It did not, however, define specifically a time frame for the mandated report upon first learning of the allegation.

The CMS clarification defined the requirement for reporting “immediately” any allegation of an incident to mean “as soon as possible, but ought not exceed 24 hours after discovery of the incident.” The CMS clarification required that each state have a means to collect reports of alleged incidents after normal business hours to meet the 24 hour requirement. This can include answering machine, voice mail, or facsimile.

The Ohio Department of Health, Provider and Consumer Services Unit, accepts reports around the clock, seven days a week. Nursing homes can file immediate reports by completing the first three sections on the Ohio Department of Health Facility Incident Report form then faxing it to 614/728-9169.

As always, the nursing home must conduct a complete investigation of the alleged incident and report the results of the investigation to the administrator and the Ohio Department of Health. The remaining sections of the Facility Incident Report form can be used to report the results of the investigation to the Ohio Department of Health. This must always occur within five days, as always required.

The ODH Provider and Consumer Services Unit has invited any questions or clarifications by contacting 614/644-0256. Lawyers on the FF&A medical malpractice and nursing home defense teams are available to answer any questions. 

**Thanks for visiting**  
**Medical Malpractice Law**

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*Notes* on-line

**Look for our next issue: Fall 2005**

This newsletter is intended for general information. Many states require that law firms add the statement, “*This Is An Advertisement*” on publications of this nature.