

# The Role of the Attorney as Nursing Home Advocate

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# The Role of the Attorney as Nursing Home Advocate

*More and more attorneys are being faced with the issues and concerns surrounding long-term care, as clients look to trusted advisors for assistance.*

*Keeping abreast of current standards in nursing home care and regulation is essential to being able to provide this guidance.*

**By Andrew P. Brusky**

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## **Legal Issues of Nursing Home Care**

**P**lanning for a nursing home admission is a complex blend of many legal areas including public benefits law, contract and negligence law, federal and state rules and regulations, as well as laws relating to surrogate decision making for health and financial affairs. Frequently, an attorney is requested to solve rather complicated and truly personal matters involving emotional, familial, and ethical decisions. The legal tools an attorney may utilize to solve

these problems go well beyond a traditional legal arsenal to incorporate negotiation and interpersonal skills not normally associated with other areas of the law.

Long-term care issues confronting an attorney appear similar to social work. Rarely is the attorney requested to perform a single legal task such as reviewing a contract or drafting a legal document. Advice and counsel require the development of an integrated financial and health care plan. Additionally, the attorney must view himself or herself as part of a dynamic team of professionals that includes nonlegal specialists such as doctors, social workers, nursing home administrators, and financial planners. It is important for an attorney to be familiar with the individual role each professional serves in order to competently assist clients with their long-term care needs.

The purpose of this article is to provide attorneys with a broad overview of the issues surrounding nursing home placement and to suggest possible resolutions to common violations of resident's rights. The format is meant to be practical and instructive. It begins with nursing home placement and continues through typical problems encountered while a resident of a nursing home. The article is not intended to be a comprehensive review of the law, but rather a commentary on everyday concerns confronting a client anticipating or experiencing a nursing home stay.

## **Determining the Appropriate Level of Care**

Before considering a nursing home, make sure your client has exhausted less restrictive options for long-term care. It is usually less costly and certainly more desirable to remain in one's own home or apartment. Your local government council on aging can provide names of agencies that provide in-

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home and supportive care designed to allow older adults to remain in their home. For example, in Wisconsin, a simple phone call to the county Department on Aging can bring a visit from a social worker who will assess an older person's ability to function in the home and determine services to meet any needs. Similarly, private geriatric case managers are in the business of guiding seniors in selecting the right care options. Give serious consideration to hiring a professional geriatric case manager in situations where a client's long-term care needs are unique or especially complicated. Note also that government programs for long-term care have historically been biased towards institutions. Increasingly, however, states are trying to shift funding from institutions to consumer-preferred home and community-based long-term care.

Be especially wary of an articulated "need for a nursing home" when conveyed by a family member such as an adult child. Often the adult child is over-protective, worn out from seemingly endless care he or she is providing to the parent, or just worried about "mom" being alone. Generally, these adult children have no idea about the array of services that are available and unfortunately often come to visit a lawyer very late in the process.

In the event home care is not feasible, consider alternative living arrangements. These choices include assisted living apartment complexes and continuing-care communities, where a resident can "age in place" and receive a continuum of care ranging from independent living to a nursing home offered all in one location. These options are less restrictive than a nursing home and provide the older adult with a level of independence commensurate with their functional ability.

Unfortunately, for some individuals a nursing home is the most appropriate residential setting. Nursing homes are designed to provide care to persons who are chronically ill or convalescing from an illness and who need care that is not appropriate for a hospital but cannot reasonably be provided in the community. Most nursing homes will require that a prospective resident be evaluated either by the person's treating physician or by a nursing home screening team, before admission is granted. The purpose of this evaluation is to ensure that the nursing home facility can meet a prospective resident's level of care needs.

## Hospital Discharge Planning

Placement in a nursing home is especially difficult when a person needs to be discharged from the hospital but can no longer return home. While the majority of nursing home residents enter from the community, direct admission from a hospital is frequently a stressful event, making the decision of selecting a nursing home even more difficult. Many nursing homes, especially the good ones, have waiting lists. This may limit a prospective resident's options. It is especially difficult to find a bed for a Medicaid recipient due to a preference on the part of nursing homes to accept private-pay residents. While nursing homes prefer "private pay" residents over government-funded Medicaid patients, due to the higher reimbursement available, they may not discriminate against Medicaid patients by, for example, requiring them to pay a deposit upon entry, find another person to serve as a "guarantor," or provide a certain number of months of private pay before conversion to Medicaid. Additionally, the Medicare system of payment<sup>1</sup> encourages hospitals to discharge the elderly patient as soon as reasonably possible. In essence, whether a patient stays one day or ten days, the hospital gets the same amount of money for a particular diagnosis. Consequently, the sooner a patient leaves, the more money the hospital makes over and above its actual costs.

If a client or the attorney feels that a hospital's decision to discharge a patient is premature, consider challenging it. It is extremely important, however, that a request for review be made as soon as possible after the written notice of discharge is given. There are strict procedural and time deadlines for review that ultimately will affect payment liability.<sup>2</sup> If the appeal is won, Medicare will continue covering the stay. If the appeal is lost, the patient can further appeal the denial by requesting a hearing in front of an administrative law judge of the Social Security Administration or even petition for judicial review if the amount in controversy exceeds a certain amount.

In arranging for hospital discharge, social workers can be especially helpful in selecting a facility to meet a patient's needs. While most nursing homes offer assistance with a person's activities of daily living, some nursing facilities offer specialized services including Alzheimer's programming, hospice, respite

care, or subacute/rehabilitative care. Remember, it is a hospital social worker's job to assist in locating an appropriate placement. Hospital patients and their families should work closely with the social worker to select a facility that meets both the patient's level of care as well as the needs of family members who will visit on a regular basis.

### Selecting a Nursing Facility

At this time, no public or private agency has devised a comprehensive system to rate nursing homes. Consequently, it is the responsibility of the individual consumer to assess the needs of a prospective resident and to select a facility that meets these particular needs. In selecting a nursing home, give serious consideration to the following factors:

1. *Determine the facility's geographical proximity to family members.* Close proximity will encourage frequent visits ensuring both the psychological well-being of the resident as well as continuous monitoring of quality of care by family.
2. *Determine whether the facility participates in the Medicare and Medicaid program.* A prospective nursing home resident must consider source of payment prior to any admission. Keep in mind that Medicare pays in full for days 1-20, and pays days 21-100 only after a steep co-payment. Plus, to qualify for Medicare coverage in a nursing home, a patient must be receiving skilled care on a daily basis, following a three-day hospitalization. Other criteria apply as well.
3. *Visit prospective facilities and meet with facility administration, staff, and residents.* Make an unannounced second visit in the evening or weekend when staffing has been reduced. Do the residents appear happy? Do staff respond to the residents within a reasonable time? Are residents involved in group activities or do they appear relegated to their rooms or left alone in wheelchairs? Look at the meal menus and resident food trays. Does the food look appetizing? Do the residents seem to be enjoying the meal? Consider tasting it yourself.
4. *Check with the state regulatory agency regarding facility deficiencies and violations reported in annual survey inspections.* Many states require this information to be available for review at the facility.

5. *Obtain a copy of the admission agreement and review it carefully.* The admission agreement should state the obligations of the facility to the prospective resident as well as the resident's obligation to the facility. Once it is signed, the contract becomes legally binding. Although federal and state regulations dictate much of what nursing homes can and cannot do, most nursing homes have their own admission agreement. Studies have found that most illegal or questionable provisions appearing in admission contracts involve one of four categories: (1) attempts to restrict medical assistance availability, (2) waivers of liability for loss or harm, (3) restrictions on medical care or nursing services, and (4) improper financial requirements.<sup>3</sup> Where a contract clause violates state or federal law, it will be unenforceable and could even result in the payment of damages to the consumer under state consumer protection laws.

### Licensing and Regulation of Nursing Facilities

The Medicare and Medicaid programs represent the key sources of federal law in the regulation of nursing homes. Medicare is a federal health insurance program that provides limited benefits for nursing home stays.<sup>4</sup> Medicaid is a joint federal and state program that pays for nursing care for persons with limited income and assets.<sup>5</sup> Most nursing facilities receive payment from one or both of these two government benefit programs. Nursing homes that receive funding from either the Medicare or Medicaid program must meet the established federal standards.

Each state enacts their own regulations and laws to license and regulate its nursing homes. Consult your individual state law.

All nursing homes must comply with additional protections required under the Nursing Home Reform Act (NHRA), regardless of whether the facility is Medicare and/or Medicaid certified.<sup>6</sup> This law was passed in response to criticism that the regulatory framework at the time was ineffective.

To enforce these laws the federal Health Care Financing Administration promulgates regulations. Each state is then responsible for implementing both federal and state law. If a facility does not meet these standards, it can receive penalties ranging from civil fines to criminal charges. Additionally, nursing homes operated by the feder-

al government, such as Veteran Affairs facilities, are governed by those agencies' particular rules as well.

### **Other Areas of Law That Govern Nursing Home Practice**

There are a variety of rights and remedies that may be implicated in a particular nursing home situation. These legal rights and remedies unfortunately are too numerous to detail in this article. Consider whether any of the following may apply to a client's circumstances:

- Contract law
- Tort and personal injury law
- Consumer protection laws
- Federal civil rights laws
- Adult protective services and elder abuse statutes
- Criminal statutes
- Medicaid fraud (criminal abuse of residents)

### **Paying the Bill**

There are several possible sources of payment for the costs associated with a nursing home. Medicare may pay for recuperative care received in a nursing home for a limited period of time.<sup>7</sup> Medicare payments are based on a strict set of guidelines. Consequently, very few nursing home residents can utilize Medicare benefits while in a nursing home. Similarly, most supplemental health insurance will only pay for Medicare-qualified care. Typically, these policies pay the portion of cost not paid by Medicare. However, when Medicare benefits expire, benefits under a supplemental policy will likely terminate as well.

After benefits under Medicare and a supplemental health insurance policy expire, a person is forced to pay privately for nursing home care. Once an individual has depleted his or her private resources, he or she may qualify for Medicaid to pay for skilled nursing home care.<sup>8</sup> Medicaid benefits can continue indefinitely for persons in need of such care and whose assets and income are below a predetermined level. For questions regarding eligibility, contact an elder law attorney or state Medicaid eligibility specialist in your area.

One other possible source of payment for some individuals is long-term care insurance that will cover all or a portion of a nursing home stay. Unfortunately, most individuals do not investigate

long-term care insurance until such time as their health begins to decline. Due to advanced age or health status, a person may no longer qualify for the insurance or cannot afford the costly premiums. Long-term care insurance is not for everybody. If a client is concerned with paying for a nursing home and has sufficient assets to protect, the attorney should recommend that the client consult with someone knowledgeable regarding long-term care insurance products.

One final point is that, as indicated above, nursing homes cannot require financial guarantees from a prospective resident's family. The NHRA expressly prohibits third-party guarantees of payment.<sup>9</sup> Under the NHRA, a facility can only seek a guarantee of payment from a third party to the extent that party has legal access to the resident's income and resources, and the third party cannot personally be held financially responsible.<sup>10</sup>

### **Planning for Incapacity—Surrogate Decision-Making**

Ideally, documents appointing a surrogate decision-maker in the event of incapacity are discussed and executed well before a person ever enters a nursing home. Many times this is not the case. The situation is particularly complicated when nursing home admission is refused in the absence of a legal decision-maker.

As long as a person has a general understanding of the admission process and does not object to admission, the person can voluntarily admit himself or herself to a nursing home. Legally speaking, the person has provided informed consent to admission. In the event a prospective resident is unable to give informed consent, the facility must inquire as to the existence of a surrogate decision-maker, that is, an attorney-in-fact under a health care power of attorney or a court-appointed surrogate decision-maker, such as a guardian. In the absence of an advance directive or in circumstances of involuntary placement where a prospective resident objects to admission, a court order may be necessary for legal admission to a nursing home. In some states, a family member may authorize nursing home placement of an incapacitated individual. Check the law in your state to determine whether some form of "family consent" law is available in the absence of an advance directive or court order.

It is extremely important that attorneys who advise older persons regarding estate planning rec-

commend that clients execute advance directives specifically authorizing nursing home placement. Some advocates voice concern that this authority has grave potential for abuse and could in fact be used unwillingly to force placement on a recalcitrant individual. However, I am of the opinion that as long as a client chooses a person they trust to make major life-sustaining health care decisions, they should also trust the agent to make an informed decision regarding nursing home placement. Certainly a preference for less restrictive long-term care options can be stated in the advance directive further indicating a person's desire.

When a person who has failed to preplan for incapacity and is now faced with nursing home admission is no longer able to provide informed consent, court involvement may be necessary. Although a guardian may be granted authority to consent to nursing home admission, most plenary guardianships strip the ward of all rights to make decisions in managing his or her own affairs. Additionally, the cost of a guardianship proceeding in terms of money, time, and emotional burden can weigh heavily on everyone involved. Continued court involvement typically is necessary after a guardian is appointed. For example, a guardian of the ward's estate must prepare and file with the court annual accountings. The discretion of a guardian is fairly restricted, and many transactions require court approval before a guardian can proceed with a major financial or health care decision.

### **Resident's Rights and Quality of Care Issues**

Nursing home residents have a right to be treated with respect and dignity. A resident or his or her legal representative has the right to participate both in the design and implementation of the resident's care plan in addition to the resident receiving the care and treatment required. A significant portion of the law regulating nursing homes is designed to protect resident's rights.

In addition to the rights contained in federal regulations under Medicare, Medicaid, and the Nursing Home Reform Amendments Act, the Code of Federal Regulations expressly addresses the rights of nursing home residents. One regulation entitled "Resident Rights," sets out general rights, including the resident's right to enjoy a dignified existence, to have access to his or her facility records, to refuse treatment, to choose an attending

physician, and to manage his or her own financial affairs.<sup>11</sup> Other regulations specify transfer and discharge rights,<sup>12</sup> as well as a resident's right to be free from restraint, abuse, and mistreatment.<sup>13</sup> Finally, the Code enumerates very specific quality of care requirements ranging from the resident's right to have his or her needs adequately assessed upon admission<sup>14</sup> to the resident's right to a maintained or enhanced quality of life within the nursing home.<sup>15</sup> These regulations in combination with other federal laws form the basis of a resident's "bill of rights," which must be respected and rigorously enforced.

Similarly, state laws and regulations exist that either reinforce federal law or expand those rights codified under federal law. Like federal regulations, state regulations can be especially helpful in establishing the standard of care that a nursing home is required to provide its residents. It is the attorney's responsibility to ensure that clients receive the best possible care afforded under the law.

### **Resolving Nursing Home Disputes or Resident Abuse**

If a resident or family member has a question or complaint about care received in a nursing facility, financial matters, or any other nursing home-related problem, or if a resident feels that his or her rights have been abridged, there are several avenues available in search of recourse. Complaints involving resident care should be discussed with the assigned social worker at the facility. The social worker is responsible for ensuring that the resident's needs are adequately met within the facility or to arrange for appropriate care outside of the facility.

If the problem persists after discussing the matter with the social worker, consider filing a complaint with the local ombudsman. Ombudsmen serve as advocates, mediators, or intermediaries between a nursing home and the resident in an attempt to resolve problems, specifically those dealing with residents' rights violations. In most states, ombudsmen do not have enforcement authority and will therefore refer complaints that require enforcement to the appropriate regulatory agency.

State regulatory agencies that inspect nursing homes to ensure they are complying with federal and state regulations are a third source of recourse. These regulatory agencies normally will also inves-

tigate complaints involving residents' rights violations, and typically they have the necessary enforcement authority as well.

Consider contacting the *Nursing Home Administrator Examining Board* if your complaint involves an administrator who has acted unethically. This board licenses and regulates the professional conduct of nursing home administrators and will conduct an investigation if proper grounds are found.

If you suspect criminal violations have occurred, you should immediately notify the police or district attorney who will investigate the criminal allegations to determine whether formal charges should be filed. In Wisconsin there exists a criminal law against the maltreatment of a vulnerable adult.<sup>16</sup>

Additionally, you may want to consider contacting your state Medicaid Fraud agency. While traditionally these agencies only pursued criminal charges in cases where a provider (such as a nursing home) had illegally billed Medicaid, they now also regularly bring criminal charges against nursing home employees for abuse of residents. In addition, some state Medicaid Fraud Control Units are bringing Medicaid Fraud criminal actions against nursing homes who bill the Medicaid program despite the quality being illegally below quality of care regulations.

If administrative efforts have proved unsuccessful, the attorney may recommend initiating litigation against the nursing home. The duty owed by a nursing home to its residents is to provide the residents with good quality health care and services in a reasonably clean and safe environment. When a facility violates this duty resulting in injury to a resident, the facility may be held liable for money damages. Similarly, if a facility fails to provide goods or services, or the quality of the goods or services fails to meet applicable standards, or a contractual dispute regarding facility procedure exists, a person can be compensated for any actual harm suffered as a foreseeable result. Recently, juries have shown much less rigorous adherence to life expectancy and lost earning capabilities in assessing damages. Large jury verdicts have been awarded for nursing home torts. The attorney must first evaluate whether enforcement of the resident's rights through litigation is advisable before ever recommending that a client pursue these legal means.

## Areas of Attorney Involvement

In summary, an attorney may be consulted at any point throughout a client's stay in a nursing home. The diversity and complexity of issues may cause an attorney to feel uneasy accepting a nursing home case. However, the attorney need not be an expert in all areas of long-term care. The attorney should feel comfortable consulting with or referring the client to other professionals with particular expertise. One area where attorneys can be of great assistance to a client are eligibility or benefit questions concerning Medicare, Medicaid, or other public benefit programs. If the attorney is unable to answer these questions, referral of the client to a Medicaid eligibility specialist is advisable. Complex issues involving benefit denials or asset protection planning should be referred to an experienced elder law attorney.

Surrogate decision-making is another area for attorney involvement. Attorneys can save clients considerable time and money by drafting and executing health care and financial powers of attorney in anticipation of declining health. When preplanning is no longer feasible, an attorney may be asked to represent a family member or interested party in petitioning the court for guardianship and/or protective services. On occasion, the attorney may be asked to represent the proposed ward who is objecting to a proposed court-appointed surrogate. Often, the attorney must give serious consideration to the ethical problem of whom he or she represents. This is particularly difficult when an adult child requests representation in a petition for guardianship against a parent who is the attorney's former client.

Frequently, clients will contact an attorney when problems develop with nursing home staff that cannot be resolved through informal methods. Complaints involving serious deficiencies in the quality of care, violation of residents' rights, or physical injury require the attorney's immediate attention. Generally, these problems involve filing a complaint with an administrative agency before initiating a court proceeding. However, if such efforts are unsuccessful or the violation so egregious, the attorney may have no other recourse but to seek remedies through the courts.

At first glance the many tasks requested of an attorney practicing in the area of long-term care

appear understandably daunting. However, once a resolution to these issues has been obtained—no doubt through considerable negotiation, patience, and compassion—the attorney will discover the practice of elder law to be incredibly rewarding and professionally satisfying.

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### Endnotes

1. See generally Medicare's Prospective Payment System, 42 U.S.C. § 1320c-1 et seq. (1990).
2. See generally 42 U.S.C. § 1320c-1 et seq. (1990); 42 C.F.R. 460 (1989).
3. LEGAL COUNSEL FOR THE ELDERLY, INC., *A Practical Guide to Nursing Home Advocacy*, at 65 (1990).
4. See generally 42 U.S.C. § 1395 et seq. (Medicare statute); 42 C.F.R. § 405-21 (Medicare regulations).
5. See generally 42 U.S.C. § 1396 et seq. (Medicaid statute); 42 C.F.R. § 430 et seq. (Medicaid regulations).
6. See generally 42 U.S.C. §§ 1395i-3 et seq., 1396r et seq. (NHRA: Omnibus Budget Reconciliation Act of 1987).
7. See generally 42 U.S.C. § 1395 et seq.
8. See generally 42 U.S.C. § 1396 et seq.
9. See 42 C.F.R. § 483.12(d)(2).
10. *Id.*
11. Betsy Abramson et al., *Advising Older Clients and Their Families* (1998), at Ch. 19, p. 5; 42 C.F.R. § 483.10.
12. *Advising Older Clients*, *supra*, at Ch. 19, p. 5; 42 C.F.R. § 483.12.
13. *Advising Older Clients*, *supra*, at Ch. 19, p. 5; 42 C.F.R. § 483.13.
14. *Advising Older Clients*, *supra*, at Ch. 19, p. 5; 42 C.F.R. § 483.20.
15. *Advising Older Clients*, *supra*, at Ch. 19, p. 6; 42 C.F.R. § 483.15.