

Enforcing Elder Rights through Private Civil Litigation: An Ethical Responsibility

Illinois Department on Aging
2013 Adult Protection and Advocacy Conference

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Introductions & Background

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Causes of Poor Care and Abuse in Long-Term Care

- **Common "Themes" in Long-Term Care**
 - "Profits over People"
 - "The Worse the Care, the Higher the Share"
 - "Census over Care"
- **What this Translates to is:**
 - Understaffing
 - Unpaid Workers
 - Undertrained Staff
 - Lack of Supervision
 - Injuries
 - Neglect



Common Types of Long-Term Care Abuse & Neglect Cases

- Pressure sores/bed sores
- Dehydration and/or malnutrition
- Falls resulting in injury
- Medication errors
- Physical, sexual and verbal abuse
- Choking
- Sepsis
- Wandering/Elopement
- Physical or chemical restraint
- Medication Errors



IDPH

- Illinois Department of Public Health's Role
 - Issue licenses
 - Monitor compliance with federal and state regulations
 - Field complaints
 - Inspect nursing homes
 - Issue violations and penalties
 - Determine Medicare/Medicaid eligibility



The Justice System's Role in Protecting the Elderly

- Senior advocates, ombudsmen, individuals, and family members should understand the legal remedies available to older adults.
- Filing a lawsuit should not be seen as a controversial action, but rather a vehicle for change.



How does the Tort System Regulate the Long-Term Care Industry

- Although Federal & State agencies regulate nursing homes...
 - Faced with limited resources
 - Large caseloads
 - Constrained by the political process
- When government oversight stalls, victims turn to the courts to gain the attention of corporations and the public



Pros of Private Litigation

- Compensates individual victims
- Focuses on individual violations
- Creates incentives for the long-term care industry to deliver better and safer care
- Protects others from future harm
 - Case example: *C.M. for H.M. vs. Winchester House*



What Legal Options are Available to Individuals & Families?

- Residents are protected under Federal and State laws that govern resident safety protections and quality of care standards.
 - Fact
 - Long-Term care facilities are subject to more regulations than any other health care institution
- When facilities fail to provide proper care and a resident is injured, the resident or his/her family has the right to file a lawsuit to recover compensation for economic and non-economic damages.



Causes of Action against a Nursing Home

- Nursing Home Care - Act 210 ILCS 45/1
- Survival Action - Common Law Negligence
- Wrongful Death Action - Common Law Negligence



The Laws that Protect Long-Term Care Residents

- Illinois Nursing Home Care Act
 - 210 ILCS 45/1
- Omnibus Budget Reconciliation Act of 1987 ("OBRA")




Illinois Nursing Home Care Act

- o Enacted in 1979 "amid concern over reports of inadequate, improper and degrading treatment of patients in nursing homes." (Senate Debates, 81st Ill. General Assembly, May 14, 1979, at 184)




Illinois Nursing Home Care Act

- Four Focuses of the Act
 - Sets forth rights of all long term care facility residents
 - Expands the powers of the State to deal with facilities which provide inadequate care
 - Requires training and minimum qualifications for non-licensed staff
 - Provides new opportunities for residents and community advocates to become involved in assuring quality nursing home care




Illinois Nursing Home Care Act

- NHCA as authority for bringing a lawsuit
 - Private Cause of Action - Most significant provision of the NHCA
 - 210 ILCS 45/3-602
 - Nursing Home Care Act authorizes a statutory cause of action for "actual damages and costs and attorney's fees" *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 489 N.E.2d 1374, 95 Ill.Dec. 510 (1986)




Illinois Nursing Home Care Act

- ▶ NHCA – Resident’s Rights
 - Including, but not limited to:
 - Manage own financial affairs
 - Retain personal physician
 - Refuse medical treatment
 - Access to medical records
 - Right to privacy
 - Free from physical and chemical restraints
 - Free from unnecessary drugs
 - Present grievances without the fear of retaliation




Illinois Nursing Home Care Act

- NHCA – “Abuse & Neglect” – A Resident’s Right
 - 210 ILCS 45/2 – 107
 - “An owner, licensee, administrator, employee or agent of a facility shall not abuse or neglect a resident.”




Illinois Nursing Home Care Act

- Abuse – Section 103
 - "Abuse" means any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility.
- Neglect – Section 117
 - A facility's failure to provide adequate medical care, mental health treatment, psychiatric rehabilitation, **personal care**, or **assistance with activities of daily living that is necessary to avoid physical harm**, mental anguish, or mental illness of a resident. (Source: P.A. 96-1372, eff. 7-29-10.)




Federal Law: OBRA

- Require nursing homes to provide, at a minimum, care in “the highest practicable physical, mental, and psychosocial well-being” of the resident



“The Standard of Care”

- ▶ OBRA - The Standard of Care
 - Establishes standards of care required for facilities who are reimbursed by Medicare
 - Medicare recipients must undergo a thorough assessment process called the MDS process, or Minimum Data Set
 - Basis for nursing home’s reimbursement from Medicare
- ▶ IL NHCA – The Standard of Care
 - Establishes standards of care for facilities in Illinois
 - Facilities receiving reimbursement from Medicaid must comply
 - Mirrors federal regulations almost exactly in requirements under standards of care




“The Standard of Care”

- Policies & Procedures
 - Facility’s own policies & procedures set the Standard of Care
 - Example – Wound Assessment Weekly
- Widely recognized industry standards
 - i.e. – National Pressure Ulcer Advisory Panel




The “Model” Nursing Homes are Required to Follow

- The “Model”
 - Assess
 - Develop Care Plan
 - Communicate Care Plan
 - Implement Care Plan
 - Re-Assess upon a Change in Condition
 - Update Care Plan




Common Regulations

- Pressure Sores
 - A regular program to prevent and treat pressure sores, heat rashes or other skin breakdown is to be practiced on a 24-hour, seven-day-a-week basis.
 - Purpose: A resident who enters the facility without pressure sores does not develop pressure sores unless the individual’s clinical condition demonstrates that the pressure sores were unavoidable.
 - A resident having pressure sores shall receive treatment and services to promote healing, prevent infection, and prevent new pressure sores from developing.




Common Regulations

- Falls
 - All necessary precautions shall be taken to assure that the residents’ environment remains as free of accident hazards as possible.
 - All nursing personnel shall evaluate residents to see that each resident receives adequate supervision and assistance to prevent accidents.
 - The facility must ensure that:
 - » The resident environment remains as free of accident hazards as is possible; and
 - » Each resident receives adequate supervision and assistance devices to prevent accidents.




Common Regulations

- Staffing
 - Sufficient staff in numbers and qualifications shall be on duty all hours of each day to provide services that meet the total needs of the residents.
 - At a minimum, there shall be at least one staff member awake, dressed, and on duty at all times.




Common Defense - Unavoidability

- Unavoidable
 - Nursing homes will claim that injuries “unavoidably” developed
 - Many things required to show actual unavoidability
 - Can't keep a resident they can't care for



Common Defense - Unavoidability

- Proving Unavoidability
 - OBRA defines unavoidability as:
 - A determination of unavoidable decline or failure to reach highest practicable well-being may be made only if all of the following are present:
 - An accurate and complete assessment;
 - A care plan which is implemented consistently and based on information from the assessment; and
 - Evaluation of the results of the interventions and revising the interventions as necessary.




Elder Rights: An Ethical Responsibility

- Initiating legal action
 - Seeking critical information
 - Obtaining relevant documentation
- Common ethical considerations
 - Identifying the appropriate client
 - Upholding the Model Rules of Professional Conduct



Initiating legal action


- The attorney/advocate/caregiver's role in defending the rights of injured and abused older adults begins here.
- The intake process involves seeking critical information and obtaining relevant documentation that you or the family can then relay to the nursing home lawyer.



Seeking Critical Information

When working with a resident or family member


- What questions can you ask and what information will be most helpful in helping a nursing home lawyer determine if there is a cause of action to pursue



Seeking Critical Information

When working with a resident or family member (cont.)

- What is the nature and extent of the injury?
- What does the resident or family believe the facility did or did not do to cause these injuries?
 - Personal observation
 - A nursing home employee blew the whistle
 - Doctor or other healthcare provider advised them to contact a lawyer
 - Hospitals have a duty to report suspected neglect



Seeking Critical Information

When working with a resident or family member (cont.)

- Did they file a complaint with the Illinois Department of Public Health?
 - An IDPH report may help you determine whether or not to pursue a case.
 - Do not be discouraged if the IDPH does not cite the nursing home.



Seeking Critical Information

When working with a resident or family member (cont.)

- Chronology
 - Establish a medical history before the resident's admission to the nursing home through the time of the resident's injury or death
 - Co-morbidities?
 - Ask about any hospitalizations or admission to other facility
- Has the family already obtained medical records?



Seeking Critical Information

When working with a resident or family member (cont.)

- Other questions to consider:
 - Family history
 - Is there a will
 - Who are the heirs
 - Family involvement in their loved one's care
 - Names of physicians and staff members



Obtaining Nursing Home Records

- OBRA authorizes the obtaining of records
- The resident or his or her legal representative has the right:
 - to access all records pertaining to him/herself within 24 hours (excluding weekends and holidays) upon an oral or written request; and
 - to purchase photocopies of the records or any portions of them upon request and 2 working days advance notice to the facility



Obtaining Nursing Home Records (cont.)

- Living resident
 - Residents themselves have rights to request records, as does the
- Deceased resident
 - Authorized by Court Order, letter of office (will)
 - "Authorized Relative" under 735 ILCS 5/8-2001.5



Obtaining Nursing Home Records (cont.)

- If the nursing home is not complying with the record requirements, report them to the IDPH



Common Ethical Considerations

- Working with attorneys to identify who can take legal action on behalf of the victim
- Upholding the Model Rules of Professional Conduct



Identifying the Appropriate Client

- Because of a nursing home resident's age and medical conditions, initial contact is likely from a family member or friend.
- If the injured nursing home resident is still alive, the resident can assert a claim for damages.
- If the injured nursing home resident is deceased, then the estate and surviving beneficiaries can assert a claim for damages.



Upholding the Model Rules of Professional Conduct

- Competency
 - When a resident cannot make decisions about legal representation due to mental impairment or for some other reason, the lawyer shall maintain a normal client-lawyer relationship with the client.
- If the client's competence is in question, a probate attorney can help assess whether an objective third party – guardian ad litem, conservator, or guardian – should be appointed



Upholding the Model Rules of Professional Conduct (cont.)

- Formation of Client-Lawyer Relationship
 - The relationship between a client and a nursing home lawyer only arises when both the attorney and client have consented to its formation.



Upholding the Model Rules of Professional Conduct (cont.)

- Confidentiality
 - The nursing home lawyer cannot reveal information related to the legal action unless the client gives informed consent.
 - Family members are not entitled to all information about the lawsuit or the client's medical conditions.



How to Help Residents and Families Take Action

- Educate them on their rights
- Help them gain access to the courts



Advising Residents and Families

- Assisting a current resident
 - Identifying violations
 - Informing them of their legal rights
 - Helping them obtain the proper documentation
 - IDPH reports
 - Records



Advising Residents and Families (cont.)

- Connecting them with an attorney
 - What to look for in an attorney...
 - Experience representing older adults
 - Experience handling similar types of cases



Interactive Discussion

- What have been your experiences from the field?
- What have you observed regarding common obstacles?
- How can we help you facilitate the legal process to protect elders?
- Q & A



Contact us
with questions, feedback, or if you believe that we can help an older adult you know or work with:

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Thank you!