

## 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!