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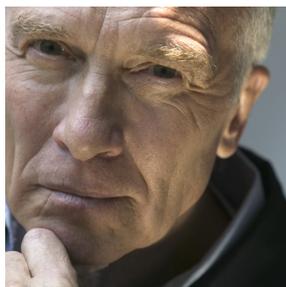


**Holding Nursing Homes Accountable for Poor Care:
A Briefing for Residents and Their Loved Ones**



After I fell, the doctor told me I would be getting physical therapy twice a day so that I can walk again. But nobody has come in days, and when I told the nurse she said they are short on staff and doing the best they can. I'm afraid I might not be able to walk again - What can I do?

When I come to visit my mother I often find her sitting in a wheelchair, in a corridor, alone. One day I saw a state inspector and told him about it, but he did not seem interested. I'm worried, but don't know where else to turn - What can I do?



Dad was always outgoing and independent, even after moving to the home. Then the nurse told him he had to wear a diaper, because they did not have time to help him walk to the bathroom. I complained to the administrator, but she said Dad needs to get used to nursing home life. What can I do?

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INTRODUCTION

When a nursing home fails in its responsibility to provide good care for residents, and government fails to hold the nursing home provider accountable, it is important that consumers know their options and legal rights. Despite strong legal requirements for nursing homes to provide good care and dignified conditions for residents, the nursing home crisis continues. As a result, too many of our most vulnerable citizens suffer needlessly every day because nursing homes fail to provide good care and the government fails to hold them accountable. In 1987, Congress passed the groundbreaking Nursing Home Reform Law ("OBRA 87"), which requires that every nursing home resident "be provided with services sufficient to attain and maintain his or her highest practicable physical, mental, and psycho-social well-being." Yet, as we mark OBRA 87's 20th anniversary, nursing homes too often continue to be unpleasant and hostile environments, the agent of harm rather than provider of care & protection, and, for good reason, "the option of last resort."

Following is an overview of information that can help a resident, family member or friend understand how the law can be used to protect themselves and their loved ones. IMPORTANT NOTE: While the following contains discussions of legal issues it is crucial to know that they do not constitute legal advice. If you have questions or problems that cannot be resolved with the facility, through the state licensing agency (the NY Department of Health) or with the help of your local long term care ombudsman office, you may want to seek the advice of an attorney. The National Academy of Elder Law Attorneys can help you find

Federal law requires that a nursing home ensure that every resident receives sufficient care to maintain their highest practicable social, physical and mental well-being. Is your nursing home abiding by this law?

a private attorney or, if you cannot afford an attorney, you may be able to access free legal aid services in your community. For more information on available services, contact your state or local bar association.

WHAT PROTECTIONS ARE THERE FOR NURSING HOME RESIDENTS?

Laws and Regulations Surrounding Nursing Homes

There are laws and rules on both the federal and state levels protecting residents from abuse and neglect. As mentioned earlier, the federal Nursing Home Reform Law (OBRA '87) entitles all nursing home residents to receive good care and live in an environment that maintains

It is important to know that the standards set forth in the federal law are the minimum, to which every nursing home in the country can and should be held accountable. State laws can only enhance the federal standards.

the quality of their physical and mental health. This entitlement includes freedom from neglect, abuse, and misappropriation of property or funds. The New York State nursing home regulations (Title 10, section 415 which can be found on the Department of Health's website – www.health.state.ny.us) mirror the federal rules (with some even more protective language) for all licensed nursing homes in New York State.

Duties and Responsibilities of Nursing Homes

Fundamentally, laws and regulations give the nursing home a legal obligation to meet a "reasonable standard of care" for each nursing home resident taking into account the resident's physical and mental condition. A reasonable standard of care is generally considered to be what a prudent or sensible individual would do under the circumstances. This obligation includes keeping safe premises for residents and keeping residents safe. Nursing home residents are susceptible to certain types of

problems, such as the development of bedsores (pressure ulcers), loss of balance/falling, dehydration and depression. Many professionals believe that such outcomes are almost always preventable. Failure to take reasonable steps to prevent negative outcomes is a breach of a nursing home's duty to its residents. If a problem does develop, the nursing home is required to take action to treat the resident and ensure that the problem does not progress further. If nursing home facilities are incapable of providing the care necessary to treat a resident properly, they are required to transfer that resident to another facility for proper medical care. In addition, the use of physical and chemical restraints (use of psychotropic medication) is severely limited.

WHERE SHOULD NURSING HOME RESIDENTS TURN WHEN THERE IS A PROBLEM THAT CANNOT BE REMEDIED WITHIN THE HOME?

When a nursing home does not comply with laws and regulations, it is important that residents of nursing homes and their loved ones know what steps to take if working with the nursing home has not remedied the situation.

Call the Long Term Care Ombudsmen

Under the Older Americans Act, every state is required to have a Long Term Care Ombudsman Program. The responsibilities of the ombudsman program include advocating for residents of nursing homes and other long term care facilities, helping with resident complaints, and making sure that residents and families participate in the survey process. Your local ombudsman can be located by visiting the NY Ombudsman Program's Website at www.ombudsman.state.ny.us or calling the aging hotline: 1-800-342-9871.

Call an Advocacy Organization

There are a number of advocacy organizations that might be able to help, either as you work with the nursing home or as you make an official complaint to the state. For instance, FRIA (Friends and Relatives of Institutionalized Aged, an LTCCC member) provides extensive free services to those having problems with nursing home care. Their hotline number is (212) 732-4455 and their Website is www.fria.org. Visit our Website, www.ltccc.org, for more information on advocacy and consumer resources (see our membership list which includes many organizations that help consumers).

Make a Complaint to the Department of Health

The NY Department of Health (DOH) is the state licensing agency responsible for ensuring that nursing homes meet the minimum standards set forth in federal as well as state law. DOH is responsible for inspecting (surveying) nursing homes, identifying deficiencies and ensuring that those deficiencies are corrected. DOH is also responsible for responding to nursing home consumer complaints, through its hotline: 1-888-201-4563. These complaints can be made anonymously.

Contact the State Attorney General's Office

The state attorney general's office investigates nursing home resident abuse and neglect, principally through the Medicaid Fraud Control Unit (MFCU). The MFCU's investigations of nursing home resident care have resulted in criminal prosecution of nursing home owners and staff when abuse and neglect were found. In addition, the MFCU has been able to require providers to institute better practices and to refund

Many people are hesitant or afraid to complain or take legal action when their loved ones are harmed. But these actions can make a difference, Could your loved one have received better care if someone in the past had held the facility accountable?

substantial sums of tax payer dollars. To report a problem or concern, you can contact the MFCU at (212) 417-5397.

LEGAL REMEDIES TO FIGHT NURSING HOME MISTREATMENT

When nothing else works, and DOH has either not validated your complaint and/or has not been able to correct significant instances of resident mistreatment, it may be time to take legal action. Consumers may be hesitant to seek an attorney's advice or to take the further step of filing a suit against a nursing home. Fear of retribution is a major impediment to filing a complaint within the nursing home system or in court. Cost may be another impediment to filing a lawsuit. Sometimes, especially if the resident has died, the family does not want to dwell on what happened. However, if nothing else has helped, the benefits of filing a suit against the facility may be worthwhile. Even if it is too late to help your loved one, think about the difference you can make to prevent others from going through the pain and heartache of poor nursing home care.

Who may bring a claim (have grounds for a lawsuit) against a nursing home?

In general, any person who suffers injury or loss from a nursing home's failure to exercise proper care of a resident may bring a lawsuit against the nursing home, and recover damages (a monetary award) to compensate them for such injury or loss. The owner or manager of the nursing home or anyone whose conduct contributed to the resident's injury may be held liable or legally responsible (this includes employees and treating physicians who are part of the nursing home). Claims brought against nursing homes for failure to provide proper medical care or treatment to a resident are often referred to as "nursing home malpractice" actions.

Bringing a claim

Consumers can turn to private law firms to file claims against nursing homes. Most medical malpractice attorneys will charge a contingency fee (a percentage of money recovered) which is dependent on recovering monies. Consumers may also go to legal aid legal offices, which offer services at no charge. There are administrative and investigative materials that can help consumers prosecute nursing home claims. New York State survey materials are readily accessible to the public and provide useful (though not always perfect) information on a facility's performance (see Nursing Home Profile on DOH's website: www.health.state.ny.us – go to Long Term Care). In addition, the U.S. government provides data on surveys, staffing levels and quality measures at www.medicare.gov (scroll down to nursing home compare link). These can also be helpful resources for consumers to review when trying to find a nursing home.

Overview of Legal Claims

Following is a brief listing of the most common causes of action - bases for suing – which have been used successfully in legal advocacy for nursing home residents. More detailed information can be found in our report, *Using Law and Regulation to Protect Nursing Home Residents When Their Government Fails Them* (see “selected resources” below). As noted earlier, it is crucial to remember that only an attorney is qualified to provide legal advice on an individual situation.

- **Negligence:** A claim of negligence is a logical cause of action in nursing home cases. Negligence requires that there be a duty which is violated and that the violation of that duty results in injury or other damages. Example: As mentioned in the discussion of OBRA 87 at the beginning of this guide, nursing homes have a duty to ensure that “A resident who enters the facility without pressure sores does not

develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable..." If a nursing home fails to provide this level of care, and a resident develops pressure sores as a result of that failure, then the nursing home can be held liable for negligence.

- **Wrongful death:** (self-explanatory).
- **Intentional tort:** A deliberate act that causes harm, for which the victim may sue the wrongdoer. Examples in a nursing home include assault and sexual assault. In this situation, the nursing home would likely be responsible for the actions of an employee.
- **Negligent hiring and supervision:** When a nursing home fails to exercise proper care in the hiring of individuals or in the supervision of their care for residents which leads to resident harm.
- **Third party responsibility claim:** A nursing home can be found liable because of acts of a third party when the nursing home fails to protect residents from other residents or others in the home. Example: A resident is injured or assaulted by another resident.
- **Breach of statutory or regulatory rights, duties or responsibilities:** Suitable for injuries such as violations of residents' right to autonomy, dignity, or privacy.
- **Medical Malpractice:** In order to bring a medical malpractice action against a nursing home, the injury must be related to the medical treatment of the resident.

A more extensive description of the different causes of action (bases for suing) applicable to nursing home lawsuits can be found in the LTCCC report, "Using Law and Regulation to Protect Nursing Home Residents," which is available at www.nursinghome411.org.

Conclusion

Everyone has heard how terrible nursing homes can be. Unfortunately, too many of us believe that 'that's just how things are' or that nothing can be done to make things better – bad treatment is 'to be expected.' In fact, a federal law was passed 20 years ago which changed those expectations. As a result of passage of the Nursing Home Reform Law (commonly known as OBRA 87), nursing homes have a legal responsibility to provide sufficient care and services so that every single resident attains or maintains the highest practicable physical, mental and psycho-social well-being. Nursing homes are responsible for ensuring that every resident receives "appropriate treatment and services to maintain or improve" his or her abilities in activities of daily living (such as eating on one's own, going to the bathroom or bathing).

Holding nursing homes accountable is essential to reduce mistreatment...

Many of us have heard excuses when our nursing home fails to meet these and other legal responsibilities: "*We are busy with other residents on the floor right now,*" "*There just isn't enough staff to take care of that,*" "*I'm sorry, but the nursing home does not have enough money or resources to provide 'special' services.*" None of these excuse the nursing home's legal duty to its residents.

Holding nursing homes accountable is essential to reduce mistreatment and improve the quality of life and care of residents. If a nursing home is providing inadequate care, action should be taken immediately. Think about other situations where you are a consumer: If you went to a restaurant, would you accept it if they seated you but then nobody came to take your order for over an hour? What if you asked someone where the bathroom was and they told you that they didn't have time to help you? If you ordered a hamburger and they brought you

a bowl of soup instead, how would you feel? Or if you asked for ketchup and they told you that your burger didn't come with "special extras," but for an additional \$10 they could "arrange" for ketchup to be brought to you?

Most of us would not tolerate any of these situations. We would probably be outraged. So why do we accept it when nursing homes fail to provide adequate care and decent quality of life for our most vulnerable citizens? As a community, we pour enormous amounts of money into nursing homes every day. Twenty years ago, in the face of scandalous conditions, our country passed a strong law to ensure that every single nursing home resident in the United States is treated with dignity and receives the care they need to achieve the highest possible level of physical and psychological well-being. Unfortunately, the government is often not able (or willing) to effectively enforce the law. When that happens, it is up to us – residents, families and friends – to make sure that nursing homes follow the law and are held accountable. The lives of our nursing home residents, now and in the future, depend on it.

Selected Consumer Resource Materials

An Easy-to Read Guide for Residents, Families and Staff: Rules and Regulations Governing New York State Nursing Homes. The rules nursing homes must follow in lay language. Available from LTCCC for \$10.00 (50 % discount for residents; 25 % discount for friends and relatives of residents; discount for bulk orders (email info@ltccc.org or call 212-385-0355)).

Nursing Homes: Getting Good Care There (2nd Edition). This consumer guide to achieving the best possible nursing home care for a relative or friend includes tips and checklists. The authors use everyday language and real-life examples to show that respecting each resident's individuality,

dignity and physical and emotional well-being is within reach. Available from NCCNHR for \$11.95 + s/h (call 202-332-2275 or go to www.nursinghomeaction.org/ecommerce/default.cfm).

Nursing Homes and Alternatives: What New York Families Need to Know.

This resource book provides information for residents and families on a range of important issues, including: choosing a nursing home, paying for long term care and monitoring care after placement. Available from FRIA for \$20 (http://fria.org/publications_eldercare.html or call 212-732-5667).

The Baby Boomer's Guide to Nursing Home Care. This guidebook takes a "nuts and bolts" approach to explaining the laws that protect nursing home residents and providing practical advice on how residents and their families can obtain the best nursing home care possible. Available from NSCLC for \$13.45 + s/h (<http://nslc.org/publications/index.html>).

Using Law and Regulation to Protect Nursing Home Residents When Their Government Fails Them. Despite strong legal requirements for nursing homes to provide good care and dignified conditions for residents, the nursing home crisis continues. This report identifies the primary legal mandates that are too often disregarded by both nursing homes and government surveillance and provides pragmatic as well as inspiring examples of people and organizations that have overcome systemic hurdles in the fight to protect nursing home residents. Available for free from LTCCC (download at www.nursinghome411.org).

Internet Resources

AARP Foundation Legal Advocacy – www.aarp.org/research/legal-advocacy/

Centers for Medicare & Medicaid Services (CMS) - Visit www.medicare.gov and go to “nursing home compare” to find out survey results and other quality measures for any nursing home in the country.

Elder Care Rights Alliance – (800) 893-4055 www.eldercarerights.org – Provides information about working with nursing home resident councils as well as other long term care issues.

Eldercare Locator – (800) 677-1116 – To report elder abuse or neglect.

Help Guide.org - http://www.helpguide.org/mental/elder_abuse_physical_emotional_sexual_neglect.htm - Detailed information on elder abuse and neglect.

LawHelp - www.lawhelp.org/NY/ - On-line resource where you can find free legal services in your community, learn about your legal rights, get information about the courts, and more.

Long Term Care Community Coalition – www.ltccc.org or www.nursinghome411.org – LTCCC advocates for long term care consumers. The Websites have news, information and resources on nursing home care and advocacy, as well as information on enforcement issues in NY State. Enforcement actions against nursing homes in NY State are published every quarter in *The Monitor* newsletter.

National Senior Citizen’s Law Center – www.nsclc.org – Legal advocacy organization for senior citizens with focus on nursing home care, assisted living and other issues affecting the elderly.

NCCNHR – www.nccnhr.org – National long term care advocacy organization based in Washington, DC.

NY State Attorney General– www.oag.state.ny.us/seniors/nursing.html - On-line guide to choosing a home and the attorney general's role.