

NURSING HOME ABUSE AND NEGLECT

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I. Introduction.

Currently, there are approximately 25,000 persons that reside in one of 245 licensed nursing homes in the state of Alabama. This number is certain to increase substantially in the next 10 years as the baby boomers increase in age. Unfortunately, the quality of care provided at nursing homes in Alabama is very suspect. According to a 1999 report from the Department of Social and Behavioral Sciences at the University of California, San Francisco, Alabama nursing homes have some of the poorest scores in the Southeast on annual inspections. This study showed that Alabama nursing homes are third worst in the nation in staffing, second worst in the nation in providing sufficient assistance to residents, seventh worst at assessing residents, tenth worst for both accident prevention and providing activities.

It is likely that these scores – as bad as they are – actually underestimate the problems in Alabama’s nursing homes. Alabama has only 37 long term care inspectors for over 26,000 beds and spends substantially less (over 50% less) for inspections than seven other Southern states. Although these inspectors do the best they can under the circumstances, it is apparent that the inspections are not enough to regulate the nursing home industry. The limited manpower and budget almost ensure that inspections will not occur as often as needed and that all complaints of abuse or poor care will not be

investigated. In 2001, there was a backlog of more than 1,200 complaints of abuse or neglect pending investigation.

Nursing home nightmares are certainly not limited to Alabama. This is a national crisis. According to a 2002 study performed by the Department of Health and Human Services, more than 90 percent of nursing homes in the United States do not have enough nurses and nursing assistants to provide essential services to avoid common quality of care problems. The study concluded that a daily minimum of 4.1 hours of total nursing time is required to avoid common quality of care problems such as bedsores, weight loss, and loss of bodily functions for long term residents. Ninety-seven percent of nursing homes do not provide this minimum threshold of nursing care to avoid these serious problems. Unfortunately, the Bush administration dismissed the report – which was developed over four years – as “insufficient” and refuses to address the staffing issues that endanger nursing home residents nationwide.

Because of the poor quality of care, the limitations of the state regulatory agency, and the apparent indifference of the current administration, many families look to litigation as a way to fight back and protect the rights of nursing home residents. Nursing home residents too often are helpless victims of nursing facilities that place profits over people. Through litigation, these persons have a voice. Even individual claims have been successful in unveiling the sources of problems and are beneficial to an overall improvement of the quality of care.

II. Common Forms of Abuse and Neglect.

In long term care settings there can be a variety of situations that result in injury to residents. Some of the most common situations concern:

A. Pressure sores -- When residents are immobile or limited in their ability to move, they are at risk for developing pressure sores or areas of skin breakdown due to friction and/or the restriction of blood flow to certain areas – commonly the heels or tailbone. The nursing home should take care to prevent the development of pressure sores by taking care to turn residents often and utilize devices that eliminate pressure to problem areas. If the development of a pressure sore is unavoidable due to some medical condition, then the nursing home must identify the problem and take action to promote healing, including proper dressing, nutrition, and evaluation by a physician.

B. Malnutrition -- Too often nursing home residents suffer from poor nutrition. This may be the result of unappealing food, or a reluctance or inability to eat. Because of insufficient staffing at nursing homes some residents who are unable to eat unassisted are not receiving proper nourishment. The limited staff is simply unable to assist every resident that needs assistance to eat.

C. Dehydration -- Maintaining proper hydration is critical for the health of nursing home residents. As with nutritional requirements, staffing issues have a great impact on proper hydration. Nursing home residents often need to be reminded to drink fluids or need help taking fluids. If a facility is understaffed, then this care may not be provided.

D. Falls -- Falls resulting in injuries to residents are the most common problem at nursing homes. The staff has a responsibility to avoid accidental injuries –

including falls – that injure residents. Falls can occur at night when a resident attempts to exit the bed, when a resident is walking in the nursing home, or when the resident is assisted by a nurse or an aide. On admission and at quarterly intervals, the nursing home must assess each residents risk for falls and take appropriate action. Interventions may include placing a resident on a lowered bed, using bed rails, or padding the floor in a resident’s room. Alarms that alert the staff when a resident moves from his bed or chair and needs assistance are also helpful in preventing falls. Probably the most effective fall prevention technique is frequent monitoring of residents and prompt replies when a resident calls. Again, proper staffing is crucial to proper fall prevention.

E. Medication or Reporting Errors – In a nursing home setting, the majority of residents are totally dependent on the staff to provide proper medication at the times ordered by the physician. Many residents’ lives depend on the accurate administration of medication. Unfortunately, medication errors can be a frequent occurrence. Either a resident does not receive the appropriate medication or receives an incorrect dosage. Nursing homes also may have difficulty keeping track of tests results that were ordered by a physician or reporting the results or significant changes in a residents condition to a physician. When this occurs, the delay in treatment can have catastrophic results for fragile residents.

F. General neglect or abuse -- Other types of abuse or neglect at nursing homes can come in the form of assaults by other residents or staff members, allowing residents to elope from facilities, verbal or emotional abuse, unsanitary conditions, or staff members that simply ignore resident’s pleas for help. It is critically important for a nursing home to thoroughly screen potential employees to learn of any negative history

and equally important to continuously access the performance of its employees. If this is not done, it places every resident in the facility at risk for serious injury or death.

III. The Alabama Medical Liability Act

A. Burden of Proof.

In Alabama, claims against nursing homes are controlled by the Alabama Medical Liability Act. This act was originally enacted in 1987 but has been amended by several “tort reform” movements in 1992, 1996 and 2000. Section 6-5-548(a) of the AMLA 1996 establishes an increased burden of proof for plaintiffs in nursing home cases:

In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider (nursing home) for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

In order to meet this burden of proof, a plaintiff must provide expert witness testimony in support of his or her claims. To be qualified to testify as to the standard of care that a defendant allegedly breached, an expert witness must come within the definition of a "similarly situated health care provider" under § 6-5-548(b) or § 6-5-548(c), depending on the situation. Also, a plaintiff must prove – through testimony of a currently licensed physician – that the nursing homes violation of the standard of care “probably caused the injury or death in question” § 6-5-549.

B. Restrictions on claims imposed by AMLA

In addition to requiring expert medical testimony, the AMLA places restrictions on where a lawsuit against a nursing home may be filed, prohibits the discovery of any information concerning a nursing homes liability insurance, requires that plaintiff’s

complaint provides a detailed specification and factual description of each and every act that injured the resident. This legislation has given the nursing homes a distinct advantage when defending claims.

Section § 6 -5-551 of the AMLA provides the most protection to defendant nursing homes. This section effectively prohibits a plaintiff from discovering evidence of “other acts and omissions” or other similar instances where the nursing home injured other residents. In cases not governed by the medical liability act, this evidence would be discoverable and may allow a plaintiff to demonstrate that defendant has a pattern or practice of causing or allowing injuries. In cases against nursing homes, the medical liability act prohibits plaintiffs from finding out about other acts or omissions in most cases.

IV. Government Regulations.

In most cases involving long term care, the nursing home is paid completely or in large part by public healthcare benefits. In Alabama, most nursing home residents are Medicaid and Medicare recipients. In 2003, 73% of Alabama nursing home residents were covered by Medicaid for the normal everyday care that the resident requires. This care includes eating, bathing, dressing, toileting, general nursing care, and prescription medications and supplies. Total monthly costs are usually between \$ 4,000 and \$ 4,500 per month. Medicare does not pay for daily long-term care, however Medicare will help pay for skilled care in a nursing home under certain circumstances.

Because nursing homes are paid largely through these governmental healthcare benefit programs, they are subject to numerous Federal and State Regulations. These Regulations are extensive and specify the type of care and documentation of care

necessary for a nursing home to qualify for payment. The Federal Regulations governing nursing homes are set forth in the Omnibus Budget Reconciliation Act of 1997, also known as the Nursing Home Reform Act. The Federal Agency responsible for their enforcement is the Health Care Finance Administration (HCFA) of the Department of Health and Human Services. Federal nursing home regulations are located at 42 USC § 1396 (the Nursing Home Reform Act), and 42 CFR § 483 (the Requirements for Long Term Care Facilities). Alabama's nursing home regulations, which are patterned after the Federal law, are located in Alabama Administrative Code § 420-5-10.

These state and federal regulations created standards which have heightened the expectations of nursing home care from a minimum maintenance goal, to the goal of maintaining the "highest practicable physical, mental and psychosocial well being" of nursing home residents. 42 C.F.R. § 483.25. These regulations, in part, require:

Adequate numbers of nursing personnel to provide for the needs of the resident;

Adequate amounts of food, supplies, equipment and medication;

Competent nurses, aides, and orderlies who are screened when hired and who have been monitored throughout their employment to eliminate unfit personnel;

Adequate and systematic planning to create an individualized plan of care for each resident;

Continuous systemic assessment of each resident and notification of the attending physician when necessary;

A record keeping system that accurately documents the clinical condition and progress of residents as well as delivery of care; and

Adequate quality assurance programs that identify and correct care deficits.

If a facility fails does not provide these minimum requirements then residents who cannot help themselves may suffer serious injury or death. The Alabama Department of Public Health, through its Division of Provider Services, is responsible for inspecting nursing homes in Alabama to insure compliance with state and federal regulations. During the calendar year 2002 the division surveyed 287 facilities and conducted 235 follow-up visits.

Under Federal Law, nursing homes in Alabama that participate in the Medicaid and Medicare programs are to undergo an annual survey/inspection and certification process. The purpose of the survey is to assess whether the type of care intended by the law and regulations, and as needed by the resident, is actually being provided. Nursing homes must be in substantial compliance or they can be denied payment for new admissions, civil monetary penalties can be assessed, Medicaid and Medicare certificates can be revoked, residents can be transferred and temporary management can be imposed on the facility. Certification surveys are, by law, to be unannounced.

The reports generated from surveys of facilities in Alabama can be obtained from the Alabama Department of Public Health, Division of Provider Services, P.O. Box 303017 Montgomery, AL 36130-3017, and recent reports are available online at <http://adphnotes.state.al.us/hcfweb.nsf>. A quick evaluation of a particular home's compliance with state and federal regulations can be found at the Medicare web site. The web site is located at: www.medicare.gov/NHCompare/home.asp.

V. Investigating Nursing Home Injuries.

The first step in investigating an injury at a nursing home is to obtain a copy of the resident's nursing home records, medical records, and possibly the death certificate. Federal Regulations, specifically, 42 C.F.R. § 483.10(b)(2), provides that a resident or his or her legal representative has the right to access all of their nursing home records within 24 hours, excluding weekends and holidays. Further, the regulation provides that the resident or legal representative may obtain copies of nursing home records upon two working days notice to the facility. In a wrongful death case against a nursing home, obtaining the records can be more difficult. Typically, a personal representative of the resident's estate must be appointed by the probate judge before the nursing home will release the records.

Records from the nursing home, hospitals, and all treating physicians should be obtained because they may demonstrate that the nursing home was not properly or accurately documenting the resident's condition. Discrepancies may also indicate that the nursing home altered or falsified records. Once the records have been obtained it is usually necessary to have a nurse familiar with long term care issues review the records. If a nurse finds that there are care issues, then treating physicians or physician experts should be asked to provide opinions about the results of any substandard care.

In addition to records, valuable information can be obtained from former nursing home employees and other families with residents in the nursing home. These sources of information can be invaluable in demonstrating that the injury to a resident was not a mistake of one person, but the systemic failure of the nursing home as a care facility.

If you suspect that a resident has been abused or neglected you should immediately contact one or more of the following agencies:

- Top of Alabama Regional Counsel on Aging (TARCOG) (256) 533-3330
- Alabama Board of Nursing (800) 656-5318
- Division of Provider Services (334) 206-5175
- Alabama Long Term Care Ombudsmen (334) 242-5743

VI. Preventing Nursing Home Abuse and Neglect.

A. Choosing the right Nursing Home.

If you are faced with the possibility of moving a loved one to a nursing home there are a number of ways to make an educated decision about the facility you might choose. Visit the facilities yourself at various times of the day and week. Make sure that the home appears to be providing good care. Be sure to check on weekends and nights when the staff-patient ratio is typically the worst. Ask to attend a family council meeting or speak with the families of other residents at the nursing home. These persons will usually have insight about the quality of care and the problems that may exist at the home. If a nursing home declines this request, then you should consider other homes. Research the nursing homes inspection history. The reports from annual inspections and follow ups are available from the Alabama Public Health Department of Provider Services and the most recent results are posted online at <http://adphnotes.state.al.us/hcfweb.nsf>. You should review the results of all available surveys. You can also review Medicare's summary of the inspection reports at www.medicare.gov.

Speaking with medical providers in the community may also provide helpful information. Social Service workers at local hospitals can usually tell you which homes have a better reputation. You also should have a meeting with the Director of Nursing and Administrator of any nursing home you are considering. Make sure to ask questions about their past experience and work history. Nursing Homes administration can be very challenging and you want to be sure that the administration is up to the task. If you find that they have moved from job to job in short intervals or have limited experience, then you might want to continue your search.

B. Maintaining Quality Care.

Once you have settled on a nursing home it is important to continue to be an advocate for your loved one. Be sure that the nursing home has received all the necessary medical information for the resident. Review the residents medication's with the physician and ask to be alerted of any medication changes. If the resident has some special need, then inform the nursing staff. Do not be afraid to post signs reminding the staff of important issues over the bed or in the room. Participate in all care planning and family meetings. This is where the needs of the resident are discussed and concerns can be voiced. Likewise, participate in any family counsel meetings so you can understand if the home is having any widespread problems.

The single most important way to help a nursing home resident is to visit the home often at unannounced and irregular times. This will allow you to get a good idea about the care that is being rendered at all times. If you have a regular visiting time, then the staff might be sure to prepare for your visit but may otherwise neglect the resident. Unexpected visits will keep the staff "on its toes" and result in better care for the resident.

If you find care that is not acceptable for any resident do not hesitate to complain to the director of nursing or the administration. Sometimes the “squeaky wheel gets the grease.” Furthermore, if you serve as an advocate for all residents then you will likely find that other visitors and families will try to help your loved one as well.

If your concerns are not being met by the administration of the nursing home, do not hesitate to call for outside help from physicians, hospitals, the Department of Public Health, and even your Senator or Congressman may be able to assist you with a problem.