

Admissibility of State and Federal Regulations

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State and federal nursing home regulations can be regarded as quintessential guidelines for attorneys involved in nursing home litigation when it comes to establishing the standard of care. The ultimate goal, obviously, is to have regulations relevant to your case admitted into evidence as the accepted standard of care for the jury to apply to the facts. Achieving success in having the regulations admitted into evidence is not a simple task, but the following are some methods that have proved to be successful in the past:

Have your own medical experts testify that the rules and regulations constitute standards of care. Persuade the opposing expert to agree that the rules and regulations constitute standards of care, or attempt to have them agree that a few of the rules and regulations in particular apply as the standard of care pertaining to the issues at hand (bedsores, falls, hydration, etc.). Have your medical expert testify that the rules and regulations constitute standards of care, and attempt to have the opposition admit that many of their policies and procedures are written based on the rules and regulations. Argue the rules and regulations are at least evidence that should be considered by the jury in determining the issue of negligence. Bootstrap the regulations by having primary nursing home witnesses admit that deficiency citations found by the state are violations of the standard of care. In many courts across the United States, rulings on the issue of the admissibility of state and federal nursing home regulations have yielded different results.

In Florida and California, courts have held that rules and regulations regarding the standard of care as applied to nursing home residents were admissible at trial. Other courts, such as an appellate court in Illinois, have held that state regulations were too vague to be sufficient indicators of the standard of care required of nursing homes. All in all, the issue of admissibility of state and federal rules and regulations at trial is one that is still in controversy.

One Florida case that involves the admissibility of state rules and regulations is *Dusine v. Golden Shores Convalescent Center, Inc. Dusine*, 249 So.2d 40 (Fla.App. 1971). In *Dusine*, the plaintiff-appellant, Dora Dusine, was a resident of the appellee nursing home. *Id.* at 40. Appellant was supposed to be restrained at all times, and on several occasions she was seen without any restraints. *Id.* at 41. Also, the appellant had fallen out of the bed once prior to bringing this action. *Id.* On the day of the injury in question, the appellant was placed in the wheelchair by an employee of the appellee using a Posey vest restraint and was left unattended for approximately twenty minutes. *Id.* When the employee returned, she found the appellant lying on the floor with an untied vest restraint still on her body. *Id.*

On appeal, the appellant contended that the abovementioned set of facts were sufficient to make a prima facie case against the appellee, and that the trial court erred in refusing into evidence a written accident report required to be prepared by the rules and regulations of the State Board of Health. *Id.* The appellant also contended that the trial court erred in not

allowing the introduction of the rules and regulations into evidence themselves. *Id.* Focusing on the issue of the rules and regulations, the Florida District Court of Appeals noted the rules and regulations stated that ‘during provisions of restraint, the patient shall be observed vigilantly’. *Id.* The Court then looked to a rule in another Florida Appeals Court case, *Alford v. Meyer*, 201 So.2d 489, 491 (Fla.App.

1967), where it was held that: “The rationale supporting the admission of a statute, ordinance, or administrative rule or regulation as prima facie evidence of negligence is that the standard of conduct or care embraced within such legislative or quasi-legislative measures represent a standard of at least reasonable care which should be adhered to in the performance of any given activity.” *Id.*

The Court held that, when viewed under this rule, the trial court had erred in denying into evidence the rules and regulations of the State Board of Health, and also, had the trial court admitted into evidence the rules and regulations requiring vigilant observation of a patient during restraint, the jury could have certainly determined that the twenty minutes absence of the appellee’s employee was not vigilant observation. *Id.* at

42. The judgment appealed was reversed and remanded for a new trial. *Id.*

In a similar case, a California Court of Appeals also was faced with the issue of the admissibility of state and federal rules and regulations. In *Conservatorship of Gregory v. Beverly Enterprises*, the court held that jury

instructions based on state and federal regulations were appropriate as well as jury instructions defining standards of care applicable to the action for elder abuse were not too vague to provide meaningful guidance to the jury.

Gregory, 80 Cal.App.4th 514 (2000). The plaintiff in *Gregory* brought the action after breaking her hip and shoulder in a fall at Beverly Manor. *Id.* at 515. The Superior Court of the City of Yreka entered judgment on special verdicts for plaintiff, and the nursing home appealed. *Id.*

The plaintiff in this case, Reba Gregory, fell in a nursing home owned by Beverly breaking her hip and shoulder. *Id.* at 516. The action was brought through her daughter and conservator who sued the defendants for elder abuse, negligence, and fraud. *Id.* The jury returned special verdicts in favor of Gregory on all three causes of action, and also found that the defendants acted with malice, oppression, or fraud regarding the claims of elder abuse and fraud. *Id.*

On appeal, one of the issues raised before the California Court of Appeals was whether the court erred in reading the jury instructions based on state and federal regulations. *Id.* at 519. The defendants argued that the regulations had nothing to do with the Elder Abuse Act, and they were too vague to provide meaningful guidance to the jury. *Id.* The Court stated in response that they could not locate any authority that suggested a party may not base instructions on relevant state or federal regulations, and referring to the issue of vagueness, the Court stated that “a statute or regulation is not void for uncertainty in an enforcement action if its meaning can be objectively

ascertained by any reasonable and practical construction.” *Id.* at 519-520. (citing *Lackner v. St. Joseph Convalescent Hospital, Inc.*, 106 Cal.App.3d 542, 551 (1980)). The Court then affirmed the decision in favor of the plaintiff, holding that the instructions drawn from the state and federal regulations were not impermissibly vague where jury had heard testimony describing how nursing home professionals construed and applied regulatory standards at issue, and where instructions taken as a whole set forth numerous specific examples of care required to be provided. *Id.* at 521. (see also Menninger, Karl, II, J.D., *Proof of Abuse, Neglect or Exploitation of Older Persons*, 53 AMJUR POF 3d 1 (2004)).

Some courts have ruled, however, that state regulations were too vague to indicate the applicable standard of care for nursing home cases. In *Stogsdill v. Manor Convalescent Home, Inc.*, Ona Stogsdill, the plaintiff and resident in the defendant nursing home, brought an action against the home for damages suffered when her left leg was amputated as a proximate result of allegedly deficient medical and convalescent care. *Stogsdill*, 343 N.E.2d 589, 591 (Ill.App. 1976). At the close of the plaintiff’s case, the court directed a verdict for the Home, but the jury found for the plaintiff against her personal doctor, who was a separate defendant in the lawsuit. *Id.* The doctor appealed the judgment against him, and the plaintiff cross-appealed from the directed verdict and resulting judgments in favor of the Home. *Id.* at 592.

During the trial, plaintiff had introduced into evidence a set of rules and regulations of the Illinois Department of Public Health. *Id.* at 610. The

regulations required up-to-date patient care program for each resident, and for the plan to be reviewed and updated in keeping with the care needed as indicated by the resident's condition. *Id.* The regulations also stated that the nursing home must notify the resident's family immediately, if possible, of anything out of the ordinary happening to the resident, such as disease or sudden illness. *Id.* Even though the evidence tended to show that these regulations were not fully complied with, no family member testified that they relied upon the nursing home to notify them that their mother had gangrene or if they had been duly notified they would have sent her to another physician. *Id.* Additionally, there was no evidence that these violations caused the plaintiff to lose her leg. *Id.*

The Illinois Appellate Court affirmed the ruling of the lower court, holding that the plaintiff failed to introduce any proof to substantiate several important elements in her case against the Home. *Id.* at 612. The Court also added that the rules and regulations were too vague to be sufficient indicators of the standard of due care required of nursing homes by themselves. *Id.* at 611. The Court stated that while the regulations require the nursing home to notify the physician in cases of illness or serious disease, it is not clear whether this means the facility's own physician or the patient's physician. *Id.* As a result, no duty can be said to have been created by requiring the notification of the advisory physician where the patient's own physician had been notified of the situation. *Id.* Furthermore, since the regulations did not clearly set forth the standard of care required, expert testimony was still

necessary in this case. *Id.*

As seen in the above cases, courts have ruled differently on the admissibility of state and federal regulations into evidence in nursing home cases, but it also must be noted that each case has its own unique set of facts. In *Dusine*, the resident was restrained, and the regulation that applied to restraint required “vigilant observation” of the restraint; therefore, the regulation was very specific as to the standard of care involving restrained residents. In *Stogsdill*, however, the regulation was not very clear regarding the standard of care applied to the notification of a physician when the resident uses their own physician and not the nursing home’s own physician. When a state or federal rule or regulation directly correlates with the issue at hand, it appears that courts are not as reluctant to allow it into evidence to establish a basic standard of care.

When faced with the issue of the admissibility of state and federal nursing home rules and regulations, the five methods listed at the beginning have been successful in varying degrees. Having your expert testify as to the regulation(s), having their expert testify at a deposition as to the regulation(s), or possibly have the defense admit that the regulation(s) apply in a request for admission are all general examples of ways to approach the admission of regulations into evidence.