

STANDARD OF CARE VS. QUALITY OF CARE IN LONG TERM CARE FACILITIES

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I. STATE AND FEDERAL REGULATIONS

A. Interplay Between State and Federal Regulations Governing Long-term Care

The long-term care industry is a highly regulated machine governed by both state and federal guidelines. These regulations provide the plaintiff's attorney with a framework that sets out the quality of care necessary in a long-term care facility. Violations of this care framework may establish the predicate for litigation.

Accordingly, any attorney who is going to practice in this area of law, even on an intermittent basis, must thoroughly familiarize himself or herself with both the state and federal regulations governing this industry. Some of the relevant federal enabling regulations in this area are:

- (1) Requirements for Long-term Care Facilities, 42 C.F.R. §§ 483.1-483.75 (1996);
- (2) Survey and Certification Procedures, 42 C.F.R. §§ 488-488.56 (1996);
- (3) Provider Agreements Under Medicare, 42 C.F.R. §§ 489-489.60 (1996);
- (4) Appeals Procedures for Determinations That Affect Participation in the Medicare

Program, 42 C.F.R. §§ 489-498.3 (1996);

B. Specific Federal Regulations Governing Long-term Care

We will now examine some of the specific regulations applicable to long-term care facilities. As you prepare to litigate a long-term care case it is important to know that one of the methods used by the defense will be the position that state and federal regulations are only “guidelines” and not actual standards of care. You should, from the outset, attempt to establish through your witnesses as well as the defense witnesses that the regulations are not just “guidelines”, but are the actual standards of care that must be upheld by long-term care facilities and by which their conduct in any particular case must be judged. If you allow it, the defense will establish standards of care in your case that do not rise anywhere close to the levels of care required by. The regulations require facilities to provide a level of care that will enhance a resident’s overall well-being. Whereas, the standard of care the defense will establish a standard of care that will be well below that required by the regulations, or in other words, “just enough to get by”.

The following outline is merely a primer on the most commonly encountered regulatory sections. It is by no means meant to be exhaustive or a substitute for a thorough examination of the applicable regulations by the practicing attorney. Indeed, these regulations are at the epicenter of practice in this area and must be learned by any person attempting to even sporadically practice in the long-term care arena.

1. Quality of Care Required of Long-term Care Facilities

Each resident in a long-term care facility “must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.” 42 C.F.R. § 483.25.

Long-term care facilities also have a duty to “based on the comprehensive assessment of a resident . . . insure that: a resident’s abilities and activities of daily living do not diminish unless circumstances of the individual’s clinical condition demonstrate that diminution was unavoidable.” 42 C.F.R. § 483.25(a)(1).

These sections outline, in specific terminology, the duty owed by the nursing home to each resident. In sum, the standard can be delineated as the provision of “care and services [necessary] to attain or maintain the highest practicable physical, mental and psychosocial well-being” of each resident. You should be well versed in this standard and utilize this terminology throughout the discovery process and trial. Remember this standard as the provision of care necessary to attain/maintain the highest practicable all-around well being of each resident.

2. Administrative Management of Long-term Care Facilities

An often overlooked, but no less fundamental section of the regulations, governs the administrative management of all long-term care facilities. Under these regulations the standard imposed upon a long-term care facility for its administrative management is as follows: “A facility must be administered in a manner that enables it to use its resources effectively and

efficiently to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.” 42 C.F.R. § 483.75.

Under this standard each facility must be “licensed under applicable state and local law” and must further have “a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility.” 42 C.F.R. §§ 483.75(a) and (d)(1).

The “governing body” is the entity who appoints the facility administrator. The administrator is responsible for the management of the facility and is required to be licensed by the state. 42 C.F.R. § 483.75(d)(2).

3. Quality of Life

In the provision of its services to a resident “a facility must care for [each resident] in a manner and in an environment that promotes maintenance or enhancement of each resident’s quality of life.” This includes “promoting care for residents in a manner and in an environment that maintains or enhances each resident’s dignity and respect in full recognition of his or her individuality.” 42 C.F.R. § 483.15(a).

To assure a resident’s quality of life, each and every resident is entitled to “self-determination and participation.” Under this standard the resident has the right to:

- (1) Choose activities, schedules and healthcare consistent with his or her interests, assessments, and plans of care;
- (2) Interact with members of the community both inside and outside the facility;
- (3) Make significant life choices;

- (4) Organize and participate in resident groups in the facility;
- (5) Meet with the family of any resident within the facility;
- (6) The right to private space (if one exists);
- (7) The attention of a designated staff member to respond to written requests from any resident group meetings;
- (8) The right to have the facility listen to and act upon any grievances or recommendations of residents and families concerning proposed policy and operational decisions affecting resident care and life in the facility;
- (9) The right to participate in social, religious and community activities that do not interfere with the rights of other residents;
- (10) The right to reside and receive services in a facility with reasonable accommodations of individual needs and preferences;
- (11) The right to receive notice before a resident's room or roommate is changed; and
- (12) The right to receive an ongoing program of activities designed to meet the interests and the physical, mental and psychosocial well-being of each resident.

42 C.F.R. §§ 483.15(b) through (f).

4. Resident Rights

Those guarantees outlined in the quality of life section above are but a portion of the statutory rights afforded to long-term care residents. More specifically, each “resident has a right to a dignified existence, self-determination and communication with access to persons and services inside and outside the facility. A facility must protect and promote the rights of each

resident . . .” 42 C.F.R. § 483.10. Some of the more pertinent, or commonly encountered, resident rights are discussed below:

- (1) The resident has the right (upon an oral or written request) to access all records pertaining to himself or herself, including clinical records within twenty-four hours. 42 C.F.R. § 483.10(b)(2).
- (2) The resident has the right to be fully informed in a language that he or she can understand of his or her total health status, including but not limited to, his or her medical condition. 42 C.F.R. § 483.10(b)(3).
- (3) A resident also has a right to be notified of changes in his or her status and “a facility must immediately inform the resident; consult with the resident’s physician; and if known, notify the resident’s legal representative or an interested family member when there is:
 - (A) an accident involving the resident which results in an injury and has the potential for requiring physician intervention;
 - (B) a significant change in the resident’s physical, mental or psychosocial status (i.e., a deterioration in health, mental or psychosocial status in either life-threatening conditions or clinical complications);
 - (C) a need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or
 - (D) a decision to transfer or discharge the resident from the facility.” 42 C.F.R. § 483.10(b)(10).
- (4) The resident has the right to examine any and all survey results. This includes the

right to examine the results of the most recent survey of the facility conducted by federal or state surveyors, as well as any plan of correction in effect with respect to the facility. This includes the duty on the part of the facility to either post the results of any surveys or to make the survey results available for examination in a readily accessible place. This includes the additional duty on the part of the facility to provide information from agencies acting as client advocates to the residents. Ala. Admin. Code § 420-5-10-.05(3)(y); and 42 C.F.R. § 483.10(g).

- (5) The resident has the right to be free from abuse. The resident has a right to be free from verbal, sexual, physical and mental abuse, corporal punishment and involuntary seclusion. Moreover, the facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and the misappropriation of resident property. Moreover, the facility must not employ individuals who would be unfit for service as a nurse aide or other facility staff, including those who have been found guilty of abusing, neglecting or mistreating residents by a court of law or who have had a finding entered into the state nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property. 42 C.F.R. §§ 483.13(b) and (c).

II. PROSECUTING THE CASE ON A QUALITY OF CARE STANDARD VS. A “JUST GETTING BY” STANDARD

A. Example: Decubitus Ulcers

Decubitus ulcers (also known as pressure sores, bed sores or decubs) are injuries to the skin and tissue underneath it, which occur when a resident sits or lies in the same position for an

extended period of time. The term pressure sores is perhaps more useful than bed sores, since it includes injuries caused by being in bed, as well as those that result from sitting in a wheelchair or using an orthopedic device that presses against the skin.

The pressure exerted by the resident's weight on a relatively small part of their body can cause the blood vessels in that area to squeeze shut. Oxygen and other nutrients do not reach the skin and it begins to die. If the condition remains untreated, a decubitus ulcer will form. During this process, layers of skin, the underlying fat beneath the skin and the muscle may all die or become necrotic. Treating Pressure Sores, Agency for Healthcare Policy and Research, 1994.

1. Regulations Applicable to Decubitus Ulcers

The Federal Regulations states as follows: "Based upon the information obtained in the comprehensive assessment and the conclusions based thereon a long-term care facility must insure that:

- (a) 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; and
- (b) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing."

42 C.F.R. § 483.25(c).

In a pressure sore case, the defense will take the position that the resident was old, sick and the deadly pressure sores were inevitable. The aforementioned regulations allows plaintiffs counsel to emasculate this defense. Before the defense can credibly argue the pressure sores were "inevitable" they must show that all appropriate skin care was provided. If all appropriate skin care was not provided, the pressure sore cannot be deemed "unavoidable". This regulation

allows plaintiff's counsel to attack the skin care provided by the facility in its entirety, instead of in a vacuum. Substandard care in the crucial areas of nutrition, hydration, skin treatments, medication, activities of daily living, etc. can all be illustrated and exhibited to the jury to show that the pressure was not "unavoidable".

III. CONCLUSION

The quality of care demands of the long-term care regulations are much higher than the community, a/k/a "just getting by", standard of care espoused by the defense experts. The regulations were created to enhance the well-being of the resident. The "just getting by" defense standards of care are created by and for long-term care facilities to allow them to side-stop the regulations, side-stop the residents, and side-stop your lawsuit.