

'21 ISSUES FOR THE 21ST CENTURY' **NURSING HOME ABUSE & NEGLECT**

With the changing demographics in America, more and more Americans are faced with making difficult decisions regarding life-transition issues. Stated otherwise--children are having to find nursing homes for their loved ones.

As a trial lawyer dedicated to advocating for nursing home patients and their clients, I cannot begin to tell you how many times I have been in a family's living room or in our conference room talking with grief-stricken and furious children and relatives relating the exact same story time and time again: "The nursing home assured us everything with be fine."

The biggest problem plaguing nursing homes is staffing. Do I have statistics to support this? Of course. More important than the statistics are the legions of families who strangely seem to repeat the same story like it's a script—"Mom could never find anyone to help her eat while the food was warm; Mom said she would push the call light and no one had time to respond. I never could find a tech or aide to help me change her. Mom was always soaking wet. We never learned about the bed sore until the hospital doctor called us in and said that the large Stage 4 ulcer was why he had a blood infection."

Staffing problems plague the nursing home industry. The problems I see in nursing homes are repeated in every part of America. After interviewing over 500 families, deposing literally hundreds of nursing home employees from every job title, background and persuasion, there are several common denominators that consistently show up when a nursing home is providing effective care. When I started prosecuting nursing home abuse and neglect, I vowed that I would depose as many employees as possible to learn the ins/outs of the business from the front lines—in the trenches so to speak.

The following observations stem solely from years of my life spent in conference rooms with court reporters and nursing home employees:

I. If They Are In It For The Money, Then Buyer Beware

As a general rule, not-for-profit nursing homes simply give better care for folks who are on Medicaid. If your loved one is in a private-pay only facility, then you are probably not reading this because they are generally adequately staffed and the care is appropriate. But if your loved one is in the nursing home as a guest of Medicaid, then you must be extremely careful where your loved one is placed.

Why is this so? Because of the way that the system operates—namely, Medicaid patients are "loss leaders" for nursing homes and they are generally accorded the same status as the 3rd class residents on the Titanic. The profit equation is: Large numbers of Medicare skilled patients, a high census (i.e. the hotel is full occupancy) and as few employees as possible.

II. Weekends/Holidays/Nighttime—The Danger Zone

Experts will tell you that weekends and night time are the most dangerous times at a nursing home. I would add that it has been my personal experience that holidays are likewise an extremely dangerous time for nursing home patients. There is a simple explanation—the best employees are the most valuable employees and thus they

understandably have the pick of the litter for shifts. No one enjoys working on Christmas Day or the “grave shift” (in nursing home parlance this is known as the “night shift” from 11 pm to 7 am.) Many times agency personnel who are not familiar with the policies at the nursing home or the normal condition of the residents are called in to pinch hit on these unpopular shifts.

III. Staffing Problems Are The Root Of All Problems

Without a doubt, this is the number one problem that plagues the nursing home industry. States have mandatory minimum staffing requirements that are translated into nursing hours per patient per day, but what these minimum ratios require never considers the acuity level of the nursing home. The acuity level, in plain English, means how sick and thus, how labor intensive, the patients on a particular floor are. As a general rule, skilled patients are higher acuity. (Skilled care is more expensive and the government pays the nursing homes more money for skilled patients as opposed to intermediate care patients who are known in the industry as ICF patients. An example of a skilled patient would be someone who has fallen at home and broken their hip and they are at the nursing home for physical therapy. Another example would be a stroke patient who is recovering and needs to re-training on how to eat/swallow. Skilled patients also may have a feeding tube or a combination of different needs that require help with bathing, eating, toileting, turning and repositioning or all of the above.

IV. A Bed-Bound Resident Is A High-Risk Resident In Every Way

I tell all of my clients that once their loved one becomes bed bound, they must become extremely vigilant in monitoring the care provided. Never trust what the nursing home staff tell you. You or some other family members need to independently check the resident’s skin on a consistent basis. Although this is not pleasant to discuss, it is imperative that you or a relative check the rear end area of your loved one. Sacral pressure sores are extremely dangerous because they are prone to becoming infected due to their location at the top of the tail bone—in close proximity to stray fecal matter from bowel movements. Many times bed bound residents also can no longer control urination or bowel movements. We have all sat down in a wet bathing suit and felt what happens after a short while. Multiply this experience by an unchanged, saturated, bacteria-soaked diaper just millimeters from a gaping pressure sore and it is a virtual miracle that anyone survives one of these wounds.

V. Attend Care Plan Meetings

In litigation some defense lawyers make a big deal about the failure of a family to attend a Care Plan meeting. As a general rule, if you don’t work and have reliable transportation, this is a meeting that you should try and make if you can. Many of my clients figure that the assurances from the nursing home are all they need. The Care Plan meeting is held at least every three months and it is an opportunity for the nursing home to go over its game plan (i.e. its strategy or plan of attack) for how it plans on dealing with the risk factors for each resident. If you are worried that your father could fall out of bed or climb over the bed rails, then the Care Plan is a great

time to confront the nursing home about what it needs to do to prevent him from suffering a devastating and life-ending fall.

VI. The Squeaky Wheel Does Get Oiled

As Vergil wrote in The Aeneid: “Fortune favors the bold.” Without a doubt, families who stand toe to toe with the nursing home generally get better results than the family that trusts the nursing home. That being said, I simply cannot blame a family that has never placed a loved-one in a nursing home. The industry does a world-class job of convincing its customers that everything will be fine. Many families understandably expected the nursing home to provide adequate care and are shocked when they find out to the contrary. Complaining up the ladder and confronting in a professional and controlled manner the Director of Nursing is the strategy to maintain with very limited exceptions. It has been my personal experience that calling 1-800 corporate complaint hotlines is a waste of time. Likewise, calling the Department of Health is generally an exercise in futility. They are hand-maidens of the industry and their investigations are topical at best. I have never handled a matter where the Department of Health found a violation that resulted in any real discipline against the nursing home.

VII. When A Lawsuit Is Filed, Believe It Or Not, The Care Gets Better

This is counter-intuitive, but true. Once you get on the nursing home’s radar screen and the defense lawyer has had an opportunity to really lecture the staff and management about the on-going nature of the lawsuit and the continuing examination of the nursing home’s actions, the care almost always gets better.

VIII. Visiting Often & At Unexpected Times Increases The Level Of Care

Remember the sign in the store warning potential banditos “Armed guard present three nights per week—you guess which nights.” If I only had a dollar for every time a former employee has testified or told me personally that because they were understaffed they initially handled the patients whose family they knew would be coming to visit.

IX. Teaming Up With Other Families Works—Create An Interlocking Web

Much like sports team employ a zone defense to hide a weak link, I encourage families to reach out to other families and promise that when they are visiting their loved one, they will check on the other family’s loved one as well. The reason this “web approach” works is because it increases the number of times that your loved one is monitored. It also tends to intimidate nursing home staff ever so slightly which is always a good thing. When the cat is away the mice will play comes to mind and the web approach creates doubt as to whether family or family ally will suddenly show up.

X. The Tennessee Department Of Health Will Not Hold Them Accountable

Threatening the nursing home with “calling the State” is akin to showing up at a knife fight with a slinky for a weapon. There are too many complaints from too many families who many times “cry wolf” thereby dulling the motivation of the

investigators. If the nursing home knows the state is coming, nothing ever happens. The industry is regulated by the Department of Health which is captive to the industry.

XI. Document The Problem And Call Corporate If The Problem Is Not Fixed

If the nursing home thinks that you are a litigation risk, they will not hesitate to throw you and your family “under the bus” with false allegations of unreasonable behavior. Revisionist history is taken to a new level with charting entries from nurses who think that their actions will soon be under the microscope. The same applies for the Medical Director who is scared to death of a lawsuit and has already agreed (either expressly or implicitly) to help cover the nursing home. I always tell my clients as soon as they contact me to create a written timeline or some type of written documentation that memorializes their memory of important events. The memory fades but the document remains. Calling corporate is more putting lipstick on the pig and is something that we can use in litigation to show we exhausted all efforts but it won’t make a difference.

XII. All Nursing Home Are Not Alike

“Beauty may only be skin deep, but ugly runs straight to the bone.” Fred Sanford, Sanford & Son.

If you think all cars are the same, all spouses are the same, all football programs are the same, or all clothes fit the same, then don’t do any research and just pick the first nursing home that looks pretty on the outside. The nursing home spend tens of thousands of dollars on marketing (including thousands for meals and gifts to social workers at the local hospital to send them hospital patients). The nursing home also spends thousands of dollars on pretty all-wood furniture, special outdoor lighting, thick, deep carpet and wonderful hospitality. Ignore all of this. Smell the home. Walk all through the home. How many patients are simply sitting in a wheelchair by themselves in a corner or pushed aside with no one around? Visit on the weekend when no one from management is around to find out what the staffing levels are like during the danger zone time. Hang around the nurse’s station with your eyes glued to the cell phone acting like you are drafting a long text message but watch what the nurses and CNAs are doing. A bad state survey on issues relating to patient safety is a huge red flag. This is much more important than whether they performed poorly on cleanliness issues in the kitchen. Rule: A or B or C penalties are not nearly as bad as H or J. A good state survey does not mean a lot to me because most all of the nursing homes know when the state is coming. They will always deny this, but it is a sad reality of the industry. The state is about as subtle as a freight train and as predictable as tax day.

XIII. Close To Home Should Never Be The Ultimate Issue

Most of my clients cite proximity to their home as the overriding factor. Please allow me to speak frankly here. If you live in a transitional neighborhood or in a lower socio-economic area, then location should never be considered. Sadly, it is these very people who have the least disposable income to pay for transportation. The reason I say this? Because location also determines where the pool of employees will be generally be coming from as well. Nursing homes located in poor

areas are the step-children of the industry. These are traditionally very dangerous nursing homes.

XIV. Nursing Homes Will Say Anything To Get You Into The Facility

I had a case where we learned that the nursing home was taking prospective family members to the private pay floor because it was much nicer than the actual area where the Medicaid residents were slated to live. **DO NOT SIGN AN ARBITRATION AGREEMENT WITHOUT CONSULTING YOUR FAMILY LAWYER.** I have litigated a case where the admissions director made up an entire conversation that was designed to help the nursing home dodge facing a jury trial. Fortunately the paperwork proved her testimony to be a lie—albeit a highly believable story until we found the paperwork that undermined her testimony. Actions speak louder than words. If the nursing home is a publicly traded company, get a copy of its annual report and find out how much they are paying their executives.

XV. If The Residents Receives Medicare Skilled Care, There Is Added \$ Incentive To Keep Him/Her At The Nursing Home.

Rule: Skilled care nursing home patients are the nursing home’s most valuable and profitable paying customers. They are the high-profit patients for the nursing home. There is a financial incentive to keep these residents at the facility. In contrast to a Medicaid patient who can leave the facility and the nursing home continues to receive compensation under the ten-day bed hold policy, THE MOMENT THAT A SKILLED NURSING HOME PATIENT LEAVES THE FACILITY, REIMBURSEMENT STOPS. Thus, there is a definite financial incentive to treat the ailment at the nursing home rather than send him/her to the hospital.

Here is how it works. The Dr. at the hospital determines that you need to go to a nursing home to get skilled nursing care.

You get skilled nursing care to:

- help improve your condition, or
- maintain your current condition and prevent it from getting worse.

You get skilled rehabilitation care to:

- help improve your condition within a predetermined time period, or
- set up a maintenance program designed to maintain your current condition and prevent it from getting worse.

Skilled care helps you get better, function more independently, and/or learn to take care of your health needs.

Skilled care is health care given when you need skilled nursing or

rehabilitation staff to treat, manage, observe, and evaluate your care. Examples of skilled care include intravenous injections and physical therapy. It is given in a Skilled Nursing Facility (SNF).

Care that can be given by non-professional staff isn't considered skilled care. People don't usually stay in a SNF until they are completely recovered. Medicare covers certain skilled care services that are needed daily on a short-term basis (up to 100 days). Skilled care requires the involvement of skilled nursing or rehabilitative staff in order to be given safely and effectively.

Skilled nursing and rehabilitation staff includes:

- registered nurses,
- licensed practical and vocational nurses,
- physical and occupational therapists,
- speech-language pathologists, and
- audiologist

Who pays for this skilled care?

Medicare usually will pay for the entire bill for the first twenty days, and then it will cover a smaller percentage with a co-payment by the patient. Coverage is provided only if the patient requires daily skilled nursing care or physical, occupational or speech therapy on a daily basis. Skilled nursing care must be provided after a hospital stay of at least 3 days.

Here is the key: Medicare pays for this skilled care only while the patient physically remains in the nursing home facility. The moment they leave the building, the nursing home's reimbursement stops. Thus, the nursing home has a financial motivation **NOT** to have the skilled care nursing home resident leave the facility.

XVI. The Nursing Homes Know When The State Is Coming To Inspect The Facility

We have uncovered evidence in certain cases that the nursing home would befriend the clerks at the local hotels where the state maintains a contract and promise money for information pertaining to the arrival of the State inspectors. Administrators talk about the arrival of the nursing home inspectors and warn each other.

XVII. Valuables Always Disappear--Their Clothes Will Always Be Lost Or Stolen

Never, ever take valuables, jewelry, heirlooms (other than pictures) and plan on having to re-stock their clothes often as anything that is stylish will inevitably be "lost in the laundry" and/or just disappear. I have never talked with a nursing home family that did not complain about this as a problem. Many nursing home employees see this as a fringe benefit of their employment at the nursing home.

XVIII. Chemical Restraint Is A Huge Problem

Chemical restraint occurs when a resident is overly medicated to a “non-therapeutic” level. Many times we will have clients who were given Narcan at the hospital to bring them out of their stupor. This is a frequent problem with Alzheimer’s resident who are deemed “problems” by nursing home staff. If your loved one was mobile and then suddenly become bed bound, consistently lethargic and non-responsive, then they either have a medical condition that requires immediate assessment, or they are joining the ranks of the chemically restrained. It is the nursing home’s way of “placing the resident in the corner.”

XIX. Many Medical Directors Have No Idea How Bad The Nursing Homes Really Are.

Often the Medical Director relies solely upon the nursing home staff to tell them when there is a significant change in the resident’s condition. It is NOT the Medical Director’s job to personally patrol the nursing home looking for a change in a resident’s condition. Do not expect the Medical Director to know about your loved one’s problems unless the nursing home has specifically made them aware. Even then, most Medical Directors maintain positions at multiple facilities and have hundreds of patients that they are responsible to treat. A personal meeting with the Medical Director is a very rare event and usually a sign that something has probably already gone wrong.

XX. Never Trust An Abuse Registry

The nursing home knows that if it reports someone to an abuse registry, implicitly it is an admission that abuse or neglect went on with its resident(s) and its employee(s) which may subject the facility to legal liability. There need to be criminal penalties attaching for the failure of a facility to report abuse—only then will we see the registry gain any type of respect for accuracy.

XXI. Drug Theft Is A Growing Problem

The twin brother of Chemical Restraint is drug theft. We have uncovered numerous cases where employees related to us that employees were stealing a patient’s pain medications to support the employee’s drug habit or for re-sale on the streets. The only real solution to this growing problem is more stringent drug testing of employees.