

EXECUTIVE SUMMARY

Introduction

Typically, an entering resident knows next to nothing about life in a nursing home. Consequently, she and her family commonly will defer to the nursing home's policies and practices, trusting that the nursing home and its staff will follow laws and perform professionally.

Unfortunately, this trust can be abused, based on this study's review of 175 admission agreements from nursing homes across Missouri. Many of the admission agreements contained provisions that conflicted with federal or Missouri law. Other provisions, although arguably compliant with law, could be used to insulate nursing homes from responsibility for their actions.

Of course, some admission agreements did comply with relevant law, and were fair to residents and their families. This report is written with the goal of educating consumers and nursing home operators, so that proper agreements will be written and used, legal requirements will be more widely known, and conflicts will be avoided.

Federal and State Law

The federal nursing home law – entitled the Nursing Home Reform Law – applies to every resident of any nursing home that is certified to accept payment from Medicare or Medicaid. Since over 97 percent of nursing homes are certified for either one or the other, or both, the Reform Law almost always will apply. The Nursing Home Reform Law focuses on residents' individual needs. For example, the Reform Law requires that a resident's care be based upon an individualized assessment and care plan, and that a nursing home make reasonable accommodations for an individual resident's preferences.

Missouri law sets forth numerous standards for nursing homes, but most of these standards are overshadowed in practice by the Reform Law. In certain instances, however, Missouri law provides protections that are absent in federal law.

Under the Nursing Home Reform Law, a nursing home must provide the care that a resident needs to reach the highest practicable level of functioning. The Reform Law was written to counteract the warehousing mentality that too frequently characterized nursing homes prior to the Reform Law's enactment. Although certain conditions are associated with aging, the Reform Law counsels that they not be considered inevitable. Care should be provided to prevent undesirable conditions such as incontinence or pressure ulcers. If such a condition nonetheless develops, then the nursing home must provide necessary treatment.

Altering Standard of Care

Lowered Expectations

Contrary to the Reform Law's philosophy, however, a significant number of admission agreements focused excessively on the risks of aging and had the resident acknowledge certain injuries as essentially inevitable. Specifically, twenty-five percent of the admission agreements contained a provision that attempted to lower the expectations of nursing home residents and their fami-

lies. For example, one admission agreement had the resident agree that the nursing home's services were "not designed to somehow protect the Resident from everyday, normal risks and responsibilities of living, including, but not limited to, such general accidents and situations such as falling, choking and weight loss and/or dehydration resulting from a Resident's failure to partake of food and drink." (Emphasis in original.) Many agreements similarly had the resident or resident's representative agree that the nursing home was not responsible for providing anything more than "general duty" nursing care, and it would be the responsibility of the resident or the resident's representative to obtain additional care if the resident's needs were more extensive.

All such provisions are inappropriate and counterproductive. The lowering of expectations carries with it the danger of a self-fulfilling prophecy. These admission agreement provisions clearly are written to influence the expectations of residents and their family members, but undoubtedly also have an impact on nursing home employees. Better nursing homes today emphasize a "culture change" in which the nursing homes move towards care that is "resident-centered," *i.e.*, based on a resident's individual needs. A culture of lowered expectations is a significant step in the opposite – and wrong – direction.

This is not to say that aging does not bring with it increased risk. But the risks should be discussed in care plan meetings, where the resident, resident's family, and nursing home staff can decide jointly on the best possible plan of care. In other words, risk should be discussed in order to prevent bad outcomes to the extent possible, not to excuse a nursing home in advance for inadequate care.

Visiting Rights

Under the Reform Law, a resident's family members are not subject to visiting hours. More than two-thirds of the admission agreements did not address visiting hours one way or the other. A small percentage of the admission agreements – five percent – contradicted the Reform Law by limiting family members' visiting hours.

Waivers of Liability

Waiving Nursing Home's Responsibility for Injury or for Lost or Stolen Property

The examined admission agreements contained a wide variety of liability waivers. These waivers claimed to eliminate or reduce a nursing home's legal responsibility for a resident's injuries, in situations in which the nursing home otherwise would have been financially liable.

One noteworthy admission agreement claimed that that the nursing home would "not be held responsible for accidents or injuries sustained by the Resident during residence in the Facility." Another admission agreement broadly waived the liability of the nursing home and its employees.

One admission agreement eliminated the nursing home's liability for non-economic damages. As a practical matter, this would almost entirely insulate the nursing home from responsibility for its own negligence. Because nursing home residents do not hold jobs and thus do not lose wages when injured, recoveries by nursing home residents consist almost entirely of non-economic damages such as damages for pain and suffering.

A common provision, found in 74 percent of the admission agreements, waived the nursing home's responsibility for a resident's personal property. Many agreements rejected liability unless the object in question had been specifically given to the nursing home for safekeeping, ignoring the fact that a resident's personal property is useful only if the resident has easy access to it. Going further, some admission agreements broadly declared that the nursing home would not be liable for a resident's lost or stolen property even if the nursing home were at fault.

New Laws Needed to Address Liability Waivers

The Nursing Home Reform Law does not explicitly discuss waivers of liability, and Missouri law is relatively lenient towards them – such waivers are permissible in consumer contracts, but the waiver must be clear, and its provisions are strictly construed against the party that benefits from the waiver. Outside of Missouri, by contrast, a waiver of liability in a consumer health care contract is almost always considered to be a violation of public policy and thus unenforceable.

Recognizing that waivers of liability in some instances might comply with current Missouri law, however, is not the same as approving of those waivers. This report takes the position that nursing home admission agreements should not contain waivers of liability, because a nursing home should be responsible for its staff's negligent actions. A waiver of liability is never in the interests of a resident or family member, and waivers generally are signed only because the resident and family member do not know that they are waiving the nursing home's liability, or feel that they have no choice.

This report recommends that Missouri law be revised to prohibit a nursing home admission agreement from ever, and in any way, waiving a nursing home's liability. In the meantime, residents and their family members should be vigilant in identifying waivers of liability, and strong in refusing to sign admission agreements containing liability waivers.

Requiring Arbitration of Disputes

Arbitration is a form of alternative dispute resolution in which rulings are made not by judges and juries, but by a private arbitrator. Arbitration can be done only with the agreement of both parties to the dispute.

Arbitration often is considered disadvantageous for consumers, who generally prefer trial by jury. The right to a jury trial is granted by the Seventh Amendment to the United States Constitution, and jury trial is considered an important way in which the will of the people is expressed and protected. By contrast, there is a real possibility that the arbitrator will have an inclination (conscious or otherwise) to side with a business against a consumer, since the business may be in a position to give repeat business to the arbitrator and arbitration service. Also, arbitrators are generally attorneys, and generally do not offer the type of societal cross-section that is the hallmark of the right to jury trial.

In looking at arbitration agreements, it is important to note whether the agreement was entered into before or after the dispute arose. Pre-dispute arbitration agreements are objectionable. These agreements generally are part of an initial contract package prepared by a business for signature by a consumer, broadly referring future disputes to arbitration. The consumer likely signs the various documents while paying little or no attention to the arbitration provisions.

Indeed, during the nursing home admissions process, neither residents nor their families are thinking of how to resolve future disputes. Their focus is on more immediate and tangible concerns – the physical and emotional aftermath of an unexpected stroke, for example, or a family’s grief over a mother’s need for nursing home care.

Health care often is recognized as an inappropriate setting for pre-dispute arbitration agreements. Both the American Arbitration Association and the American Health Lawyers Association do not provide arbitrators under pre-dispute arbitration agreements for health care disputes, unless ordered by a court to do so.

In Missouri, as in many other states, a contract can be found unconscionable if the contract’s terms are unfair, and the circumstances of the contracting process had not given the disadvantaged party an adequate opportunity to negotiate a fair agreement. An arbitration agreement thus is unenforceable if its terms, along with the circumstances of its signing, demonstrate an adequate level of substantive and procedural unconscionability.

Eighteen percent of the examined admission agreements required arbitration as a condition of admission. Another four percent of the agreements offered arbitration as a purportedly voluntary option. These numbers likely understate the prevalence of arbitration agreements, since an arbitration agreement could be a document separate from the admission agreement itself.

Right to Remain In, or Return to, Nursing Home

Authorizing Evictions

Under the Nursing Home Reform Law, involuntary transfer or discharge is allowed only for one of six reasons. Nonpayment is one reason; a second reason is the nursing home going out of business. The other four reasons all are based on the resident’s health or behavior. Involuntary transfer/discharge is allowed if the resident no longer requires nursing home care (reason #3) or requires a level of care that cannot be provided in a nursing home (#4). The final two reasons are based on the protection of others in the nursing home – a resident can be transferred or discharged involuntarily if his presence endangers others’ health (#5) or safety (#6).

In the examined admission agreements, however, 17 percent of the nursing homes claimed the right to terminate a resident’s stay without a reason. Furthermore, of the nursing homes that listed reasons for an involuntary transfer/discharge, 46 percent included at least one reason not allowed by the Reform Law.

One admission agreement authorized transfer/discharge of a resident for being “unduly disturbing, unduly noisy, objectionably untidy, noncooperative or destructive in behavior and action.” In a similar vein, another admission agreement authorized transfer/discharge for a resident being “uncooperative or destructive to people or facility.” A third admission agreement broadly authorized involuntary transfer for any resident “becom[ing] uncooperative or unmanageable.”

Such justifications are objectionable both because they go far beyond the justifications allowed by the Reform Law, and also because they are inconsistent with nursing home reality. In fact, nursing home residents often are disturbing, untidy, uncooperative or destructive. They can’t help it – this type of behavior frequently results from Alzheimer’s disease and other dementias, which are common among nursing home residents. When presented with such

behavior, a nursing home should not transfer or discharge the resident – instead, the nursing home should assess the resident’s condition and develop a care plan that addresses the resident’s needs as best as possible.

Limiting Rights to Bed Holds and Readmissions

Under Missouri Medicaid rules, the Medicaid program will pay to hold a nursing home bed while the resident is hospitalized, but only for up to three days. In addition, under the federal Nursing Home Reform Law, a nursing home must offer readmission to the next available bed if the hospitalized resident is Medicaid-eligible and continues to need nursing home services.

A nursing home must notify a resident of these rights. As a practical matter, nursing homes giving this advance notice generally provide the notice as part of the admission agreement.

Of the examined admission agreements, only 32 percent of the agreements provided notification of a resident’s bed hold right. 46 percent of the agreements did not mention the bed hold right, while an additional 11 percent of the admission agreements disclaimed a bed hold right.

The right to readmission was more likely to be ignored entirely – 65 percent of the admission agreements said nothing about the federal readmission right. Twenty-five percent of the admission agreements acknowledged the right to readmission, while 4 percent of the admission agreements disclaimed any right to be readmitted.

Requiring or Soliciting Financial Guarantees, Despite Federal Law to the Contrary

Under the Nursing Home Reform Law, a nursing home cannot require a resident’s family member or friend to become financially liable for nursing home expenses. A no-guarantee rule makes sense in nursing home admissions because nursing home expenses are not limited to any particular amount, and because the Medicaid program steps in when a resident has inadequate financial resources.

Nineteen percent of the admission agreements required a financial guarantee, in direct violation of the Nursing Home Reform Law. Thirty percent of the agreements solicited, but did not require, a financial guarantee. The guarantor was commonly termed the “responsible party.”

For at least three reasons, such “voluntary” guarantees are improper. First, the admission agreement and the term “responsible party” are deceptive, because they often give the family member or friend the impression that a “responsible party” is only a representative or contact person. As a result, a family member or friend might sign as “responsible party” without understanding that she purportedly is becoming financially liable for all nursing home bills.

Second, admission agreements with supposedly “voluntary” guarantees can be used to require guarantors. It is easy for a nursing home staff member to tell a family member or friend that she must sign as “responsible party,” even if the guarantee provision is written as being voluntary.

Third and finally, a supposedly “voluntary” guarantee is unenforceable because it provides no benefit to either a resident or a “responsible party.” A “responsible party” signature has no affect on a resident’s admission; as explained above, the Nursing Home Reform Law prohibits a nursing home from requiring a guarantee as a condition of admission. Such a gratuitous promise, benefiting neither the resident nor the “responsible party,” is not enforceable “if the slightest

circumstance of fraud, duress, mistake, or undue influence is present.” Nursing home admissions are situations in which fraud, duress, mistake, and undue influence can easily occur, and thus a “voluntary” promise to be responsible for nursing home expenses would likely not be enforced.

This result – that a “voluntary” guarantee agreement is unenforceable and improper – comports with common sense. It is difficult to imagine a more one-sided agreement. It would be unfair to make a family member or friend liable based on an admission agreement provision that gave no benefit to the resident or to the resident’s family member or friend.

Conclusion

Missouri consumers should not take anything for granted. A nursing home admission agreement may or may not be consistent with relevant law, and frequently will contain provisions that disadvantage residents and their families.

Accompanying the report is a guide for residents and families entitled *Nursing Home Admission Agreements: Think Twice Before Signing*. The guide is available for free download from the National Senior Citizens Law Center at www.nslc.org. The guide explains how consumers can contest admission agreement provisions that are inconsistent with law or otherwise improper, whether the provisions are discovered prior to admission or afterwards. In some circumstances, lawsuits may be brought to challenge admission agreement provisions that are inconsistent with law. The guide lists strategies and resources available to consumers.

Legislative action may also be appropriate. For example, after a report revealed numerous problems in Los Angeles County nursing home admission agreements, California law was amended to require the state’s nursing homes to use a standard admission agreement.

Ultimately, it is counterproductive for nursing homes to ignore, misrepresent, or disclaim relevant standards. Better nursing homes today pursue a “culture change” in which resident needs and preferences are given high priority. An improved culture will require honest, cooperative relationships between nursing homes, residents and family members. An important step in developing such a culture would be for nursing homes to acknowledge and follow relevant provisions of the Nursing Home Reform Law.

THINK TWICE BEFORE SIGNING:

IMPROPER AND UNFAIR PROVISIONS IN MISSOURI NURSING HOME ADMISSION AGREEMENTS

Introduction

An older person moves into a nursing home because she cannot live independently. The needs of a nursing home resident can be extensive. On average, a nursing home resident needs assistance with four activities of daily living (for example, dressing, eating, using the toilet, and bathing). Approximately sixty percent of nursing home residents have Alzheimer's disease or a comparable dementia. Residents frequently are incontinent. A significant number of residents cannot even roll over in bed without assistance, and some residents require intravenous feeding or ventilator care.

A resident's reliance on the nursing home thus is profound, and this reliance extends beyond physical necessities. Typically, an entering resident knows next to nothing about life in a nursing home. She likely has not lived in a nursing home before, and very probably has tried to avoid even thinking about nursing homes. Consequently, she and her family commonly will defer to the nursing home's policies and practices, trusting that the nursing home and its staff will follow laws and perform professionally.

Unfortunately, this trust can be abused. As this study of admission agreements demonstrates, some nursing homes have established policies that conflict with law. Worse, these legal violations cannot be explained away as lapses by low-level employees. Rather, the improper policies have been instituted directly by nursing homes' management and legal advisers.

This study's findings are not unusual. Across the board, studies of admission agreements have found that the agreements often misrepresent the relevant law. This includes studies performed in Maine, Louisiana, North Dakota, Maryland, and Virginia, and two studies performed in California.¹

Also, this study found admission agreement provisions that, while arguably legal under federal and Missouri law, are detrimental to nursing home quality of care. Some of these provisions insulate the nursing home from legal liability for its actions.

All this being said, this study also found some admission agreements that were generally in compliance with the law, and that established reasonable nursing home policies. This report is written with the goal of educating consumers and nursing home operators, so that proper agreements will be written and used, legal requirements will be more widely known, and conflicts will be avoided.

Nursing Home Law

Federal Nursing Home Reform Law

Since 1965, the federal government explicitly has regulated nursing homes. The federal interest in nursing homes has two primary bases. The first basis, of course, is the well-being of residents. The second basis is the substantial sum of money – over \$65 billion annually – paid to nursing homes by the Medicare and Medicaid programs.²