

Understanding Nursing Home Discharges

by Pi-Yi Mayo, CELA*

At some point in their career every Elder Law attorney will get a phone call from a frantic spouse or family member on the verge of tears because the nursing home has told them their loved one is going to be evicted from the nursing home and that they must either pick the person up today or they will be transported to the home of the relative and left there. At the time of this call these clients will be at their wits end and stressed to an unimaginable level over the prospect of having to immediately drop everything in their life and prepare to somehow care for their ailing relative. Most often they did everything humanly possible to care for the person at home before they were forced to seek the nursing home care in the first place and the thought of having to provide the care again is more than most can rationally cope with. This is where you as an Elder Law attorney can make a real difference in people's lives by your very specialized knowledge. This paper is intended to give you the legal knowledge necessary to prepare for this eventual phone call. Your knowledge and skill as well as your confident demeanor will be a lifeline to this drowning person in this emergency situation. After, confirming just a few facts you should be able to assure the desperate caller that the nursing home is prevented by state and federal law from doing any such thing and then you will most likely be able to stop any further actions by the nursing with a few phone calls.

Federal Law. The rights of residents in nursing homes as well as the responsibilities of the providers of their care are spelled out very clearly in the federal law. Most of the federal law is then enacted in one form or another by the State of Texas. The main source of laws in this area is The Nursing Home Reform Act of 1987 (NHRA). This was contained in Public Law 100-203, Subtitle C part of the Omnibus Budget Act of 1987. Most of the nursing home industry refers to the law as "OBRA-87." NHRA is codified at Title 42 of the United States Code, §§ 1395i-3 and 1396r. The federal regulations that mirror these USC provisions are found at Title 42 §§ 483.5 through 483.75 of the Code of Federal Regulations. Any nursing home that accepts money from either the Medicare or Medicaid must comply with the provisions of the NHRA. The requirements of the law and the extent to which they describe the duties and obligations of nursing homes to residents are astounding. Every aspect of a resident's life and their care is proscribed by these laws and

regulations. If nursing home work is a significant part of your practice you should study and be familiar with all of these sections as they control basically all of the interactions between the resident and the facility. These regulations are further explained in HCF Transmittal No. 274 (June 1995). In this transmittal the Health Care Financing Administration takes the regulations and sets forth “Guidance to Surveyors” to explain to field surveyors how the regulations are to be implemented and instructions on how to verify or determine if the regulations are being complied with. These guidelines are unbelievably specific such as instructing the surveyors to observe the types of flooring the nursing home has in different parts of the nursing home to make sure that Medicaid recipients are not housed in wings with tile floors when private pay patients are in areas with carpeted hallways.

Texas Law. In order to deal with the phone call from your client you do not have to resort to the federal law mentioned above at all. Most of the Code of Federal Regulations (CFR) sections dealing with the discharge of a resident have been copied word for word and set forth in the Texas Administrative Code (TAC). In comparing the CFR to the TAC the only deviations that can be observed are when the TAC includes additional protections for a resident that the CFR does not have. The Texas Administrative Code sections that deal with most aspects of nursing home regulation are found at Title 40 Social Services and Assistance, Part 1 Texas Department of Human Services, Chapter 19 Nursing Facility Requirements for Licensure and Medicaid Certification. The specific sections dealing with Discharge Rights are found at 40 Tex. Admin. Code § 19.502. These sections set forth the only legal basis upon which a nursing home may involuntarily discharge a resident and the procedures required to do so. Since the TAC sections mirror the CFR only references to the TAC will be set forth in the following parts of the paper.

Legal Requirements for Discharge. The Federal law and the Texas Administrative Code recognize only six limited justifications for involuntary discharge from a nursing home. Prior to listing the six reasons however the definition of a discharge is set forth at 40 TAC §19.502 (a). A transfer or discharge includes movement of a resident to a bed outside the certified facility, whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement within the same certified facility. Note however, a resident has a right to refuse certain transfers within a facility as well. 40 TAC §19.421. The term *transfer* refers to a movement from one certified institution to another certified institution. The term *discharge* refers to a movement from a certified institution to a non-institutional setting such as a private residence. The law further specifies that the policies regarding transfer, discharge and the provision of services must be

identical for all individuals regardless of the source of payment for their care. 40 TAC §19.504 This is one of the first lines of inquiry when you are contacted by a client. First, determine how the resident is paying for their care and then find out if they are being treated differently from other residents that have a different payment source. If you discover differences in treatment between private pay residents and Medicare or Medicaid residents then the discharge is illegal.

The 6 Legal Basis for Discharge. The NHRA prohibits a nursing home from discharging or transferring a resident unless the facility can document that the transfer or discharge was made in compliance with one of the following six requirements. This should be the basis for your second line of inquiry when you get that phone call. If you cannot determine that the transfer is being made for one of these six reasons then the transfer or discharge is illegal.

1. Resident's Welfare

The transfer or discharge is necessary for the resident's welfare, and the resident's needs cannot be met in the facility. 40 TAC §19.502 (b) (1).

2. Resident Medical Improvement

The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility. 40 TAC §19.502 (b) (2).

3. Safety Of Other Residents And Staff

The safety of individuals in the facility is endangered. 40 TAC §19.502 (b) (3).

4. Health Of Other Residents

The health of other individuals in the facility would otherwise be endangered. 40 TAC §19.502 (b) (4).

5. Failure To Pay

The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid. 40 TAC §19.502 (b) (5).

6. Nursing Home Closes Or Stops Accepting Medicaid

The facility ceases to operate or participate in the program which pays for the resident's care. If the facility voluntarily withdraws from participation in Medicaid, but continues to provide nursing facility services: 40 TAC §19.502 (b) (7).

- a. the facility's voluntary withdrawal from Medicaid is not an acceptable basis for the transfer or discharge of residents who were residing in the facility on the day before the effective date of the withdrawal (including those residents who were not entitled to Medicaid assistance as of such day);
- b. for individuals who begin residence in the facility after the effective date of the withdrawal, the facility must provide notice orally and in a prominent manner in writing on a separate page of the admission agreement at the time the resident begins residence and document receipt in writing, signed by the individual, and separate from other documents signed by the individual of the following information:
 - (i) The facility is not participating in the Medicaid program with respect to these residents.
 - (ii) The facility may transfer or discharge these residents if they are unable to pay the charges of the facility, even though the resident may have become eligible for Medicaid nursing facility services.

Documentation Requirements. If the nursing home intends to involuntarily transfer or discharge a resident under any of the provisions set forth above except for subsection (b) (7) concerning closing of the nursing home, the basis for the action must be documented in the resident's clinical record. Further, if the basis for the discharge is section (b) (1) Resident's Welfare or (b) (2) Resident Medical Improvement the documentation of the clinical record *must be made by the resident's physician*. If the basis for the transfer or discharge is section (b) (4) Health Of Other Residents then the documentation *must be made by a physician*. The documentation may be made by any staff member if the basis is other than these specific sections. 40 TAC §19.502 (c). The difference between the requirement of *the resident's physician* and *any physician* is an illusory requirement because as a practical matter in most nursing homes one physician will be the "treating physician" for every resident in the home. This requirement of the involvement of any physician however could be fertile ground for inquiry concerning the discharge as there have been some recent cases in which physicians have been hit with large liability verdicts for rubber stamping transfers of nursing home residents.

Notice Requirements. The nursing home is required to give the resident notice of any proposed

involuntary transfer or discharge and the regulations are specific as to the timing and the contents of the notice. 40 TAC §19.502 (d), (e), (f). The regulations governing this area are generally straight forward and easy to deal with. This is not the case with the requirements for the timing of the notice of discharge. The aforementioned TAC section 19.502 becomes very convoluted when describing the required time the nursing home must give notice prior to the intended action.

1. Timing Of Notice Of Transfer or Discharge

If the basis for the transfer or discharge is that the resident has failed to pay a bill (see #5. Failure To Pay above) or that the nursing home is closing or no longer accepting Medicaid (see #7. Nursing Home Closes Or Stops Accepting Medicaid above) the notice of transfer or discharge must be made by the facility *at least 30 days before the resident is transferred or discharged*.

If the basis of the discharge is any of the other six legal requirements set forth above Resident's Welfare ; Resident Medical Improvement ; Safety Of Other Residents And Staff ; Health Of Other Residents ; or the resident has not resided in the facility for at least 30 days then the notice may be made as soon as practicable before transfer or discharge. There is no definition of what is "practicable" in the TAC or in the Federal Law. As a practicable matter the notice must give the resident time to file an appeal of the transfer or discharge as discussed below.

If the basis for the transfer or discharge is Safety Of Other Residents And Staff or Health Of Other Residents and the discharge is not to a hospital the nursing home must immediately call the staff of the state office LTC-R Customer Service Section of the Texas Department of Human Services (DHS) to report their intention to discharge and submit the required physician documentation regarding the discharge. 40 TAC §19.502. (e) (4).

2. Contents And Delivery Of Notice Of Transfer Or Discharge

The facility must notify the resident *and*, if known, a responsible party or family or legal representative of the resident about the transfer or discharge and the reasons for the move in writing and in a language and manner they will understand. The written notice must contain the following:

- a. the reason for transfer or discharge;
- b. the effective date of transfer or discharge;
- c. the location to which the resident is transferred or discharged;
- d. a statement that the resident has the right to appeal the action as outlined in DHS's Fair Hearings, Fraud, and Civil Rights Handbook by requesting a hearing through

- the Medicaid eligibility worker at the local DHS office within 10 days;
- e. the name, address, and telephone number of the regional representative of the Office of the State Long Term Care Ombudsman, Texas Department on Aging, and of the toll-free number of the Texas Long Term Care Ombudsman, 1-800-252-2412;
 - f. in the case of a resident with mental illness or mental retardation, the address and phone number of the state mental health/mental retardation authority, which is: Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, 1-800-252-8154; and the phone number of the agency responsible for the protection and advocacy of persons with mental illness or mental retardation and/or related conditions, which is: Advocacy Incorporated, 7800 Shoal Creek Boulevard, Suite 175-E, Austin, Texas 78757, 1-800-252-9108. 40 TAC §19.502 (f).

PREPARATION AND ORIENTATION OF RESIDENT. Anytime a resident is to be discharged from a nursing home the facility must prepare a Discharge Summary or a Discharge Plan of Care. 40 TAC §19.803. The regulations specify what the facility must do in preparing such a plan. One of the requirements is that the discharge plan must be developed with the participation of the resident, a family representative, responsible party, and/or legal guardian, which will, after discharge, assist the resident to adjust to his new living environment. *If the discharge is involuntary the facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.* 40 TAC §19.502 (g). One of the requirements of the discharge plan is that a final summary of the resident's status including items from what are called Resident Assessment Protocols (RAP's) must be available at the time of discharge. A little knowledge about how the RAP's are created can be a very useful thing at this time. Within 14 days of the resident's admission the facility must prepare a comprehensive assessment of a resident's needs, using the Resident Assessment Instrument (RAI), including the Minimum Data Set (MDS), specified by DHS. The MDS contains standardized data about the resident's condition. Based on the MDS a care plan is created by an interdisciplinary team composed of representatives from all of the departments of the facility. The care plan is composed of specific plans and treatments to deal with the specific medical problems and needs of the resident.

If the discharge summary or discharge care plan has not been prepared or the family was not

offered an opportunity to participate in the development of the plan then this is a procedural flaw that should prevent the discharge if challenged. If the discharge care plan has been created it should be compared with the RAP's and the information on the MDS that was prepared when the resident first entered the facility to see if the discharge care plan adequately provides for the needs of the resident.

Challenging a Discharge. At the time of the frantic call the most important thing is to look to the procedural aspects of the actions of the facility and determine if the proposed transfer or discharge can be stopped with a phone call to the legal counsel for the facility. In most cases the nursing home will have failed to follow any of the legal steps required to evict the resident. At the most basic point find out if they have given a written notice at all. In many cases the relative will simply be told by a representative of the nursing home that they must remove the resident.

Right to a Fair Hearing. If you are unsuccessful at stopping the proposed transfer or discharge with phone calls then the next step is a Fair Hearing. Any individual who receives a discharge notice from a facility has 10 days to appeal. If the recipient appeals, he or she may remain in the facility, except in the circumstances described in III.A.5. Failure to pay above or 40 TAC §19.502 (e) (3) (the section that talks about as soon as practicable discharge), until the hearing officer makes a final determination. 40 TAC §19.502 (i). If the resident is a Medicaid recipient their Medicaid payments and eligibility will continue until the hearing officer makes a final determination. If the recipient has left the facility, Medicaid eligibility will remain in effect until the hearing officer makes a final determination.

If the resident has already been discharged and the hearing officer determines that the discharge was inappropriate, the facility, upon written notification by the hearing officer, must readmit the resident immediately, or to the next available bed. If the discharge has not yet taken place, and the hearing officer finds that the discharge will be inappropriate, the facility, upon written notification by the hearing officer, must allow the resident to remain in the facility. In addition to notifying the facility of the inappropriate discharge the hearing officer is required to report their findings to Long Term Care-Regulatory for investigation of possible noncompliance by the nursing home.

If the basis for the discharge is one of the grounds that allows your client to remain in the facility pending the outcome of the appeal you have effectively put off the proposed discharge for at least 30 days or more. Practical experience with the fair hearing process in the State of Texas would indicate that it most always takes at least 30 days to get a fair hearing scheduled. Once the hearing is held depending on the docket of the hearing officer it may take another several weeks to

get a decision.

Winning the Appeal. The failure of the nursing home to follow the required procedure in a transfer or discharge matter is the easiest way to challenge the action of the nursing home. Each of the procedural steps set forth above should be examined to determine if the facility has skipped any steps or even has a valid legal reason for the transfer in the first place. Although a thorough examination of the different techniques that can be used to defeat a proposed transfer or discharge is beyond the scope of this paper some very common reasons for challenging a transfer can be :

1. New Facility Is No Better Than This One

If the reason for the transfer is not based on a true inability to care for the resident, then what type of facility does the discharge plan propose for the resident? If the new facility is the same type and for all practicable purposes cannot provide any different medical treatment than the current facility then the basis for the transfer does not comply with the law. How can the facility justify a transfer based on their inability to care for the needs of the resident and then provide in the discharge plan for placement in a facility that cannot provide any different care.

2. Resident Is Not A Danger To Safety Or Health Of Others

Many times a nursing home resident will be stricken with a disease that affects their mental status and causes them to exhibit disruptive or unpleasant behavior. If the nursing home is just trying to rid themselves of such a resident because they require a lot of staff time and attention then the transfer or discharge is inappropriate. Always obtain a copy of the Resident Assessment Instrument and the Minimum Data Set and determine what Resident Assessment Protocols were created to deal with the behavior problems of the resident. Discharge of the resident should not be the option of choice for the facility as the regulations require that the facility must provide medically-related social services to attain the highest practicable physical, mental, or psycho-social well-being of each resident. 40 TAC §19.703 (a). If the care plan does not set forth the goals or methods that the facility plans to utilize to obtain the highest practicable mental well-being for the resident then they should not be allowed to discharge the resident. Further, no matter how much of a pain the resident may be and how disruptive they may be they are most likely not a danger to the safety of the other residents or the staff. Unless they pose such a danger then the discharge is inappropriate.

CONCLUSION. The practical side of dealing with the frantic phone call mentioned above may

be that you do not want to oppose the transfer. In the exercise of your function as a counselor it may be that the best thing you can do for your client is to utilize your knowledge to help them find an alternative placement for the person. Once the emergency can be averted then long-term aspects of the situation should be evaluated. Does the caller really want their loved one to stay in this facility if another appropriate placement can be found? However, there are many times when the transfer or discharge should be challenged. It may be necessary to oppose the transfer or discharge in order to have the time to find another facility. Sometimes because of the behavior of the resident changing the facility is not the answer, forcing the facility to provide the care as required by the law is what is needed. Sometimes when the family or care givers of the resident are too vocal in the demands they make of the facility for the care of the person the nursing home will simply try to get rid of the resident rather than deal with the demands of the family.

In the cases where it is in the best interest of the resident to remain in the facility, the Federal law as well as the laws of the State of Texas give your client many protections from a unlawful discharge. This paper will give you a start on finding and applying that law. If you need further help there are several advocacy groups in the country that can provide additional help in the law and techniques to deal with a wide range of issues concerning nursing homes. The foremost of these is the National Citizens' Coalition for Nursing Home Reform. They have a website at <http://www.nccnhr.org> that can provide additional resources.

*Pi-Yi Mayo, CELA and Randy Drewett, CELA are "Certified Elder Law Attorneys" by the National Elder Law Foundation.

FOR MORE INFORMATION ON ELDER LAW ISSUES CALL:

RANDY DREWETT, CELA

(409) 833-4000

Beaumont