

**EVALUATING A NURSING HOME
FROM A LITIGATOR'S VIEW**

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I. INTRODUCTION

The purpose of this paper is to give you tips on what you should advise your clients to consider when they are evaluating a nursing home, assisted living facility or other type of residential care for their loved ones. By following the guidelines set out herein, your client will be able to make an informed decision about this most important choice which profoundly affects the quality of their loved one's life. They may also assuage some of their own guilt and apprehension about trusting their loved one's health and care to strangers. In addition, they will have vital information needed in the event that litigation against the facility becomes necessary.

II. TYPES OF FACILITIES AVAILABLE

Industry projections are that the number of people requiring long-term care will double in the next two decades to nearly 14 million. The choice of the appropriate facility is complicated, but there are specific differences between the type of care provided by a nursing home facility and that provided by an assisted living or other residential care facility. In addition, there are varied legal requirements and criteria that are applicable to different types of facilities. It is important to understand the differences.

A. Nursing Homes.

A nursing facility provides food, shelter and nursing care. Other care provisions include minor treatment under the direction/supervision of a physician. The Long-Term Care Regulatory Department of the Texas Department of Human Services (DHS) issues licenses to operate a long-term care facility in Texas and certifies facilities that choose to serve Medicare and Medicaid patients. The licensing process requires detailed information on the owner/operator and controlling persons to allow for denial of a license based on the applicant's past history as a provider. Other responsibilities include investigating complaints, monitoring facilities that are out of compliance with state or federal regulations, pursuing enforcement actions against facilities that have been cited for noncompliance with regulations, conducting informal dispute-resolution activities, providing information and releasing records to the public, and managing Medicaid contracts.

1. Most skilled nursing facilities (SNF=s) accept Medicare and, as a result, are subject to numerous federal statutes and regulations which attempt to achieve a minimum level of care for residents. The Texas Health and Safety Code, Chapters 242, 247 and 252; the Human Resources Code, Chapter 103; and the Social Security Act require DHS to inspect and survey all long-term care facilities to ensure they are in compliance with all applicable state and/or federal laws. Certification surveys are also required for participation in the Medicare and/or Medicaid programs.
2. SNF=s are subject to specific staff requirements.
3. SNF=s are required to have medical directors, physicians who supervise and are responsible for the medical care provided in the facility.
4. Medications in a SNF can only be administered by an LPN, medication aide or an RN.
5. SNF=s are required by federal law to conduct in-depth assessments of residents upon admission and on a regular basis thereafter.
6. Medicaid is accepted.
7. Some facilities are private pay facilities.
8. Some offer specialized Alzheimer units.

9. Routinely inspected by DHS to determine their compliance with state and federal Medicare and/or Medicaid regulations and state licensing laws. Nursing homes are surveyed every nine to 15 months, depending on past compliance with regulations. Survey teams of from two to five skilled professionals in the health care, social work, or construction fields look at all areas and operations of the facility to ensure resident care is provided according to the regulations that safeguard their health and safety. Follow-up visits are made when additional monitoring is warranted. Survey teams also are responsible for investigating complaints and incidents reported to DHS.

B. Assisted Living Facilities.

Assisted living facilities provide individualized health and personal care assistance in a homelike setting with an emphasis on personal dignity, autonomy, independence and privacy. These facilities also serve as an intermediate placement between the resident's own home and a nursing home. These facilities are for persons who, either by choice or necessity, need help with some activities, but do not require extensive care. Residents are semi-independent physically or mentally, or are frail persons who need frequent assistance. Residents can get help with daily living activities, such as eating, housekeeping, dressing, bathing, personal care assistance, health care monitoring, limited health care services and/or the dispensing of medications, but heavy medical and nursing care is not offered.

Many people faced with the prospect of making the decision to place their parents in a residential care facility will opt for an assisted living facility rather than a nursing home simply because there is less of a stigma attached to the concept of assisted living than to that of a nursing home. The phrase assisted living is being used as a marketing tool because it provides the family an outlet where they do not have to say their loved one is in a nursing home. They want to avoid the highly publicized problems that plague the nursing home industry and are psychologically more comfortable with admitting their parents to an assisted living facility, which implies they need some help, as opposed to a nursing home, which in their mind often is the end of the line. Therefore their decision is not always made with the real needs of the patient in mind.

However, frequently an assisted living facility will permit residents to continue to live in the facility although the needs of the residents have far exceeded the ability of the facility staff to care for them. General Accounting Office surveys reveal that 93 per cent of assisted living facilities indicated they were able to serve the frail elderly.¹ Twenty-five per cent of the assisted living centers responded that cognitively impaired residents made up 50 per cent of their population.² Many assisted living facilities are being attacked because they are in effect operating as a nursing home facility without licensing, but these facilities may or may not be inspected and they are not subject to the same regulations which establish standards for nursing home facilities. In fact, the General Accounting Office concluded in 1999 that it was not possible to determine the precise number of persons living in assisted living facilities in the United States because there is no generally accepted definition of assisted living and no systematic means of counting these facilities. Estimates of the current number of beds in assisted living facilities range from 800,000 to 1.5 million.³

¹United States General Accounting Office, *Assisted Living: Quality-of-Care and Consumer Protection Issues in Four States*, GAO/HEHS-99-27, note 3, at 8 (Apr. 1999).

²*Id.* at 10.

³United States General Accounting Office, *supra* note 3, at 4.

1. They are subject to state regulations and are inspected by DHS yearly.
2. Generally private pay and do not accept Medicare reimbursement. As a result, they are not subject to federal regulations.
3. Residents enjoy a certain level of Independence, and privacy is generally more emphasized in this type of setting than in a nursing home setting.
4. Medical and medication requirements of the resident must be minimal. Medications are generally dispensed by unlicensed personnel, usually referred to as Acaregivers@.
5. There are generally no licensed certified nurse assistants (CNA=s).
6. Do not have medical directors. Instead, they have contract physicians who may come in to see a resident on an as-needed basis.
7. Generally have no staff minimums.
8. Lack of sufficient or qualified staff.
9. States do not require that persons hired by assisted living facilities undergo a criminal background check, as is required of nursing home employees.
10. Tend to be governed by residential care agreements entered into with the resident.
11. Be sure you know what services are provided by any facility you are considering because the services offered vary greatly among facilities, whether called personal care homes, managed care, catered living, board and care, domiciliary care, sheltered housing or residential care facilities. These services are available at an assisted living facility: three meals a day, housekeeping, transportation, laundry, help with dressing and grooming, and some assistance with medication.

C. Residential Care Facilities.

1. These facilities are variously known as residential care facilities for seniors, adult care homes and boarding homes for seniors, many of which are not licensed. No requirement to be licensed means these facilities are not necessarily subject to state inspection.
2. Which facilities may be licensed in Texas.
3. No medical care provided.
4. No licensed personnel.
5. No staffing requirements.

D. Alzheimer's Units.

1. Consider the level of dementia and the type of assistance the patient requires (*i.e.*, eating, drinking, bathing, etc.).
2. Precautions to handle wandering and other manifestations of dementia which require specialized methods of treatment or control.

III. WHAT TO LOOK FOR AND LOOK OUT FOR.

A. Geographical Location.

Consider the facilities located in a geographical area which will make it convenient for family members to visit often.

B. Type of Facility Needed.

Consider the type of facility that will best suit the medical and care needs of the patient.

C. Advertising.

Be very skeptical of advertising and slick brochures.

D. Visit the Facility.

Nothing is more important than an inspection of the facility with a critical eye. It is imperative to visit the facility and see for yourself. Once you have selected a facility and placed a loved one, do not always visit at the same time so that the staff will be prepared for your visit. Go by to visit your loved one at varying times so that you can have a more complete view of what is occurring at all times of the day.

E. Monitoring of Persons Entering and Exiting the Facility.

Notice whether persons entering and exiting the facility are monitored by staff. Also find out whether there is any alarm or protection against patients wandering out of the facility and strangers wandering in.

F. Restraints.

Find out the facility policy regarding restraints. Restraints are a last resort and must be ordered by the patient's physician and approved by the family. Facilities that use restraints as a form of control and convenience for the staff should be avoided.

G. Keep Copies of Everything.

Keep the brochures and any other information you are given by a facility. Once you have selected a facility, keep copies of ALL contracts, admission documents, bills, receipts and any other papers you receive from the facility.

H. Photographs.

Take photographs of the resident at the time of admission and keep a periodic record of photographs. In the event of any injury, bruise or other unusual event, take photographs. All of these photographs should be dated.

I. Keep Track of the Names of Staff Members.

Keep a record of the names of the administrator(s), director(s) of nursing, charge nurses, medication aides and certified nurse aides who assist your loved one. Make a note of the date that these people leave and when their replacements take over. There is tremendous turnover of personnel.

J. Complaints.

Should a problem develop, complain to the administrator, director of nursing or charge nurse, and keep a record of the dates of your complaint, the substance of your complaint, and the person to whom you complained. If your complaint is not addressed and corrected, you should consider locating another facility.

K. Review Records.

Once your loved one has been admitted, periodically ask to review all of his/her records, including medical records, medication administration records, and activities of daily living records (ADL=s). You are entitled to see these records and make sure that what is reflected in the records comports with your observations. For instance, notice whether records reflect the resident has eaten 100 per cent of every meal when you have observed that he/she has actually lost weight. Check to see what the facility has been feeding the resident.

L. Care Planning Meetings.

If you are notified that the facility will be having a meeting to determine the care plan for your loved one, have a family member participate in the meeting. If you do not understand what is being discussed, then ask questions.

IV. NURSING HOMES.

Inquire as to who owns the facility and whether the facility is in bankruptcy. Find out whether the facility is part of a chain. No one needs the shock of discovering that the facility is closed because the owner is bankrupt and has gone out of business. Also ask about lawsuits that have been filed against the facility.

You must inspect the facility yourself. Ask to inspect the entire facility, including the kitchen, laundry and other areas not normally frequented by the residents. Notice whether there are odors which could indicate the facility or the residents themselves are not kept clean. Take a look at the beds and bedrails to determine whether they appear to be newer or older beds and whether the bedrails work properly.

Find out whether there are bed alarms to alert the staff when wandering patients get out of bed. These alarms may be found on more modern beds, but older Medicare facilities will probably not have them. See whether the equipment in the facility appears to be safe and functioning. Check to see whether systems to control wandering (door alarms, bracelets or anklets for residents, etc.) are being utilized. Are the exterior doors kept locked? Do staff members assure during the day that the doors that are to remain locked at all times actually are? What happens when staff members go outside to smoke? Are the services offered provided by employees of the facility or by other agencies?

If you can, talk to the families of other residents to see what their experience has been. Try to develop a relationship with the family of your loved one=s roommate. That way, you both will be more inclined to watch out for your loved one=s roommate when you are not there.

Also talk to the people who work at the facility. Find out the patient-to-aide ratio and patient-to-nurse ratio for each shift (see Section X below). Ask about the rate of turnover of staff.

V. ALZHEIMER 'S UNITS.

Alzheimer=s unit can be found at some nursing homes and assisted living facilities. Whether an Alzheimer=s patient is more appropriately admitted to a nursing home facility than an assisted living facility depends on the degree of dementia the patient exhibits. There are some assisted living facilities who could accommodate someone with a limited degree of dementia. A greater progression of the dementia would require the medical care of a nursing home.

The type of protection the patient requires against wandering and other activities which could result in injury is also an important consideration. Precautions against patients wandering and unauthorized persons on the premises should be in place, particularly in a facility whose residents suffer from dementia and Alzheimer=s. If the facility is an open facility for Alzheimer=s patients and they are allowed to walk outside, be sure that you walk the entire grounds of the facility, checking the gates and fences to be sure that residents cannot leave the grounds unnoticed. Also check the grounds carefully to see that they are safe. There have been reports of deaths of patients from serious injuries occurring where construction sites had holes which had not been filled in or pavements were uneven, causing patients to fall and sustain injuries to their heads.

Whether there is sufficient staffing to prevent residents of the opposite sex from entering your loved one=s room is critical to prevent sexual abuse. There are many sexual abuse incidents in nursing homes which involve patient-upon-patient attacks. Sexual abuse by staff or people who just walk into the facility also occurs.

VI. INSPECT BODY.

Once your loved one has been admitted to a nursing home or other facility, you are encouraged to inspect your loved one=s entire body periodically. It is very important to assure that pressure ulcers are not forming and that there are no bruises or wounds which are unexplained and may indicate mistreatment or neglect.

VII. NUTRITION AND HYDRATION.

Proper nutrition and adequate fluids are cornerstones for maintaining health and healing any wounds that occur. Encourage your loved one to drink plenty of fluids. Notice whether your loved one seems to be overly thirsty whenever you visit. Also notice whether his/her urine is concentrated, whether his/her mouth is dry, and if mucous membranes appear to be dry. These are signs that adequate fluids are not being provided. Lack of hydration and poor nutrition create a tremendous problem for residents. Check meal trays to see what is being presented to them, as well as how much food is not being eaten. Make sure your loved one is being fed by the staff if required.

VIII. MEDICATION.

Review medication with staff. Medication errors are very high and extremely dangerous. Make sure that the medication aide has a photograph of your loved one on his/her medication chart. It is a huge problem when medications are dispensed to the wrong resident and a photograph can sometimes be a lifesaver. If the physician orders a change in your loved one=s medication, be sure to check that the change is noted and the proper medication is being given.

IX. VIDEOS.

Ask the facility whether you can place a video monitoring system in the patient=s room. Some cameras can be set up to be attached to a computer at your location so you can monitor your loved one at any time (like those systems used to monitor children in daycare centers). If you are told that placing a video camera in the room is a violation of the residents= rights, then tell them that your loved one agrees to having the camera and, if there is a roommate in the room, the camera will be focused only on your loved one. See how the facility responds to your request. Videotaping may lead to an improved quality of care, but it is not without significant legal questions which to have date not been resolved.

X. INSUFFICIENT STAFFING.

The most difficult problem that confronts families and the largest single cause of abuse and neglect of residents is the lack of sufficient staffing. NCCNHR has promulgated and promoted the following minimum ratios for nursing aides:

Day shift - One aide per 5 patients
Evening shift - One aide per 10 patients
Night shift - One aide per 15 patients⁴

Problems and harm to patients tend to occur when ratios are higher than these suggested. Based on these numbers, the amount of care given by the nurse aides is as follows:

Day shift - 3 aides x 8 hours = 24 hours
Evening shift - 2.5 aides x 8 hours = 20 hours
Night shift - 1 aide x 8 hours = 8 hours

Total nurse aide hours = 52 hours

52 hours divided by 30 patients = 1.73 hours per patient per day

XI. GENERAL INFORMATION.

A. NCCNHR.

It is a good idea to join the National Citizens= Coalition for Nursing Home Reform (NCCNHR). This organization is the primary advocacy group for nursing home patients and has a great deal of information that is helpful in making a decision regarding a nursing home.

B. Cost.

The average price of assisted living in the United States is estimated at approximately \$2,000 per month. Some facilities charge as much as twice that amount and even more if they provide programs for residents with dementia, Parkinson=s disease or other serious health problems.⁵ If a number of services are needed, it is usually more cost effective to enter an assisted living facility than to have home care services that are paid for individually. Private pay nursing homes are considerably more expensive.

C. DNR' s.

Most facilities will ask that family members sign a ADo Not Resuscitate@ order (DNR). This signed form means that, in the event your loved one suffers cardiopulmonary arrest, no resuscitative measures will be taken. Extreme care should be exercised as far as the items checked off on the form. Make sure that the form truly reflects your desires.

D. Facility Contract.

Many nursing homes and assisted living facilities have now included a provision in their contracts for compulsory arbitration of any conflicts that arise between the resident and the facility. There has been significant controversy regarding whether these provisions are enforceable. The provision is obviously meant to benefit the facility so be sure to question it.

E. Physician.

⁴NCCNHR website at http://nccnhr.org/govpolicy/51_162_472.CFM.

⁵Amy Goldstein, *Assisted Living: Paying the Price*, THE WASHINGTON POST, Feb. 20, 2001.

Many facilities will recommend that the resident use the facility's own medical director as his/her physician rather than the resident's own private physician. What the facility does not tell you is it has a contract with the medical director by which the facility will benefit monetarily when the medical director provides services to the residents. Many times the medical director will merely walk through the facility without spending time with any residents and document it as a patient visit. Also, if a problem should arise regarding medical treatment of the resident, it is likely that the medical director, as an employee of the nursing home, will side with the facility and not be objective.

First ask your loved one's own private physician whether he/she would treat the resident at the nursing home.

If not and you are able to take your loved one to the physician's office for care, it is recommended that you do so and continue with the physician if he/she retained your confidence. If you are not able to take your loved one to the physician's office for appointments, then ask to see a list of doctors who come to the facility to examine residents. You should investigate the doctors to the extent that you can and decide whether one of them would be an appropriate choice. The medical director should be selected as the resident's physician only as a last choice. In that event, you should request a meeting with the medical director.

XII. WEBSITES AND NUMBERS TO CALL

There is much valuable information available both on the Internet and at various agencies and organizations you can call. The following is a list of websites and telephone numbers that can help you make a selection. Many of these sites will link you to other sites of interest.

1. www.nccnhr.org

The National Citizens' Coalition for Nursing Home Reform is an organization that advocates for quality care for persons with long-term care needs. This website provides a wealth of information and offers publications of interest.

2. www.medicare.gov

This website provides a nursing home comparison, statistical information and survey information for nursing homes nationwide. There is also information regarding staffing requirements.

3. www.hcfa.gov

This website provides comprehensive information regarding nursing home facilities that receive Medicare and Medicaid.

4. <http://facilityquality.dhs.state.tx.us>

This website provides information about the owner of the facility, the facility's overall rating as compared to other facilities in Texas, and survey information.

5. <http://memberofthefamily.net>

This website has information regarding the national nursing home watch list and a registry of all nursing homes in the country.

6. <http://cms.hhs.gov/medicaid/reports/rp700hmp.asp>

This website contains Department of Health and Human Services staffing ratios.

7. http://reform.house.gov/min/pdfs/pdf_inves/pdf_nursing_TX_rep2.pdf

A ten-year study on nursing home conditions in Texas.

8. www.aarp.org

There are numerous articles, publications and other important information are available on this website.

9. www.aoa.gov/housing/al.html

The Administration on Aging website has a checklist for evaluating assisted living residences.

10. www.ncal.org

This is the website of the National Center for Assisted Living and has information for those considering assisted living.

11. www.aahsa.org

This is the website of the American Association of Homes and Services which represents non-profit organizations dedicated to providing quality health care, housing and services to the elderly. This site lists criteria to consider when choosing an assisted living facility.

12. www.protectelders.org

This website has a Nursing Home Checklist to use on an inspection tour of a facility.

If you prefer calling or writing:

1. Texas Department of Human Services, Long-Term Care Regulatory
(800) 252-8016 (press 0 to be connected with a live person to answer your questions)
(800) 458-9853 (to report elder abuse in a facility)
2. Customer Service Hotline, Texas Department of Human Services, Long-Term Care Regulatory
(800) 458-9858 (to find an assisted living facility)
3. Texas Abuse/Neglect Hotline
(800) 252-5400
4. Ombudsman Hotline
(800) 720-7777
5. OSCAR Reports and F-Tag Information:
Survey Solutions
1200 Chambers Road, Suite 400
Columbus, Ohio 43212
(800) 488-1281

6. National Citizens= Coalition for Nursing Home Reform (NCCNHR)
1424 16th Street NW, Suite 202
Washington, D.C. 20036
(202) 332-2275
7. Eldercare Locator Service (directs you to the nearest agency on aging at no charge)
(800) 677-1116
8. Assisted Living Facilities Association of America
9401 Lee Highway, Suite 402
Fairfax, Virginia 22031
(703) 691-8100
9. American Association of Retired Persons
601 E Street NW
Washington, D.C. 20049
(800) 424-3410
10. American Association of Homes and Services for the Aging
2519 Connecticut Ave. NW
Washington, D.C. 20008
(202) 783-2242
11. National Consumers League (for a copy of APrimer on Long-Term Care@)
1701 K Street NW, Suite 1200
Washington, D.C. 20006
(202) 835-3323