

SELECTION AND INVESTIGATION OF NURSING HOMES



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Physical and sexual assault, battery, rape, drug overdoses, homicide.

Serious wounds, injuries, death.

Dehydration, malnutrition, poor hygiene, unsanitary conditions.

Isolation from the community, social withdrawal, non-communicative, neglected.

Any or all of these descriptions may be thought of as being illustrative of the common problem facing large inner cities or crime or violence-ridden sections of communities across the country. These descriptions however are much nearer to us than we think. Across the country descriptions such as these are from investigations, inspections, and lawsuits involving abuse and neglect in nursing homes and care facilities. There is a great deal of information from several sources that can be learned about a nursing home or care facility and this information can be obtained in determining appropriate placement and selection of a nursing home or care facility, prior to becoming a patient or resident.

The numerous sources providing information which is of vital importance in the selection and placement decision range from official state and national governmental agencies, including state and local departments of health and human services/resources, law enforcement and emergency personnel and licensing boards and authorities to national, localized or regional non-profit and civic groups including senior citizens' centers and coalition groups. Sources of information which should be explored include talking with current residents/patients or their families and friends, neighbors nearby or close to the location of the facility, and, of course, visiting on several occasions and speaking with the staff, employees and management of the facilities under consideration, as well as residents or their families.

This is a vital life decision. Treating it as such means making the informed decision about selection and placement after carefully investigating and assessing a facility's capabilities and capacity to care and provide for you or your loved one. The law provides that a facility "must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being" to its residents/patients.

SELECTION AND INVESTIGATION OF NURSING HOMES

In the course of investigating and litigating cases of nursing home negligence, substandard care, and injuries and accidents occurring in nursing homes, it is necessary to obtain a great deal of information regarding the particular facility. Unfortunately for the neglected, abused or injured person, my investigations are “after the fact.” That is, something bad has already happened. But, it occurred to me that a tremendous amount of the information that I obtain is available to the public specifically for the purpose of assessing, investigating, and selecting a nursing home, or adult care facility for yourself or a loved one.

For far too many, the “selection” process involves no more than locating a facility that has a bed. Little if any further inquiry is made. This results in a very incomplete examination of the facility’s capabilities, services and quality offered, not only in terms of service, but also in terms of staffing. Most alarming however, is that this limited, narrowly focused “selection” process is dangerous, potentially disastrous, and may be life-threatening. I have represented a number of injured care home residents with injuries so serious that amputation was necessary and families of residents who died while in the care, or as a result of the care that was provided at the care facility.

It is obvious to me, that we and our loved ones are much better served with an investigation of the prospective facility prior to becoming a resident or patient. Think of it this way, we don’t take our children to the first “babysitter” ad in the classifieds. We investigate the facility, visit the location, discuss our own child’s particular needs, likes, dislikes, habits, what soothes or comforts them, and we make assessments of staff, watch them interact with the other children in their care, and finally we make an informed decision whether or not this daycare center is appropriate. All of these considerations and more can be accomplished when determining our own selection of a care facility, or the selection of a care facility for our loved ones.

The presentation will include several ideas to consider in the selection process from visiting the facility on several occasions on different dates and at different times, observing and sampling the quality of food service, atmosphere, social and recreational opportunities, staff behavior and visibility (that is, does there appear to be adequate numbers of staff for the number of residents you see), cleanliness and condition of rooms, equipment and overall condition of the facility, environmental conditions such as comfortable temperature and lighting. Take a stroll down each hallway, look into the rooms, and use common sense asking yourself, “Are the people I am seeing being taken care of?” Talk to residents and family members or visitors of residents, let them know you are considering the facility for yourself or a loved one, and their thoughts, criticisms and comments are important to you. Obviously, there are a number of “informal” investigation steps that may be taken. In the event of special needs, levels of care, use of devices or appliances for mobility, or other physical, social or psychological conditions, your investigation should include the facility’s capabilities to address those particular needs.

Meeting and speaking with staff and management is critical. The key here is that you must determine if there is an adequate number of qualified staff persons. Mere quantity is not

enough, and neither is impeccable qualifications of just a few. For many residents and patients the care facility becomes their entire “community.” Their entire social world, where they receive health care, where they have their hair done, teeth cleaned, where they eat, and where they interact becomes a community in and of itself. In any community in order to sustain itself, there must be an adequate number of qualified people and the care facility “community” is no different. Staff people from dietary consultants to social service workers to nurses and nurses aides and assistants must be trained, competent and diligent to the needs of each individual resident and patient. Ask about the qualifications of the management in directing care, and most important from a management standpoint adequate spending and budgeting for providing the resources to take care of you or your loved one. Be wary of administrators and directors and the facilities they operate if they are not forthcoming and open about these considerations, or if they discourage or impede your investigation into this area.

Assess the nursing care, the qualifications of the nurses and aides, talk to the director of nursing. Speak with the nurses and the nurse aides, ask them what, if any, criticisms they have, what their opinions are as to staffing, and their ability to not just “take on another patient” but to care and provide for you or your loved one. Personalize it. Ask about the training of staff to ensure that they are current and up-to-date with patient care. These are the staff persons who will have the most contact with you or your loved one, they will be the ones on a day-to-day basis tending to the needs of and caring for the resident. There are no dumb questions, ask away.

Obtain all of the promotional literature, advertisements, and other written, documentary or videotape materials about the facility and staff. Take the time to review them and ask questions about the materials at a subsequent visit to the facility. Ask for blank copies of all of the documents that you would be asked to sign upon admission to the facility and review them. You may consider reviewing them with a physician or other health care person, or any attorney.

Check with local senior citizens centers. They too may have a wealth of information about the facility that you are investigating.

There are a number of “outside” or formal sources of information which you can utilize in the investigation and selection of nursing homes. West Virginia and Ohio have state and local ombudsman programs and commissions on aging, which may serve as advocates, and investigating arms for nursing home residents. State and federal laws and regulations may be discussed as well as deficiencies, complaints, and investigations, if any, of the facilities under consideration. The rights and privileges afforded to residents of facilities will be explained and an abundance of written material may be obtained explaining those rights and privileges. Other information pertaining to the requirements of state and federal laws and regulations is available from these sources.

One of the most important governmentally mandated reports, commonly referred to as a “survey report” or “survey” must be posted at and available for review at every medicare/medicaid eligible facility, which includes most all facilities. Annually, these facilities are “inspected” by usually a team of “surveyors” who examine the facility. The entire operation of the facility is examined and assessed from quality and condition of the building to the quality

and effectiveness of individual care to the residents. Deficiencies, substandard conditions, and inadequacies are listed and plans of corrections must be implemented. If the facility fails or refuses to address these a host of penalties or fines may be imposed.

The survey and other information required by the Health Care Financing Administration (HCFA) may be obtained with the assistance of the ombudsman. Detailed financial information may be obtained as well, and particularly with residents in need of acute or continuous care, decisions must be made about adequate resources to meet those needs.

State departments of health and human resources and licensing boards may have information as well. These are important in order to ensure that the facility has remained in good standing with all appropriate licenses current and valid. Suspensions and/or revocations may be revealed which should prompt further inquiry. Surveys are maintained here, as well as complaint investigations, and various reports such as medical cost reports, mortality reports, and civil penalty reports. The facility's application and certification papers are maintained at these departments, and the applicable medicare/medicaid contracts and certifications are available. Other offices such as the secretary of state may have useful information. Here again, ask the administrator or director specifically to whom all reports of the facility are made, and where these agencies may be contacted. Be wary of the administrator or director and the facility if they are not forthcoming or impede your inquiry into these areas.

Check with local law enforcement. I have represented nursing home residents who have been victims of crimes, serious crimes including sexual assault and homicide. These agencies can alert you to concerns of adequate supervision and security at the facility.

Everything seems to be on the Internet now. Many facilities have their own web pages, and there are several web sites that provide information about or concerning nursing home facilities. Some of these sites may provide information about the particular home that is under consideration or may remind you of some the general considerations to be mindful of in the selection of an appropriate facility.

The number of people comprising the population in nursing facilities has grown, and it is expected to continue to grow. More residents than ever reside in these facilities. Nursing homes though on the personal level cannot and must not be just simply about mere numbers. Each resident is an individual who entitled to individualized, specifically designed care to meet their needs, regardless of the financial source of payment. Residents are entitled to quality of life, not just being warehoused. The facility is required to attain and maintain the highest practicable physical, mental and psychosocial well-being of its patients. This is not merely a wishful goal, but rather the law. The decision of placement may well be traumatic, made even more so because of the complexities involved. However, the complexities resulting from a thorough, wide-ranged investigation should not be looked upon as unnecessary, unimportant, or too large a task. After all, it is a life decision we must make for ourselves, and sometimes a life decision we must make for someone we love who cannot make their own decision.

STATISTICS: Population

In May 1999, a comprehensive report on long term care facilities for a twenty year period, 1978-1997 was generated. The report and study was conducted by researchers from the University of California, San Francisco, and Wichita State University in cooperation with the United State Health Care Financing Administration (HCFA) and United States Department of Housing and Urban Development. Data and statistics were collected specific to each state and then considered nationally in determining national trends and characteristics. The following statistics are most revealing:

- *Over 34 million Americans are 65 years of age or older
- *This comprises over 12% of the entire population of the U.S.
- *There are nearly 18,000 nursing facilities in the U.S.
- *The number of beds in these facilities is almost 2 million
 - *Occupancy is 80-90%
- *Ohio has approximately 1000 nursing homes/approx. 90,000 beds
 - *Over 13% of Ohio's population is 65 or older
- *West Virginia has approximately 150 nursing homes/approx. 11,000 beds
 - *Over 15% of West Virginia's population is 65 or older
- *Both states % of older population is above national average

STATISTICS: Abuse and Neglect

The actual numbers of instances of abuse and neglect in nursing facilities is difficult to ascertain. There are unreported instances, unexplained injuries, and unrealized or unrecognized instances of abuse. Nationally, detailed statistical information is sparse, however, statistically, more and more instances are being reported for investigation and litigation involving negligence, abuse and neglect has significantly increased.

***Approximately 40% of all HCFA certified facilities have violated federal standards**

Nursing Homes: When a Loved One Needs Care, Consumer Reports, August 1995

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The following statistics are from a 1998 publication of Jury Verdict Research, an LRP Publications Company entitled: *The 5 Myths of Nursing Home Litigation*. Statistically:

***Basis of liability:**

Treatment – 41.5%;

Negligent Supervision – 34.5%

Business/Employee Negligence – 8%

Premises Liability – 8%

Physical/Sexual Abuse – 6%

Other – 2%

***Most frequently occurring injury situations:**

Death – 42%

Fractures – 17%

Emotional injuries – 9%

Amputations – 5%

Other – 27%

FEDERAL LAWS AND REGULATIONS

The Nursing Home Reform Act, 42 U.S.C. §1396R, Nursing Home Reform Amendments to the Omnibus Budget Reconciliation Act (OBRA) of 1987, 42 U.S.C. §1395 and other public health statutes ushered in higher minimum standards for quality and care to patients and residents. The Health Care Financing Administration (HCFA) regulations establish minimum requirements and standards for nursing facilities and maintains extensive lists of possible/potential deficiencies or indicators of substandard care. Federal regulations in 42 C.F.R. §483 detail the operational mandates and standards of which nursing homes must comply. As with the growing trend in reports of abuse and neglect, federal legislation continued to be proposed and debated concerning abuse prevention, access to quality of care, patients rights bills, and care and treatment directives.

The federal requirements, under 42 U.S.C. §1396R, are essentially enforced by the HCFA rules appearing in the Code of Federal Regulations, Part 488 and Part 483. Part 488 includes the survey and certification procedures while the day-to-day requirements and standards for long term care facilities appear under Part 483.

Again, nursing homes who are recipients of Medicare/Medicaid funds, which includes most, must comply with the federal laws.

STATE LAWS/REGULATIONS

West Virginia

The following West Virginia statutes relate directly to the standards, requirements and laws under which nursing homes are owned, operated and controlled:

*W.Va. Code § 16-5C-1 et seq. Nursing Homes

*W.Va. Code § 30-25-1 et seq. Administrators

*W.Va. Code § 16-5L-1 et seq. Long-Term Care Ombudsman

There are also laws regarding medical care and treatment by physicians, nurses, aides and staff people and health care providers and professionals, including licenses, training, continuing education, which may be implicated given the specific facts of a case.

Of significant note is the application of the Medical Professional Liability Act to nursing home cases:

*W.Va. Code § 55-7B-1, et seq. Medical Professional Liability Act

State regulations specifically concerning the standards and operational mandates of nursing homes are:

*63 C.S.R. 13 Nursing Home Licensure

*21 C.S.R. 1 Administrators Licensing Board

*12 C.S.R. 1 Licensing Advisory Counsel Rules

Again, various regulations may be implicated depending upon the particular facts of a case.

State and federal medicare/medicaid statutes and regulations apply. These may be implicated again, given the particular facts of a case.

Other statutes such as criminal fraud, evidence or records tampering and particularly those of crimes against the person or property may be applicable.

STATE LAWS/REGULATIONS

Ohio

In many claims, numerous laws and regulations may be implicated which are not primarily directed to nursing homes or care facilities. Laws and regulations concerning licenses, qualifications, and certifications and training for health care providers and professionals may become relevant. In addition to the various titles under the Public Welfare chapters other areas concerning public health, sanitation, and business related issues may require a review of certain regulations and statutes. Falsification of records is a concern in any case, however, particularly of concern in nursing home litigation where claims are record intensive may implicate criminal statutes, medicare/medicaid fraud issues or other provisions. Primarily in Ohio, however, the following statutes are primary to the operations, standards and guidelines under which nursing and rest homes function:

*Chapter 3721 Rest Homes; Nursing Homes

*Chapter 4751 Administrators

*Chapter 109.57 Criminal Records Check

*Chapter 5111 Medical Assistance Programs

*Chapter 173 Reportings, Grievances, Reports

The following administrative code references must be reviewed, in addition to those which may be implicated considering the facts of each individual case:

*OAC 3701-17 Nursing and Rest Homes

*OAC 4751 Board of Examiners of Nursing Home Administrators

*OAC 5101 Various Applicable Ohio Medicaid Provisions

Numerous provisions of 5101 are applicable and apply to nearly every aspect of nursing home administration, patient care, costs, accountings, reportings, and disclosures. See generally sections under OAC 3701 for specific provisions concerning long-term care facilities and beds, including records retention/access, management of patient funds/accounts, accommodations, definitions, and continuing training, competency and qualifications evaluations, for nurses and nurses aides. Building standards, comfort and environmental issues indicated under 4101, and licensure of residential care facilities under 5122 may also be implicated. A number of applicable regulations specifically cover “special” needs patients/residents such as mentally ill, retarded, or juvenile residents/patients.

A SELECTION/INVESTIGATION CHECKLIST

This checklist is not meant to be done in any particular order, however, it is advisable to attempt to have adequate inquiry into each of these areas. Some steps are better repeated. For example, talk to the administrator, then to staff, then to the administrator again, to address some questions, concerns, criticisms that may have been raised during your discussions with staff.

Remember this Caveat: BE WARY OF MANAGEMENT, ADMINISTRATORS AND THE FACILITIES THEY OPERATE IF THEY ARE NOT FORTHCOMING, COOPERATIVE, OR IF THEY DISCOURAGE OR IMPEDE YOUR INQUIRY OR INVESTIGATION INTO THESE AREAS. You are in the midst of a significant life decision for yourself or for your loved one, who may be unable to ask for themselves.

This checklist is broken down and again does not have to be followed in any particular order. Several areas may be covered at one time. For instance, you may be able to observe a recreational area, and determine that social activities, interaction opportunities and overall acceptable and suitable conditions exist, or your walk through the facility may satisfy your inquiry into overall environment, cleanliness and condition of the facility.

Also, keep this in mind when talking to nurses/aides: they are on the front lines, the ones on a day-to-day basis primarily caring for and tending to the needs of the patients/residents.

The Facility

- *Visits to the facility – different dates and different times
- *Overall condition of facility – inside and out
- *Look at the rooms – occupied as well as unoccupied,
cleanliness,
overall condition,
equipment/furniture,
space
- *Observe/sample food service
- *Atmosphere – pleasant,
noise,
lighting,
temperature,
overall environment
- *Social/recreational opportunities
- *Staff behavior – attitude, professionalism, approachable
- *Staff visibility – adequate number in relation to number of
patients observed
- *Residents/Patients – ask yourself “Are the people that I
am seeing being taken care of?”
- *Discussions – residents/patients and/or their families,
thoughts,
criticisms,
comments
- *Special needs residents/patients – availability and
accessibility of appliances and devices for mobility,
medical care,

- *Special needs cont’d
physical conditions,

mental conditions
psychosocial,
psychiatric,
psychological

overall capacity/capability to meet special needs

*Meeting/speaking/discussions with management/staff

adequate, qualified staff

medical/health care

doctor(s)

staff

availability/accessibility

treatment/notification policy

emergencies

dental

social service

hygiene

dietary

*Administrators – forthcoming, open

answers questions

takes time to explain

knowledgeable

qualifications

budget/provision of resources to meet the needs

to whom does the facility report, and where are the
agencies located

talk to them again, after speaking with staff and
learning their concerns, criticisms

*Nurses/Nurses aides

numbers, by shift, throughout the day

qualifications/training
duties/responsibilities
attitudes
criticisms

*Nurses/aides cont'd

opinions as to staffing
working conditions
concerned, appears caring
current, up-to-date with patient care

*Literature

promotional materials
advertisements
other written, documentary, visual or video materials
blank copies of all documents or materials that will
 need to be signed upon admission
 additional review by doctor, attorney
review and ask questions about at next visit

*Survey or Survey Report

available/posted
deficiencies, substandard care, conditions, violations,
 inadequacies
plans of corrections
inspections/surveyor reports
assessments
reviews over the course of time (several years of
 reports should be available)

Governmental Sources – deficiencies, complaints,
investigations, materials explaining patients/residents rights
and privileges, applicable state and federal laws and

regulations, contacts and advocates names, addresses and phone numbers, medical and mortality data, civil penalty and financial reports

*Ombudsman programs/contacts

*Offices of Health Licensure and Certification (OHFLAC)

*Commissions on Aging

*Departments of Health/Human Services

*Departments of Social Services

*Adult advocates

*Law enforcement – security, complaints, crimes, elder citizen task force, supervision

*Licensing boards

applications

certifications

suspensions/revocations

current

*Medicare/Medicaid offices – contracts, good standing

*County or Local/City offices, depending on locations may have investigative or citizens' assistance/information department in addition to health and police agencies

The Community

*Local senior citizens centers or service groups

*Neighbors to the facility

*Local charities

*Friends/neighbors

Other resources, the Internet, and References

*Attached are Resource/Reference pages. These are not all-inclusive, nor are they intended to be. However, the reference materials themselves often have bibliographies and references pages. The Internet sites include “links” by topics or particular area of concern. Often facilities have their own web sites. While there is a vast universe of information on the Internet, proceeding with caution with respect to that information is good advice, particularly if the web page is not the official site of a well-known respected private, public or governmental source.

RESOURCE REFERENCE PAGES

Committee on the Aging, 1550 Corporate Woods Parkway, Suite 100, Uniontown, Ohio 44685-8797; 800-421-7277, Ext. 3205.

West Virginia Long-Term Care Ombudsman Program; Legal Aid Society of Charleston, 922 Quarrier Street, Room 400, Charleston, WV 25301; 304-343-4481.

Office of Health Facility Licensure and Certification; (OHFLAC) West Virginia Bureau for Public Health; Room 206, 350 Capitol Street, Charleston, WV 25301-3718; 304-558-0050.

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Gerald W. Townsend; Fluharty & Townsend, Attorneys-at-Law, P. O. Box 201, Parkersburg, WV 26102; 304-422-5449.

National Citizens Coalition for Nursing Home Reform; (NCCNHR) 1424 - 16th Street, N. W., Suite 202, Washington, D.C. 20036-2211; 202-332-2275.

Office of Health Facility Licensure & Certification; (OHFLAC)
Ohio Department of Health, Licensure Program, Third Floor,
246 North High Street, Columbus, OH 43215-2412; 614-466-7713.

Area Agency on Aging, Region 9, Inc.; 60788 Southgate Road, Byesville, OH 43723; 800-932-7277.

Ohio Department of Aging; Long-Term Care Ombudsman/Elder Rights Hotline;
50 West Broad Street, Ninth Floor, Columbus, OH 43215-3363;
800-282-1206.

Nursing Home Litigation: Investigation and Case Preparation; Edited by Patricia W. Iyer, R. N., M.S.N.; Lawyers & Judges Publishing Company, P. O. Box 30040, Tucson, AZ 85751-0040; 520-323-1500; Copyright 1999.

1997 State Data Book on Long Term Care Program & Market Characteristics; Department of Social & Behavioral Sciences, University of California, San Francisco, CA 94143; Department of Health Services Organization & Policy, College of Health Professions, Wichita State University, Wichita, KS; May 1999.

The Five Myths of Nursing Home Litigation; LRP Publications, Horsham, PA; 215-784-0860; Copyright 1998.

Memorandum of Understanding 3/15/94;

The Medicare, Medicaid and Child Health Insurance Agency; <http://www.hcfa.gov/>

SeniorScape; <http://www.seniorscape.com/>

National Senior Citizens Law Center; <http://www.nslc.org/nursing.html>

Nursing Home Info; <http://www.nursinghomeinfo.com/>

Nursing Home Report Card; <http://www.seniorcarehelp.com/>

Nursing Home Information Site; <http://www.angelfire.com/tn/nursinghome/index.html>

Bedrail Restraint Links; <http://www.duluthnews.com/docs/bedlinks.htm>

AARP Web Place; <http://www.aarp.org/getans/consumer/rights.html>

Commission on Legal Problems of the Elderly; <http://www.abanet.org/elderly/home.html>

Clinical Practice Guidelines for Falls and Falls Risk;
<http://www.hcfa.gov/pubforms/rr0997.htm>;
<http://www.ahca.org/quality/guides.htm>

National Senior Citizens Law Center; <http://www.nslc.org/>

Administration on Aging; <http://www.aoa.dhhs.gov/>

Senior's Site; <http://www.seniors-site.com/>

American Association of Homes and Services for the Aging; <http://www.aahsa.com>