



LNP 231

Assisted Living Facility Risks and Regulations

Assisted living facilities are becoming increasingly popular with the elderly. They provide a comfortable middle ground for housing once an elderly person is no longer able to safely live alone. You may even have a loved one in an assisted living facility right now.

This is Pat Iyer with Iyer's Insights, one of the twice weekly shows of Legal Nurse Podcast.

Some factors contributing to the popularity and growth of the assisted living industry include:

- the aging of the American population;
- the need of seniors requiring assistance with activities of daily living;
- the continued increase in the number of seniors living alone;
- divorce; and
- the role of women as work force members, making them unavailable to be caretakers.

Additionally, the increased net worth of seniors may prevent individuals from qualifying for public assistance for alternative housing options. Our nation is constantly looking for cheaper methods of health care for seniors as well as other individuals. A resident in an assisted living facility is more likely to privately pay for the services, with no financial assistance from the government for the cost of the facility. This is a relief to the Medicare and Medicaid systems.

The monthly charges for assisted living care run into the thousands.

Assisted living facilities offer services such as meals, laundry, housekeeping, community activities and twenty-four-hour staff. However, assisted living facilities do not inhibit a resident's daily activities in the same way a nursing home does. In a nursing home, a resident would typically not have the ability to leave the facility unattended. In an assisted living facility, the resident could leave as long as the facility was not concerned about the resident's ability to do so.

Many assisted living facilities provide such things as an emergency response system, round-the-clock security, transportation and community services. However, a nursing home will offer more services including call-bell response, health services, periodic monitoring and skilled nursing care. These services are usually unavailable in the assisted living facility setting.

As a legal nurse consultant, you might be asked to screen a potential case against an assisted living facility, to serve as an expert witness, or to review medical records from such a facility. Some of the liability issues you might encounter are falls, pressure sores, sexual assault, medication errors, and injuries that occur to a confused person who wanders out of a facility.

Abuse is another example of a liability issue. Every state has enacted statutes that authorize the development of adult protective services agencies. Typically, these agencies establish an investigation and reporting system for allegations of abuse against elderly persons. Check with the local agency involved for any statutory authority that may be present within the agency.

Elder abuse reporting laws vary widely from state to state. The following factors will vary from state to state:

- age and circumstances of the victim
- the definition of abuse
- types of abuse and/or neglect
- the classification of civil or criminal violations
- reporting requirements
- remedies for the abuse

Additionally, every state has a Long-Term Care Ombudsman Program, responsible for advocating on behalf of residents in long-term care facilities. Ombudsmen are usually granted full and unencumbered access to all facilities, residents and resident records with or without notice to the facility. The LNC involved in working up an assisted living facility case should recommend the attorney contact the Ombudsman responsible for the particular assisted living facility.

In the event a plaintiff's attorney believes the abuse or neglect the client suffered deserves official investigation, he or she should advise the client to contact local law enforcement officials. Some cases can rise to a criminal violation such as assault, battery, or even sexual assault or rape.

The attorney will likely inquire into whether or not the assisted living facility reported the incident to the police or the Board of Nursing. If an assisted living facility reports an employee to criminal authorities, the insurance company may have a basis to disclaim coverage for that employee's actions leading to the report.

For example, in one case a nurse removed a resident's bed alarm; later, the resident fell out of bed, suffered a fractured hip and subsequently died. The facility reported this nurse to authorities and he or she pled guilty to assault. The insurance company, in that case, denied coverage for the nurse's intentional criminal actions.

The attorney can use a Freedom of Information Law (FOIL) Request to gather any information the police may have on the particular case. Request any information about the resident, facility and employees. Also, inquire if the Board of Nursing has taken disciplinary action against the nurse.

There is no uniformity in the assisted living facility admission/discharge criteria among the states. Medicare and Medicaid laws are the only federal regulations that govern the assisted living industry. The applicability of these laws to assisted living facilities is limited. Most jurisdictions have enacted their own statutes and/or regulations that cover the admission process. A careful review of the same will assist in determining the standard of care and whether there has been a breach of the standard of care. Some states have delineated criteria and prerequisites for admission to an assisted living facility.

In the event that the state has no statutory scheme to cover the admission process, the attorney will look to the common law to determine if there is liability. Under the common law, the nursing process of assessment, diagnosis, planning, implementation and evaluation is applicable in assisted living facilities. An assisted living facility should not accept a patient whose needs it cannot meet.

It is important to gather all of the admission documents when determining if there is liability. Many jurisdictions require an admission agreement and specify some of the information it must contain. For example, in some states the assisted living facility admission must include a residency agreement and an individualized service plan. The resident agreement must include the admission criteria for that facility, among other information. In these states, the individualized service plan must be developed with the resident's physician and in accordance with the medical, nutritional, functional, cognitive and other needs of the resident.

Most assisted living facilities use a licensed practical nurse or a registered nurse to oversee the admission process. Unfortunately, the admitting nurse often has the conflicting responsibility of making sure all the beds are filled but at the same time only admitting those residents that meet the facility's admission criteria. There may be liability when a nurse accepts residents whose needs exceed that which the facility is capable of meeting or legally permitted to provide.

The admitting nurse will perform an assessment to determine if a resident is appropriate for the facility. Review a copy of the assessment form as well as the admission agreement. Read the admission agreement, admission policy and advertising materials of the facility to establish a breach in the standard of care.



This is Pat Iyer. Before I continue, listen to this: assisted living facility cases are specialized. This area of litigation has its own rules, regulations and language. Who better to learn from than an attorney who spends his time litigating assisted living and nursing home cases?

Attorney Sean Doolan has developed expertise in representing the victims of nursing home and assisted living malpractice. He shares his lessons learned and provides specific information you can use to review a case involving a nursing home. Sean will enable you to understand:

- How care is improved by lawsuits
- How nursing homes try to prevent falls
- Which cases are difficult to win
- The role of the Ombudsman
- The types of medical malpractice claims that occur from care in assisted living facilities versus nursing homes
- How to look for signs of quality care in a nursing home
- Where to look on the Internet for a rating of a nursing home

This program is called **Reducing the Risks of Nursing Home Care**. Purchase this program's transcript at this link: <http://LNC.tips/NHC> and use the code Listened to get a 25% discount on the price.

When an assisted living facility can no longer meet a resident's needs, or when the law and regulations require it, a resident must be moved and/or discharged to a different level of care. More often than not, the liability in these cases centers on the failure to discharge a resident whose needs the facility can no longer meet. For example, a resident admitted with the beginning stages of Alzheimer's could worsen in his or her condition, elope from the facility and be harmed.

Carefully review the regulations as they relate to discharge criteria. States regulating the admission of residents will likely have rules affecting the discharge of residents. If the state does not have a statutory or regulatory scheme, the attorneys will look to the common law standard.

In determining whether a resident should have been discharged earlier, examine the statutory or regulatory scheme in the state as it relates to assessing residents. For example, in some states, the individualized service plan must be reviewed and revised as frequently as necessary to reflect changes in the resident's needs but not less frequently than once every six months. If a facility's staff does not routinely assess its residents, it may open up itself to liability.

In many facilities a registered nurse is responsible for overall management of a resident's care, which includes routine assessments. Accordingly, a registered nurse in regular contact with residents of assisted living facilities has the responsibility of assessing residents to determine whether they need a higher level of care.

Assisted living residents exist in the grey world between independent living and the need for nursing home care. Legal nurse consultants may be involved in these cases as consultants or experts, guiding the attorney on the nuances of this environment.

Some of the material in this podcast comes from a chapter Sean Doolan and Monica Agosto wrote for my book, **Nursing Malpractice, 4th edition**. Order your copy of this text at <http://LNC.tips/NM>.

Be sure to order your copy of the transcript for the program **Reducing the Risks of Nursing Home Care**. The link for this product is <http://LNC.tips/NHC>. Use the code Listened to get a 25% discount.

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