

PENNSYLVANIA BAR ASSOCIATION

ELDER LAW SECTION

RESOLUTION

The Pennsylvania Bar Association is concerned with inadequate consumer protections in the proposed Assisted Living Residence regulation and supports public hearings before the regulation is adopted. The PBA President is authorized to request that any legislative or administrative hearings be scheduled as deemed appropriate. The President or his designee is empowered to speak at those hearings on behalf the Pennsylvania Bar Association.

The Section also requests that the Board of Governors act on behalf of the House of Delegates as the public comment period expires on September 8, well before the next House of Delegates session.

*****Approved by the PBA Board of Governors on August 21, 2008***

--Report follows on next page--

REPORT

Before 2007, Pennsylvania law recognized only two types of licensed residential entities for long-term care: nursing homes and personal care boarding homes. The law holds nursing homes to significantly higher facility standards than personal care homes as the acuity of the residents and the complexity of their needs requires this. Personal care homes have historically had insufficient regulations to meet the needs of their residents, who by law can only need assistance with some of their activities of daily living and instrumental activities of daily living. New standards for personal care homes were adopted in 2005 bringing the requirements closer to what the needs of residents necessitate. Neither of these settings are “home-like” settings. And, consumers want living units that are more like independent apartments than like hospital rooms or overcrowded college dorm rooms.

In July 2007, the Pennsylvania General Assembly passed a bill to license the fast-growing assisted living industry. The new law, however, did not clearly establish what standards apply to assisted living. The Pennsylvania legislature had questions of residents’ rights, staff qualifications, fire and safety codes and physical plan configuration, for example, to be established in state regulations. The Office of Long Term Living, working together with the Department of Public Welfare and the Area Agency on Aging, has responsibility for promulgating the regulations, and providing for a comment period prior to issuing “final” regulations.

The Elder Law Section of the PBA is responding to this first comment period after carefully reviewing the proposed regulations. We have found that the proposed regulations do not meet either the expectations of the Legislature or of the Elder Law Bar, especially as it pertains to ensuring the rights of consumers – the very population the act seeks to serve.

The proposed regulations are an important step in Pennsylvania’s overriding policy to assist Pennsylvania resident to age in place. There are, however, significant deficiencies in these proposed regulations that will make it difficult, if not impossible, for residents, and therefore legal practitioners to adequately assess and finance care at this level without substantial revisions to the regulations in the area of consumer protection. Critical provisions and protections have been omitted from this draft package, without which a consumer and her attorney will be adrift in a murky sea. These deficiencies and omissions are broad and far-reaching. There are problems at every level of involvement between a facility and a resident - from the first interactions at the time of application and admission, through the duration of the stay, and at the point of potential transfer or discharge. These must be addressed and remedied. Here are a few examples where these inadequacies hinder effective representation of a client’s, and the family’s, needs and interest.

Proposed Regulations Lack a pre-admission Assessment

At the planning/pre-admission stage, there is no required pre-admission assessment of the prospective resident. As it stands, a client would commit the financial resources, move out of her home, and sign a contract weeks before the facility is required to identify what the client needs and whether the facility can meet the client’s needs and at what price. Without such a process occurring prior to admission, the resident risks being admitted to an inappropriate facility and being committed to a new place to live weeks before knowing this. Similarly, were the facility able to meet the care needs, there is also the issue that without the pre-admission assessment it will be impossible for the resident to understand the actual cost of care among the various levels of services provided within an assisted living facility. Advising a client on what the contract provides her in exchange for her money will be virtually impossible. Changing a contract on behalf of a client is much less desirable than knowing exactly the terms of the contract prior to admission. In the most serious cases, the failure to have the prior assessment may require multiple transfers to various facilities at various levels of the continuum of care. Except in the event of any urgent discharge from a hospital, Consumers and their families deserve the full disclosure and

transparency of an upfront assessment of their care needs and articulation of how the facility will meet them **prior to admission.**

Proposed Regulations Lack a Defined Set of “Core” Services

Another example of the deficiencies within the proposed regulations is a failure to include a defined core package of services, so that there is a “dependable” minimum set of services that enables a legal practitioner to assist his or her client in evaluating the actual cost of care and comparing options among facilities. Whereas, one of the articulated goals of the General Assembly in passing Act 56 of 2007 was to define what clients and their families could reliably expect an assisted living facility to be and what they could depend on all assisted living facilities to minimally provide, the regulations fall short in this area.

Proposed Regulations Lack Adequate Protections against Risk Assumption by unwary, unsophisticated Clients

Also within the proposed regulations is the concept of informed consent. Presently, this concept will be relevant not only at the time of admission, but also during a resident’s stay at the facility. While it is desirable to have the concept of self-determination and “aging in place” reflected in the proposed regulations, there is a risk with the current proposed regulations that facilities will be able to shift substantial risks to the resident. Waiving a facility’s liability through an “informed consent” agreement is a serious step that should not be taken lightly and not without good council. There are no provisions to ensure that residents, especially frail and impaired residents, are adequately represented in the process of creating a balanced agreement between facility and resident. For instance, while the proposed regulations indicate that the long-term care Ombudsman will assist residents, this is not their lawful role. The proposed regulations provide no assurance that a resident’s attorney of record be included in the process and make available no independent entity (nor any legal services or bar referral) to review the risks and best interests of the unrepresented consumer.

Proposed Regulations Offer no Protection against Inappropriate Discharges

The proposed regulations speak to the facilities’ rights and process through which to appeal licensure decisions by the Department. By stark contrast, they are devoid of protections for consumers to challenge involuntary discharges or transfers from what has become their home. As such, consumers and their legal practitioners have no practical way to challenge a denial of admission or a decision to discharge. In particular, there must be protection against eviction until the resident can have his case heard by the proper tribunal.

The proposed Regulations for Licensure of Assisted Living Facilities in Pennsylvania must be modified to insure that necessary provisions for consumer protection are carefully considered so that the prospective residents and their attorneys can insure that Pennsylvania residents are able to age in place.

Respectfully Submitted,

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Chair, Elder Law Section

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