

Involuntary Transfer and Discharge from Nursing Homes: Prevention, Advocacy, and Appeals



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Mary Ann Parker, DC Long-Term Care Ombudsman Program
Lori Smetanka, National Long-Term Care Ombudsman Resource Center

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February 11, 2015

National Elder Rights Training Project for the National Legal Resource Center.
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- <http://nlrc.acl.gov/index.aspx#network>
- Collaboration developed by the Administration for Community Living/Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
- Request a training
- Request consulting
- Request technical assistance
- Access articles and resources





Presenter – Eric Carlson

- Eric is a Directing Attorney at the National Senior Citizens Law Center (soon to be Justice in Aging as of March 2). He has over twenty years of experience in long-term services and supports, including home and community-based services, nursing facility care, and assisted living facilities.
- He currently is leading NSCLC's research and advocacy around LTSS provided through Medicaid managed care, and NSCLC's project to advance reform in CA's assisted living facilities.
- He counsels attorneys from across the country, co-counsels impact litigation that protects LTSS consumers, and is author of the legal treatise Long-Term Care Advocacy.





Presenter – Mary Ann Parker

- Mary Ann is the staff attorney for the D.C. Long-Term Care Ombudsman Program/Legal Counsel for the Elderly. She began her legal career in private practice in Maryland. However, she has been involved with legal concerns facing DC's seniors for approximately 25 years.
- For approximately ten years, she has provided legal representation to DC residents receiving long term care services and supports in facilities and in their homes.
- She received her BS in Journalism from West Virginia University and her J.D. from American University, The Washington College of Law.





Presenter – Lori Smetanka

- Lori joined the National Consumer Voice for Quality Long-Term Care in 1994 as Law and Policy Specialist focusing on the long-term care survey and enforcement systems. Her work included rights, prevention of abuse and neglect, and providing support to state and local long-term care ombudsman programs.
- In 2004 she became Director of the National Long-Term Care Ombudsman Resource Center, which provides support, technical assistance, and training for state and local long-term care ombudsman programs.
- Lori is a member of the Board of Directors of the Assisted Living Consumer Alliance, and numerous other workgroups and committees.



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Eric Carlson, National Senior Citizens Law Center

Nursing Home Reform Law

- Applies to every facility certified for Medicare and/or Medicaid.
- Applies regardless of resident's payment source.
 - Transfer/discharge law found at 42 USC 1395i-3(c)(2), 1396r(c)(2); 42 CFR 483.12
 - Surveyor's Guidelines in Appendix PP to State Operations Manual
 - VERY few published cases

Six Allowable Reasons

- Necessary to meet resident's welfare
- Resident's health has improved; no longer needs facility services
- Safety of others endangered
- Health of others endangered
- Nonpayment after reasonable notice
- Facility ceases to operate

Notice Requirements

- Notification of resident and, “if known, an immediate family member of the resident or legal representative.”
- Written notice in a language that resident and/or representative will understand.

Contents of Notice

- Reason
- Date of proposed transfer/discharge
- Location to where resident is to be moved
- Right to appeal
- LTC Ombudsman program: name, address, & telephone #

Timing

- Generally 30 days in advance of proposed transfer/discharge.
- “Practicable” notice of less than 30 days allowed in certain circumstances.
 - No interpretation of “practicable” in law.
 - “Practicable” should be long enough to accommodate appeal.

Non-Payment Not Exception to Notice Requirements

- “Congress specifically intended a 30 day notice because [in the Reform Law] it exempted a 30 day notice for a number of reasons ... but not for nonpayment of services.”
 - 56 Federal Register at 48,840 (1991).

Documentation in Clinical Record

- Basis must be documented in resident's clinical record.
 - By **resident's MD** if transfer/discharge based on resident's welfare, or improved condition.
 - By **any MD** if transfer/discharge based on endangerment of other's health.

Preparation

- “[F]acility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge.”
 - Orientation may include (according to CMS Surveyor’s Guidelines) “trial visits, if possible, by the resident to a new location.”
 - Surveyor’s Guideline to 42 CFR 483.12(a)(7), located in Appendix PP to CMS’s State Operations Manual.

Also, General Preparation Obligations

- Facility must have “[a] post-discharge plan of care that is developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment.”
 - 42 CFR 483.20(1)(3)

Appeal Hearings

- Hearing officer.
- Hearing generally held at nursing facility.
- Relatively informal.
- Right to introduce evidence and cross-examine witnesses.
- Resident usually outnumbered, so strong advocacy needed.

Improper Justifications

- Resident is disruptive, argumentative, and/or obnoxious.
- Resident does not follow facility policies or care plan; is “non-compliant.”
- Caring for resident is too burdensome or expensive.
- Facility is exposed to potential legal liability for injuries suffered or caused by resident.

More Improper Justifications

- Resident refuses treatment.
- Resident does not need facility's specialized services.
- Resident's Medicare eligibility has ended.
 - *See also Jimmo v. Sebelius* on continued Medicare reimbursement.
- Facility is part of hospital complex.

And more ...

- Resident has exhausted savings; now is Medicaid eligible.
 - Depends on whether state allows partial Medicaid certification.
- Resident's Medicaid application is in process; facility has not been paid.
- Facility has voluntarily withdrawn from Medicaid program.

Defenses

- Facility hasn't met burden.
 - *e.g.*, facility can meet needs, resident isn't a danger.
 - Facility violates law “if it refused to provide a statutorily defined service in order to eliminate certain residents under ... the transfer reasons.”
 - 56 Federal Register at 48,839 (1991).
- Facility has made procedural mistake.
 - *e.g.*, no MD documentation, no listed destination.

More Defenses

- Facility proposed transfer to another location and that location:
 - Can't provide appropriate level of care (assisted living facility, homeless shelter, daughter's house, etc.)
 - Provides the same level of care as the current nursing facility.

Assisted Living

- Nursing Home Reform Law doesn't apply.
- Residents generally reliant on state law for assisted living transfer/discharge, but these laws tend to be weak.
 - Broad justifications, *e.g.*, inability to meet resident's needs.
 - No designated adjudication mechanism.
 - Advisable to request landlord-tenant procedures.

New Federal HCBS Rules Add Requirement

- Resident must have, “at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity.”
 - 42 C.F.R. § 441.301(c)(4)(vi)(A).

Written Agreement As Necessary to Protect Residents

- If landlord/tenant laws do not apply, State must ensure that each resident has written agreement that “provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.”
 - 42 C.F.R. § 441.301(c)(4)(vi)(A).

Transition Process for HCBS Rules

- States currently are developing transition plans.
- Transition must be completed by no later than March 2019.
- Advocates should be actively involved.

Mary Ann will discuss strategies

**INVOLUNTARY TRANSFERS AND
DISCHARGES FROM NURSING HOMES:
PREVENTION, ADVOCACY AND APPEALS
IN THE DISTRICT OF COLUMBIA**

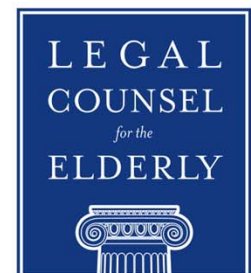
Presentation by:

Mary Ann B. Parker, staff attorney

*The DC Long-Term Care Ombudsman Program, Legal Counsel for the
Elderly,*

DCOA Network Provider

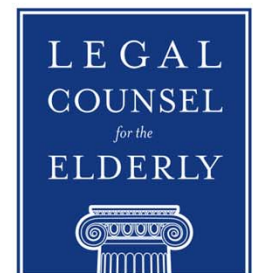
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DC Long-Term Care Ombudsman Program

- DC Office of Aging(DCOA) established the Office of DC Long-Term Care Ombudsman Program(DCLTOP) in 1975.
- DCOA awarded to a grant to Legal Counsel for the Elderly(LCE) to operate the Ombudsman Program in 1985.
- Included within DCLTCOP's staff is an assigned attorney.
- DCLTCOP has placed a high priority on preventing and if necessary challenging involuntary transfers and discharges.

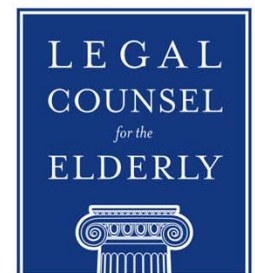
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Preventing Involuntary Transfers and Discharges through Advocacy:

- Advocate for strong local laws outlining the process for transfers and discharges.
- Work with regulatory agencies to draft the laws and regulations.
- Ensure that the laws are implemented.
- Educate residents, families, facilities, courts and other stakeholders.
- Increase awareness of larger related issues.
- Emphasize discharge planning.

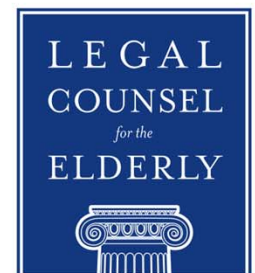
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Preventing Involuntary Transfers & Discharges Through Legal Challenges:

- Be prepared to legally challenge to ensure the law is followed.
- Ensure legal counsel is available for individual representation of residents.
- Challenge not only the substantive reason for the discharge, but the process...was the resident notified...was the notice valid?

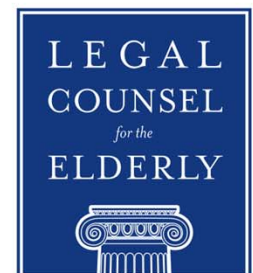
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DC's Process in Appealing Transfers & Discharges:

- All notices are required to be sent/faxed to DCLTCOP and our program has one administrative staff person who logs in the notices and distributes via email to the appropriate ombudsman for review.
- After reviewing a questionable notice, the Ombudsman will reach out fairly quickly to resident, the facility and, if necessary, the regulatory agency for investigative purposes.
- If not resolved, the Ombudsman will refer to DCLTCOP attorney.
- The attorney will enter the request for a fair hearing which may include a Motion to Dismiss based on procedural defects of the notice.
- All cases are heard before the Office of Administrative Hearings(OAH) and can be appealed after reconsideration to the DC Court of Appeals.

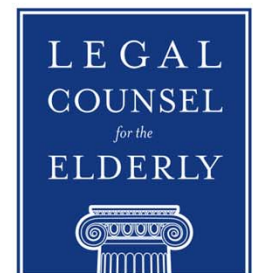
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DC Transfer & Discharge Case Examples:

- DCLTCOP appealed a discharge case which resulted in the court finding that the administrative law judge had the authority to readmit a nursing home resident who was discharged with an invalid notice. (Paschall v. D.C. Dep't of Health, 871 A.2d 463(DC 2005))
- DCLTCOP filed a mandamus lawsuit to require that the Model Discharge Plan required by DC law was implemented for all discharges. (DCLTCOP v. District of Columbia, et al., Case No. 03ca7660 Sup. Court(DC 2004))
- As a result of these cases, DCLTCOP brought numerous legal challenges before the OAH which resulted in rulings that bolstered protections for residents.

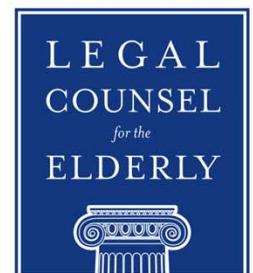
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Impact of Appealing Involuntary Transfers and Discharges:

- Sets up a structure for notices to be issued and challenged.
- Eliminates the discharge process as an easy way for a facility to unilaterally remove residents.
- Increases success in resolving contested cases without having to go to court or in some instances without having a formal notice issued.

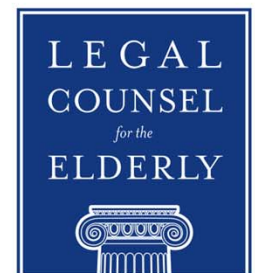
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Impact of Appealing Involuntary Transfers and Discharges...

- Requires the facility to focus on rights of residents and their treatment plans.
- Prevents other residents' rights from being violated.
- Keeps the resident in charge of his or her life!

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**The National Long-Term Care
Ombudsman Resource Center**

INVOLUNTARY TRANSFER AND DISCHARGE FROM NURSING HOMES: PREVENTION, ADVOCACY, AND APPEALS

Lori Smetanka, JD

Director, National LTC Ombudsman Resource Center

February 11, 2015

National Legal Resource Center



Individual and Systemic Advocacy

- Timely response to complaints
- Cultivate your partners?
- Understand your problem
- Develop a strategy



Partnerships

Develop processes for working together – case referral, technical assistance, information sharing, joint letters

- Long-Term Care Ombudsmen
- Legal Aid/Legal Services
- Survey Agency
- Medicaid Agency
- Protection & Advocacy
- State Bar Association – Private Attorneys
- Others



Understand Your Problem

Evaluate data so you know where to put your resources –

- Nonpayment?
- Lack of proper assessment and care planning?
- Behavioral challenges – from residents or family members?
- Weak response from the survey agency?
- Uninformed hospital discharge planners?

Develop a Strategy

- Outreach and Education
 - Consumers
 - Nursing Homes, Assisted Living Facilities
 - Hospital Discharge Planners
 - Administrative Law Judges
- Advocacy
 - Resident assessment, care planning
 - Adequate notice and planning
 - Safe and orderly discharge
 - Resident representation, support to appeal
 - Strengthen laws, regulations



QUESTIONS?



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- Next webinar for March will be announced in the next week.
- Email us your ideas for speakers and topics to trainings@nclc.org



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- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speakers!



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