CONSUMERS’ ATTORNEYS AND NURSING HOME CONTRACTS

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Goal #1: Help secure appropriate medical treatment by advising families how to handle hospital discharge to nursing rehabilitation facility.

Goal #2: Protect spouse/family liability for NH costs, and preserve assets to the greatest extent possible under the law.
Tasks of the Elder Law Attorney

- Assist in review of all nursing home contracts
  - Nursing homes can bully families into signing contracts/create new obligations on family members
  - “Resident Representative” vs. “Responsible Party”
    - Advise family to sign only if contract does not obligate 3rd party liability
- Edit NH Contract - but only AFTER admission
  - Provide opinion re: Medicaid eligibility to nursing home if requested
- Protect client’s right to privacy (don’t provide copy of Medicaid application)
Sole Grounds for Facility Discharge

42 CFR § 483.15(c)(1)(i)
- Facility must allow resident to stay unless:
  - Transfer or discharge is necessary for the resident’s welfare (i.e. facility cannot meet resident’s needs)
  - Improved health so that facility services are not necessary
  - Danger to other residents or employees because of clinical or behavioral status of resident
  - Non-payment for services after “reasonable and appropriate notice.” Applies to a resident who fails to pay or failed to apply for third party payment (Medicare, Medicaid or insurance) or applies and is denied and refuses to pay privately
  - Facility goes out of business
Facility May Not Discharge Residents When:

1. Resident entered for Medicare covered rehabilitation which has now concluded
2. Resident or family, etc., refuses to sign admissions contract

- NOTE: even if facility can’t force you out, it does not alleviate the resident’s responsibility to pay privately for the care or apply for benefits to pay for the care
Problems Provisions in NH Contracts

- Requiring 3rd parties to guarantee application for Medicaid
- Requiring 3rd parties to guarantee recertification of Medicaid
- Requiring 3rd parties to pay any legal fees incurred by NH because of failure to apply for/maintain Medicaid
- Expanding the definition of “representative” and/or “sponsor” to include legal liability beyond that required by Federal and State laws
Regulation now provides that facility may not request or require third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility.

Addresses the “voluntary signing” of a guarantee by a third party.

But NH may seek a 3rd party to sign an agreement on behalf of the resident to spend resident’s funds if the third party has access to the resident's funds:

- Agent under power of attorney
- Joint account holder
- Court-appointed guardian
- Not grounds for discharge if Representative refuses

42 USC 1396r(c)(5)(B)(ii); 42 USC 1395I-3(c)(5)(B)(ii)
No Waiver of Federal Rights

42 CFR § 483.15(a)(2)

- NH may not require a resident to waive the right to Medicare or Medicaid

- NH may not require a resident to guarantee she will not apply for public benefits to pay for care
  - i.e. can’t require a resident be private pay