



Defending Evictions from Nursing Homes, Assisted Living Facilities, and Other Residential Facilities

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20_{Common} Nursing Home Problems—and How to Resolve Them



National Senior Citizens Law Center

With Support from The Commonwealth Fund

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Advocacy guide
available from
National Senior
Citizens Law Center,
along with
California-specific *10
Tips for Nursing
Home Residents*



Nursing Facilities Governed By Federal Law

- Federal Nursing Home Reform Law sets standards.
- Applicable to any facility certified for Medicare or Medicaid.
 - 42 U.S.C. §§1395i-3(c)(2), 1396r(c)(2); 42 C.F.R. § 483.12(a).
 - California procedures at section 618 of Licensing and Certification Policy and Procedure Manual.



Six Justifications for Involuntary Transfer/Discharge

1. Nonpayment after reasonable notice.
2. Facility ceases to operate.
3. Resident's health has improved; no longer needs facility services.
4. Nursing facility cannot provide necessary level of care.
5. Safety of others is endangered.
6. Health of others is endangered.



Written Notice Required

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



Notice Must Include Relevant Info

- ❑ Reason, with supporting facts.
- ❑ Date of Proposed Transfer/Discharge.
- ❑ Location to where resident is to be moved.
- ❑ Right to appeal.
- ❑ LTC Ombudsman program: name, address, & telephone #.
 - Sample notice in L & C Policy and Procedure Manual.



Advance Notice Required

- Generally 30 days.
- “Practicable” notice allowed in certain circumstances.
 - No interpretation of “practicable” in law.
 - “Practicable” should be long enough to accommodate appeal.



No Exception for Nonpayment

- “Congress specifically intended a 30 day notice because [in the Nursing Home Reform Law] it exempted a 30 day notice for a number of reasons ... but not for nonpayment of services. We interpret this exemption as leaving the Department without discretion to consider the commenter's suggestion [to authorize notice of less than 30 days in instances of alleged nonpayment].”
 - Medicare and Medicaid; Requirements for Long Term Care Facilities, 56 Fed. Reg. 48,826, 48,840 (1991).



Documentation Required

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



Discharge Planning Required

- “[F]acility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge.”
 - 42 U.S.C. §§ 1395i-3(c)(2)(C), 1396r(c)(2)(C);
42 C.F.R. § 483.12(a)(7).
- Orientation may include “trial visits, if possible, by the resident to a new location.”
 - Surveyor's Guideline to 42 C.F.R. § 483.12(a)(7),
Appendix PP to CMS State Operations Manual.



Also General Discharge Planning Obligation

- Facility must have “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 C.F.R. § 483.20(1)(3).



Hearing Officer Conducts Hearing In Nursing Facility

- Advice:
 - Be aggressive.
 - Look for facility mistakes, so you can turn tables.



Improper Justifications

- ❑ Disruptive, argumentative, and/or obnoxious.
- ❑ Does not follow facility policies.
- ❑ Caring for resident is too burdensome.
- ❑ 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.



And More

- ❑ Resident's Medicaid application is in process; facility has not been paid.
- ❑ Resident has exhausted savings; now is Medicaid-eligible.
- ❑ Facility has voluntarily withdrawn from Medicaid program.
- ❑ Facility is part of hospital complex.



Possible Defenses

- ❑ Facility able to meet resident's needs.
- ❑ Resident's physician has not documented need for transfer.
- ❑ Facility has not identified more appropriate facility.
- ❑ Alternative facilities do not provide appropriate level of care.
- ❑ Alternative facilities not significantly different than current facility.
- ❑ Facility has provided inadequate notice of proposed transfer or discharge.
- ❑ Facility has failed to prepare resident for transfer/discharge.

Evictions in Residential Care Facilities



Relevant Law

- Adult Residential Facilities
 - Cal. Code Regs., tit. 22, §§ 80000 et seq. (general licensing requirements), §§ 85000 et seq. (ARF-specific requirements).
- Residential Care Facilities for the Elderly (RCFEs) (at least $\frac{3}{4}$ of residents are age 60 or older).
 - Cal. Code regs., tit. 22, §§ 87100 et seq.
 - *See also NSCLC's 10 Tips for Assisted Living Residents, at www.nsclc.org.*



ARF Conditions for Eviction

1. Nonpayment of the rate for basic services within ten days of due date.
2. Change of use of facility.
3. Failure to comply with state or local law after receiving written notice of alleged violation.
4. Failure to comply with general facility policies as specified in admission agreement.
5. Needs and services plan modification has been performed ... which determined that resident's needs cannot be met by the facility and resident has been given opportunity to relocate.
 - Cal. Code Regs., tit. 22, § 85068.5.



RCFE Eviction Conditions Are Similar

1. Nonpayment of rate for basic services within ten days of due date.
2. Change of use of facility.
3. Failure to comply with state or local law after receiving written notice of alleged violation.
4. Failure to comply with general facility policies as specified in admission agreement.
5. **After admission, it is determined that resident has need not previously identified and a reappraisal has been conducted pursuant to Section 87587, and the licensee and the person who performs the reappraisal believe that the facility is not appropriate for the resident.**
 - Cal. Code Regs., tit. 22, § 87224.



Must Facility Accommodate Resident's Increased Care Needs?

- Americans with Disabilities Act says yes.
 - See Eric Carlson, *Critical Issues in Assisted Living: Who's In, Who's Out, and Who's Providing the Care*, at 33-38 (NSCLC 2005).



Notice

- Generally 30 days.
 - 3 days notice allowed with approval of Community Care Licensing Division, if resident is danger to self or others.

- Notice must include date, place, witnesses, and circumstances.



Remedy? Forum for Adjudication?

- RCFE regulation mentions right to file complaint with CCL, but regs for ARFs and RCFEs each say that nothing in section “is intended to preclude the licensee or client [resident] from invoking any other available remedy.”



Right to Unlawful Detainer Procedures

- Cal. Civ. Code § 1940(a) (landlord/tenant law applicable to “dwelling unit”).
- *Klarfeld v. Berg*, 633 P.2d 204 (Cal. 1981) (room in retirement hotel was “dwelling unit” although facility provided services).



Aggressive Advocacy Is Needed

- Feel free to call with any questions.

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