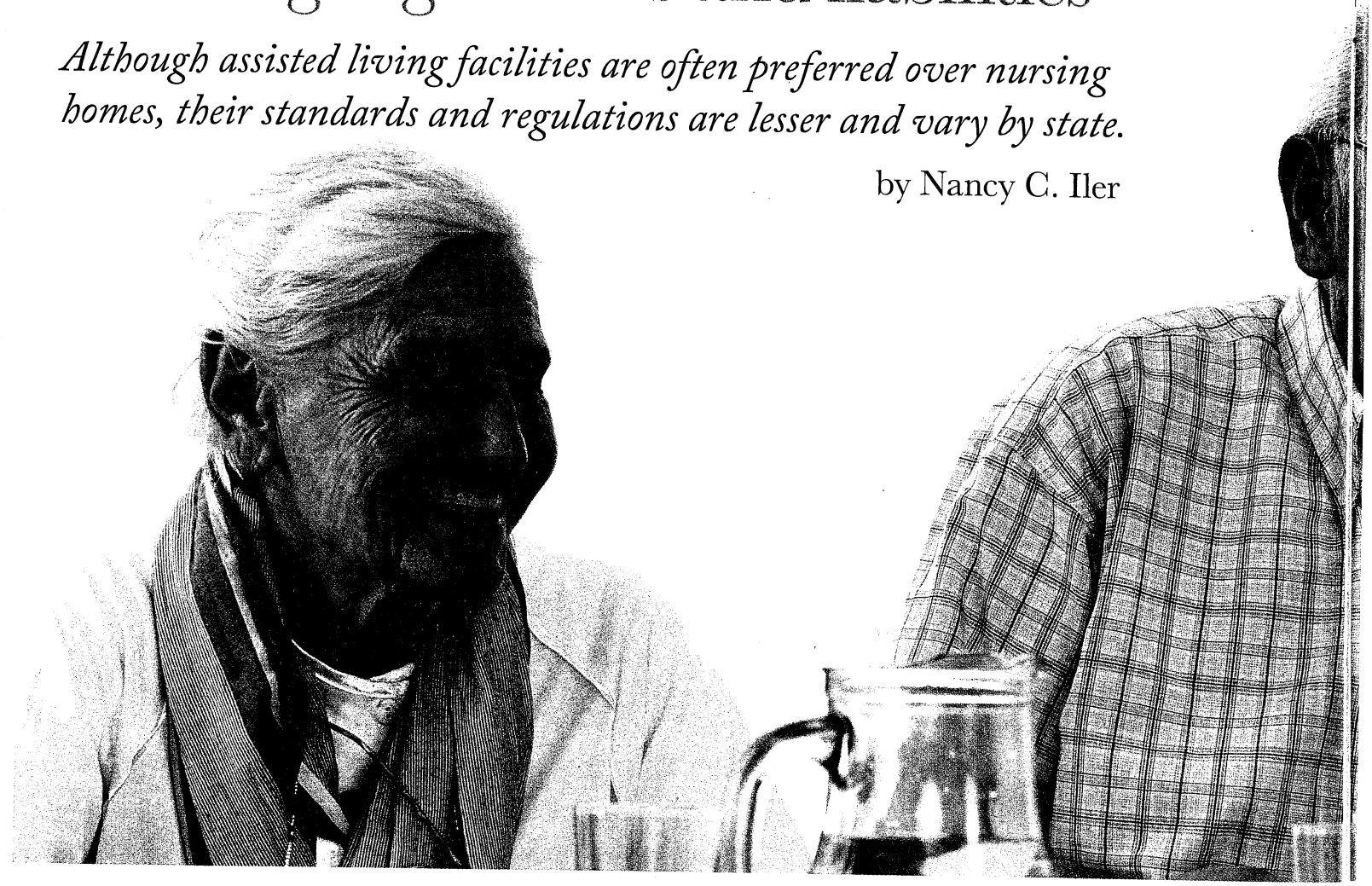
Assisted living facilities vs. nursing homes: Defining regulations and liabilities

Although assisted living facilities are often preferred over nursing homes, their standards and regulations are lesser and vary by state.

by Nancy C. Iler



It's all over the news: Our population is getting older. Doctors, politicians and businesspeople are scrambling to figure out where all the baby boomers will live and who will care for them. Regardless of whether you're a part of this generation, this issue will most likely affect your life in some way—through your practice, your family, maybe even your own care. This rapid population shift is drawing increased attention to the laws that govern the health and residential care our seniors receive.

The number of Americans over the age of 65 is currently less than 13 percent of the U.S. population, but that number is expected to balloon to 19 percent by 2030.[1] The business of long-term care is booming just in time for baby boomers. Long-term care is not just limited to traditional nursing homes that provide skilled nursing care. As the demand grows, so do the choices of facilities, all offering a range of services and range of supervision. Assisted living facilities are a growing choice for many. They help residents with daily living tasks such as bathing, eating and medication dispensing, and they might even provide some limited skilled nursing care.

Many of us perceive assisted living as a more dignified, less institutional version of nursing care. But is it the right place for everyone, given specific medical conditions and abilities? Many families tell a similar story: "I promised my mom I wouldn't put her in a nursing home, so we chose assisted living instead." Many of these families are seeking help because they're surprised to learn, often after an injury or death, that the care provided to

their loved ones was not the care they expected, or the care was substandard.

The assisted living industry is big business and getting bigger. In fact, assisted living facilities make up the fastest-growing segment of long-term care. From 1998 until 2015, the number of facilities in the U.S. grew from approximately 11,000 to 40,000.[2] The "typical" residents in assisted living or residential care in 2010 were mostly female, white and 85 years or older. Residents had a typical stay or tenure of approximately two years.[3]

This industry's growth is most likely due to a combination of several factors: It's not only the large number of aging Americans, but also the fact that assisted living companies are moneymakers for investors. That's because these facilities predominantly serve private-pay residents, whom they can charge large monthly fees. By contrast, nursing home care is almost entirely paid for by government programs, including Medicare and Medicaid.

It is necessary to know the differences between assisted living and nursing homes, then review the theories of liability against assisted living in Ohio.

Defining assisted living

If you ask people to describe a nursing home, many would picture poor lighting, dirty linoleum floors, air that smells like urine and residents crying out for absent family members. Assisted living conjures up very different images. First and foremost, many families say that it is not a nursing home. They envision residential care facilities as new construction with

bright lighting, upbeat music and residents playing cards in the day room.

These widely held perceptions convince many families that assisted living always offers a better quality of life for its residents. But more important than looks and smells is the care and supervision provided. It's critical to consider which setting is the best fit for residents and families, and that includes the legal obligations and liabilities.

The nursing home industry continues to be highly regulated. Beginning in 1987, the Omnibus Budget Reconciliation Act, or OBRA, ensured a minimum level of care delivered to our seniors living in nursing homes under government funding (Medicare and Medicaid).[4] Not only do these regulations define what is a nursing home, but also they cover every aspect of care in nursing homes from the temperature of the food to the prevention of pressure ulcers.

Mandatory annual inspections determine whether the nursing home is complying with these regulations; further, state inspectors respond to any complaint of elder abuse or neglect. In such cases, an onsite inspection determines whether abuse has occurred and which specific regulations have been violated. The home must then submit a plan of correction.

All nursing home annual inspections and substantiated compliant inspections or surveys are public record. You can review these records at medicare.gov/nursinghomecompare under the specific nursing home's name. This is a valuable resource in determining whether the care delivered complies with the federal regulations and offers an "apples to apples" comparison among nursing homes.

You might expect that assisted living facilities would be subject to the same comprehensive federal regulations that govern care and life in nursing homes. Surprisingly, this isn't the case. There is not even a standardized definition for what qualifies as an assisted living facility. The assisted living industry has lobbied strongly against such regulations, so it is left up to each individual state to define assisted living facilities and even what to call them. This lack of regulation makes it more difficult for families and consumers to evaluate quality of care indicators and compare one facility to another.

In general the rules and regulations governing the establishment, licensing and monitoring of assisted living facilities are found in the Ohio Administrative Code §3701.17, which implements Ohio Revised Code Chapter 3721. In Ohio, these types of senior housing are called "residential care facilities," and the law defines them as follows:

> [A]ny home that provides accommodations for 17 or more unrelated individuals and supervision and personal care services for three or more of those individuals who are dependent on the services of others by reason of age or physical or mental impairment; or accommodations for three or more unrelated individuals, supervision, and personal care services for at least three of those individuals who are dependent on the services of others by reason of age or physical or mental impairment, and ... provides to at least one of those individuals any of the skilled nursing care authorized by section 3721.011 of the Revised Code.[5]

That means assisted living facilities are authorized to care for catheters, change wound dressings, supervise special diets and observe changes in the resident's condition to determine further medical treatment and administer medications.[6] This skilled nursing care may be provided for up to 120 days on a part-time, intermittent basis.[7] If a facility has a specialty unit such as an Alzheimer's wing, it is subject to some additional requirements.[8]

The differences between nursing homes and assisted living or residential care facilities do not end there. Another difference involves staffing: both the types of caregivers and the hours they are required to work. The traditional nursing home staff has requirements for the hours that registered nurses, licensed practical nurses, and state certified nursing assistants may work. The state of Ohio has minimum staff hours; in other words, a nursing home resident must receive two and a half hours of direct care per day.[9] The state requirements for staff hours at residential care centers are much lower and much less specific. For example, an assisted living center is required to employ a registered nurse to provide supervision only for "sufficient time each week" to manage the skilled care provided.[10] Without federal regulations, centers can decide for themselves how much nursing staff is required, which may concern families who mistakenly believed that an RN was required to be in the facility 24 hours a day.

Major differences also occur in the types of personnel who staff each of these entities. The staff members providing bedside care at a nursing home are state-certified nurse aides (STNA), licensed practical nurses (LPN), and registered nurses (RN). All of these professionals must be licensed by the state of Ohio. The staffing in assisted living is much different. Staff providing personal care services must be at least 18 years of age (16-year-olds are allowed but must have onsite supervision by someone at least 18 years old). They must understand English if assisting residents with self-administered medications, and they must complete first aid training within two months of hire. Additional training is required for staff members who assist residents with cognitive impairments. Both types of facilities are required to keep resident care records, but the specific requirements differ dramatically. Federal regulations require nursing homes to keep much more extensive and detailed records of care and assessment of

the resident. Meanwhile, the state requirements for resident records are minimal for assisted living.[11]

All nursing homes and most residential care facilities are required to be licensed in Ohio. Residential care centers require licensure when residents receive personal care services or skilled nursing care. The state's definition of "personal care services" includes assistance with daily living, assistance with self-medication, and preparation of a special diet pursuant to the direction of a licensed health care professional.[12] Licensure is not required for facilities that provide personal care services to fewer than three residents. It's also not required for facilities that provide only services that are not considered personal care such as housing, housekeeping, laundry, meals, social or recreational activities, maintenance, security and transportation.[13]

Another major difference is who pays. In nursing homes, most care is paid by the government programs Medicaid and Medicare. Assisted living facilities are mostly paid for privately, although Ohio does allow some government benefits via a Medicaid waiver that pays for only the cost of care, not room and board.[14] Other general similarities between these two entities include that both are required to comply with the Residents Rights as set forth in the Ohio Revised Code.[15]

Legal remedies

When people living in residential care experience neglect that causes injury or death, many families explore the possible legal remedies to hold the facility accountable. Whether you represent the plaintiff or the defense, it is crucial to determine the duty an assisted living facility owed to the resident so you can analyze liability. The facility's obligations are closely tied to the level of services for which a resident has contracted. There are many questions to consider:

- Did this resident require a higher level of care than the

facility could provide?

- Did the resident's condition deteriorate to the point where he or she should have been transferred to a facility that provides a higher level of skilled nursing care?

- Did the facility breach contract by violating the resident care agreement?

- Was the facility negligent for failure to assist the resident with the bathroom, eating or other nonprofessional tasks? Or was it negligent for other professional malpractice or medical malpractice due to a failure of the nurses?

- What was the care, skilled or not, that was contracted to be provided? What level of supervision was promised?

- What was the care or lack of care that caused the injury? And was that specific care contracted for?

Answering these questions begins with a careful review of the written resident agreement that the residential care facility is required to enter into prior to beginning residency.[16] Certain items must be included in the written agreement, such as billing rates, explanation of services offered, types of skilled nursing care provided or permitted and discharge policies.[17] A resident and facility may also enter into a written risk agreement, where the parties agree to share responsibility for making and implementing decisions affecting the scope and quantity of services provided to the resident.

Also included in the admission packet may be a mandatory arbitration clause or agreement, which residents and their families should reject if they want to retain their right to sue the facility. The use of mandatory arbitration clauses to limit liability has been the subject of much litigation lately.[18] When working on this type of case, you need to examine all agreements to determine the care for which the resident contracted.

Review of recent cases

In Corsaro v. ARC Westlake Village, Inc.,[19] the executrix of the estate of a former resident at an independent living facility brought an action alleging negligence and breach of contract claims. The plaintiff alleged that the facility failed to escort the resident from the dining hall to her room, resulting in her falling and fracturing her wrist. The plaintiff also alleged that the facility was negligent in its training and supervision of employees.

Regarding the claimed breach of contract, the evidence established that the resident had refused any contractual services offered to provide her an escort.[20] Although the resident's daughter had expressed a desire to contract for an escort, the resident resisted that offer. Thus, there was no contractual agreement to escort the resident to and from the dining hall upon which a breach could be maintained. The Corsaro court also upheld summary judgment in favor of the facility on the executrix's claim for negligence. Summarily, the court concluded that the facility did not owe any legal duty to the resident. Without an independent legal obligation, the executrix could not maintain a negligence cause of action.[21]

Some courts have found liability based on negligence. In Radous v. Emeritus Corp.,[22] the personal representative of a deceased resident's estate sued the assisted living facility where the decedent resided and died. The decedent was found in a spa tub after being left unattended by a resident aide. The representative alleged breach of contract, wrongful death, medical malpractice and punitive damages. The breach of contract claim was dismissed as subsumed in the malpractice claim. The decedent chose the defendant facility because it could provide her with bathing assistance, a service specifically mentioned in her resident agreement. She paid extra money each month for the bathing supervision. On the night in question, the decedent was left unattended and drowned in the tub.

In ruling on the facility's motion for summary judgment on the negligence and malpractice claims, the Radous court concluded that the claims could proceed without the necessity of expert testimony. As the court explained, the plaintiff alleged that "Defendant breached its duty of care by leaving an infirm resident alone in a spa tub in a locked room for well over an hour late at night, provided its staff deficient training . . . and had an inadequate number of staff members on duty the night in question."[23] A jury "could certainly comprehend" the theory of liability without the need for expert testimony.[24]

In Washnock v. Brookdale Senior Living, Inc., the representative of the estate of a deceased resident brought a negligence action against the senior living facility where the resident was staying.[25] The plaintiff alleged that the facility failed to adequately monitor the ingress and egress at the facility. The resident, who suffered a level of dementia, had wandered out of the

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facility in freezing temperatures, became locked out when the self-locking door closed and was found dead the following morning. Unlike the Corsaro case, the Washnock court concluded that the facility did owe an independent legal duty to its residents to monitor the self-locking door. As the court cogently explained:

> [F]or all practical purposes, [defendant] appear[ed] to serve the same core constituency; namely, elderly individuals seeking "protection from the ordinary risks of everyday life." Businesses that deliberately market and cater to a specific group of "at risk" individuals carry a significantly higher degree of moral blame when they fail to provide the most basic of protections to the persons whom they serve. Indeed, [defendant] has no qualms about demanding a substantial premium from those elderly individuals who have expressed a desire to live in their "independent" communities, but argues that the law should treat their facility no differently from the landlord of a single-family home.[26]

Likewise, other courts have held that ordinary negligence was the basis of liability. See also Carte v. The Manor at Whitehall,[27] in which ordinary negligence, not medical malpractice, principles applied to claim that a resident sustained injury while receiving assistance to and from the bathroom, and Eichenberger v. Woodlands Assisted Living Residence, L.L.C.,[28] in which a negligence claim against a facility when a resident fell from a wheelchair and struck his head while being transported to a dining hall was not a "medical" claim, subject to the one-year statute of limitations.

As the foregoing cases instruct, determining the duty owed to a resident of an assisted living facility for purposes of liability analysis is crucial and is closely tied to the level of services for which a resident has contracted.

Growth of remedies

As Ben Franklin said, there are only two certainties in life: death and taxes. The former might be a long time coming, but then we're certain to grow old. We are experiencing just the beginning of the expansion of long-term care facilities, and with that expansion we will continue to see many types of care facilities. Will the state legislature expand the regulations or will the long-term care lobby be able to hold that off? With that explosive growth will come the expansion of legal liabilities and remedies.

Author bio

Nancy Iler is the founding member of Nancy C. Iler Law Firm LLC, which is dedicated to representing injured people and their families with a focus on nursing home and assisted living abuse and neglect. She began her professional life as a registered nurse: advocating for patients before advocating for clients later as an attorney. She is a member of the Elder Law and Special Needs Section of the OSBA. Nancy can be reached at (216) 696-5700, nancy.iler@ilerlawfirm.net or www.ilerlawfirm.net

Endnotes

[1] *Legal Considerations for Assisted Living Facilities,* 28 J.L. & Health 308 (2015) by Y. Tonly Yang

[2] Ibid.

[3] U.S. Department of Health and Human Services, National Health Center for Health Statistics No. 91, April 2012 "Residents living in Residential Care Facilities: United States, 2010."

[4] Those federal regulations are set forth in the 42 CFR§ 483.1-480.

[5] O.A.C. Ohio Administrative Code §3701.17.50 (FF).

[6] O.A.C. §3701.17.50 (HH).

[7] CITE.

[8] O.A.C. §3701.17.52 (C) & (D).

[9] O.A.C. § 3701.17.08 (C).

[10] O.A.C. §3701.17.54(D)(1).

[11] O.A.C. §3701.17.58.

[12] O.A.C. 3701-17-50(Z).

[13] O.A.C. 3701-17-51 (B)(2).

[14] See www.aging.ohio.gov/services/assistedliving/.

[15] O.R.C. §3721.10-17.

[16] O.A.C. 3701-17-57.

[17] Additionally, prior to admission or on request from a resident, the facility shall provide copies of and explain certain policies: rights and procedures, pursuant to R.C. 3721.2; smoking policy; policy on advance directives; definition of skilled nursing care; if applicable, care policy for special care unit; policy on ability to accommodate disabled residents; and any other facility policies. Also included must be explanation of charges, including security deposit; statement that all charges assessed are included in the agreement; statement that basic rate shall not change without thirty days written notice; explanation of refund process; explanation of services provided; and statement that resident must be discharged or transferred when skilled nursing care is required beyond the limitations of the facility. See O.A.C. §3701.17.57 (**NCI CHECK CITE).

[18] See *New York Times series on arbitration at http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?*

[19] 2005-Ohio-1982 (8th Dist.)

[20] *Id. at ¶19.*

[21] *Id. at ¶27.*

[22] N.D. Ohio Case No. 1:12-CV-319, 2013 W.L. 1283903 (Mar. 27, 2013).

[23] Id. *at p. *3.*

[24] Id.

[25] E.D. Mich., Case No. 12-11607, 2014 W.L. 495414 (Feb. 6, 2014).

[26] (Id. at p. *5).

[27] 10th Dist. No. 14AP-568, 2014-Ohio-5670 (Dec. 23, 2014).

[28] 2014-Ohio-5354 (10th Dist.)