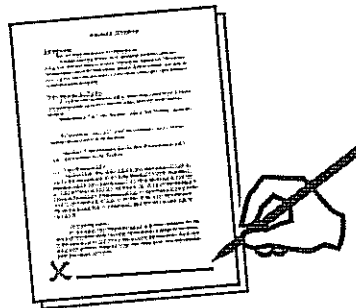


Nursing Home Admission Agreements: Think Twice Before Signing

A Guide for Nursing Home Residents and Their Families



National Senior Citizens Law Center
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With Support from
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Be Smart

- Educate yourself
- Inform yourself

Be Bold

- Speak up
- Make requests
- Be your own advocate

Be Strong

- Know your resources
- Work with allies

Moving into a nursing home can be a difficult process, physically and emotionally. The incoming resident and her family often feel anxious and vulnerable. Typically, they know next to nothing about nursing home life. As a result, they assume that the nursing homes' procedures are just the way that it is, and the way that it has to be. They assume that the admission agreement is a routine document, and sign it without much thought.

These assumptions often are wrong. Some nursing home procedures are harmful to residents, and may violate nursing home law. Likewise, some nursing home admission agreements are harmful and have provisions that violate the law.

This guide discusses common admission agreement problems, based on a recent study of 175 nursing home admission agreements. The guide is meant to inform and empower nursing home residents, their families, and others with an interest in improving nursing home care. As this guide explains, the federal Nursing Home Reform Law provides many protections for residents and families and, if aware of those protections, residents and families can take action to obtain the quality of care that residents deserve.

The study of admission agreements is entitled "Think Twice Before Signing: Improper and Unfair Provisions in Missouri Nursing Home Admission Agreements," and is available from the National Senior Citizens Law Center at www.nslc.org. The study's findings are relevant in any state, since nursing home admission agreements are similar across the country.

Be Smart! Information Is Power.

Moving into a nursing home can be difficult. The resident is entering an unfamiliar situation and likely is giving up some significant part of the life to which she had been accustomed.

There are, however, many things that the resident should not give up. Under nursing home laws, a resident has rights that are meant to allow her to live as independently and safely as possible.

The federal Nursing Home Reform Law focuses on a resident's individual needs. In general, a nursing home must provide necessary care in as homelike an environment as possible. A resident's preferences should be followed whenever practicable.

Nursing home admission agreements should reflect these rights and honor the Reform Law's resident-centered philosophy. The recent study, however, found that admission agreements often contain provisions that conflict with the law and/or are not fair to residents or their families.

This guide discusses common problems in nursing home admission agreements, and explains what residents and families should do when an admission agreement contains a questionable provision.

This guide is just a starting place and is not a substitute for the independent judgment and skills of an attorney or other professional. If you need legal or other expert advice, please consult a competent professional in your area.

Six Common Problems with Admission Agreements

1. Agreement lowers standard of care, and accepts certain injuries as almost inevitable.

Problem: The agreement claims that certain injuries are almost inevitable for older adults. The agreement limits the care that the resident can receive and, if the resident's needs increase, forces the resident to hire a separate "private duty" caregiver.

What you should know: The federal Nursing Home Reform Law requires a nursing home to provide the care necessary for a resident to reach "the highest practicable level of functioning." This law applies whether the resident's care needs are light or heavy.

The Nursing Home Reform Law requires that a nursing home provide a logical progression of care — prevention first and then treatment as necessary. The nursing home staff should work with the resident and his family to design an individualized care plan for any conditions he has, or is at risk of having. Conditions such as skin breakdown, pressure sores, dehydration, weight loss and even falls can be prevented with appropriate care. The nursing home is paid to provide necessary care; there should be no need for a resident to separately hire a private-duty caregiver.

2. Agreement Limits Resident's Right to Receive Visits from Family.

Problem: The agreement claims that visits are allowed only during certain hours.

What you should know: A nursing home resident has the right to be visited by a family member at any time of the day or night.

Under the Nursing Home Reform Law, a resident can receive a visit at any time from "immediate family or other relatives of the resident." This rule follows the idea that the nursing home is now the resident's home; frequent visits from family help to create a more homelike environment. Family members should feel like welcome visitors rather than trespassers. If visits are at night, and the resident shares a room, the visit can take place in a lounge or other common area.

It should be noted that a visit can only be made if the resident wants to see the visitor. A resident has the right to decline to see a visitor.

3. Agreement waives or limits the nursing home's responsibility.

Problem: *The agreement claims that the nursing home will not be responsible for a resident's injuries. The agreement may claim the nursing home is not responsible for residents' personal items if they are stolen or lost, even if the nursing home or its staff is at fault. Some agreements attempt to limit the amount or kinds of damages that the nursing home is required to pay if the resident is injured.*

What you should know: *A resident should not agree to waive or reduce a nursing home's responsibility.*

In general, nursing homes are required to comply with the federal Nursing Home Reform Law, with state law, and with the standard of care set by professional standards. It is never in a resident's interests to waive or reduce a nursing home's responsibility. This is particularly true at the time of admission, when neither the resident nor the family know what might happen in the future. The resident and family members want to rely on the standards set by law, and not have the nursing home's responsibility reduced by an agreement drafted by the nursing home's attorneys. In any case, these waiver-of-liability provisions are invalid and unenforceable in most states.

4. Agreement requires arbitration of disputes or claims.

Problem: The agreement claims that the resident gives up his right to a jury trial and agrees to have all disputes between the resident and the nursing home settled by arbitration.

What you should know: A resident should not waive her right to a jury trial. A jury generally is better than an arbitrator in understanding a resident's point of view.

Arbitration is a form of alternative dispute resolution in which rulings are made by attorneys called arbitrators, rather than by judges and juries. In general, consumers should not choose arbitration, because the court system (including jury trials) is better in understanding a resident's point of view. An arbitrator may have an inclination (conscious or otherwise) to side with the nursing home against the resident, since the nursing home may be in a position to give repeat business to the arbitrator and arbitration service.

Arbitration can be expensive, since the parties are required to pay for the arbitrator's time. Some arbitration agreements contain provisions that limit the damages that a nursing home might have to pay, or that reduce the resident's ability to investigate the nursing home's actions.

Health care often is recognized as an inappropriate setting for arbitration agreements. Both the American Arbitration Association and the American Health Lawyers Association generally refuse to provide arbitrators for health care disputes involving a consumer, if the arbitration agreement was signed before the dispute arose.

If, for some reason, a resident might prefer arbitration, that decision should be made after a dispute has arisen. It

certainly is premature to choose arbitration during the admissions process, when the resident and family members have no way of knowing what dispute might arise in the future.

5. Agreement authorizes eviction for improper reasons.

Problem: The agreement claims that the resident can be evicted for being difficult or uncooperative.

What you should know: To a great extent, nursing homes exist in order to provide care to persons with Alzheimer's disease and other dementias. Accordingly, the Nursing Home Reform Law specifically requires a nursing home to provide appropriate care for residents with dementia. Eviction is only allowed for one of six specified reasons, and none of those reasons allow eviction for a resident being difficult or uncooperative.

Of the six allowable reasons for involuntary transfer or discharge, the first two reasons are nonpayment and the nursing home going out of business. The other four reasons all are based on the resident's health or behavior. Reasons #3 and #4 allow involuntary transfer/discharge if the resident no longer requires nursing home care, or requires a level of care that cannot be provided in a nursing home. The final two reasons are based on the protection of others in the nursing home – a resident can be transferred or discharged involuntarily if his presence endangers others' health or safety.

It is objectionable for a nursing home to evict someone for being difficult or non-cooperative because this goes far beyond the reasons allowed by the Reform Law, and also because it is inconsistent with nursing home reality. In fact, nursing home residents often are difficult or uncooperative. They can't help it – this type of behavior frequently results

from Alzheimer's disease and other dementias, which are common among nursing home residents. When presented with such behavior, a nursing home should not transfer or discharge the resident – instead, the nursing home should assess the resident's condition and develop a care plan that addresses the resident's needs as best as possible.

6. Agreement requires resident's family member or friend to become financially liable for nursing home expenses.

Problem: The agreement claims that the "responsible party" agrees to be fully responsible for all nursing home expenses.

What you should know: The Nursing Home Reform Law prohibits a nursing home from requiring a resident's family member or friend to become financially responsible for a resident's nursing home expenses.

Despite the fact that the Reform Law prohibits a nursing home from requiring a family member or friend to become financially liable, some admission agreements have a family member or friend sign as a "responsible party." Elsewhere in the document, these agreements generally define "responsible party" as a person who is financially liable for nursing home expenses.

No family member or friend should sign as a "responsible party" or accept financial liability in some other way. The Reform Law prohibits a nursing home from requiring such financial liability, and there is no good reason why any family member or friend would choose to make herself financially liable. If an agreement claimed that a family member or friend had "volunteered" to become financially liable, that provision of the agreement likely would be so one-sided that it would be declared unconscionable and thus unenforceable.

Nonetheless, when a resident cannot handle his own financial matters, a nursing home can require a resident's family member or friend to sign as the resident's *agent*. The agent is responsible for paying the *resident's* money to the nursing home as appropriate.

Be Bold

- ✓ Speak up!
- ✓ Make requests!
- ✓ Be your own advocate!
- ✓ Read the fine print!

Tips for Residents and Family Members

During admission, if a resident or family member sees an objectionable provision in an agreement, she should speak up! Speaking up is particularly advisable if the resident already has moved into her room in the nursing home. Remember, once the resident has moved in, there are only six limited reasons for eviction (see Problem #5 above). Objecting to inappropriate admission agreement provisions certainly is not one of those reasons.

If the resident has not yet moved into the nursing home, the negotiating situation is a little more difficult, but the basic strategy remains the same – speak up! This guide recommends that the resident or agent strongly consider signing an admission agreement only after appropriately deleting or modifying offending provisions.

The nursing home staff member probably will be too embarrassed or confused to object, and will continue with the resident's admission. Of course, there is the risk that the nursing home will refuse admission, but avoiding that risk generally is not worth the signing of an illegal or unfair admission agreement. Remember, most nursing homes cannot afford to turn away potential customers. Also, refusing to sign is an important step in educating nursing homes and their staff on the illegal or inappropriate provisions in many admission agreements.

A resident or family member can use this guide to explain to the staff member what the problem is, and what nursing home law requires. Even more information is available from “Think Twice Before Signing: Improper and Unfair Provisions in Missouri Nursing Home Admission Agreements,” the full report on admission agreements, available from the Internet at www.nsclc.org.

The resident or family member may want to get help from the Long-Term Care Ombudsman Program, a free service available in every state. The word “ombudsman” means someone who investigates reported complaints and helps to resolve problems. The ombudsman program is established by federal and state law, and is completely independent from a nursing home’s administration. Most ombudsman programs operate with a limited number of paid staff members supervising trained volunteers. Contact information for the ombudsman program is located in the “Resources” section at the end of this guide.

The resident or family member may wish to make a complaint against the nursing home with the state’s nursing home inspection agency. The agency can take action if a nursing home has violated a federal or state nursing home law.

Also, consultation with a local attorney may be advisable. If an agreement is not yet signed, an attorney can give advice and may be able to assist with negotiations. If an agreement already is signed, the attorney can advise on whether certain provisions are likely to be enforceable.

A few important issues to keep in mind:

- Residents and family members should be particularly wary if an admission agreement waives or limits a nursing home's responsibility. (See Problems #1 & #3) A resident wants to live in a nursing home that follows the law and recognizes its legal and professional obligation to provide necessary care. For numerous reasons, it is a bad sign if an admission agreement claims to waive the nursing home's responsibility, or claims that injuries are almost inevitable.
- As discussed earlier, there is no reason for a resident in an admission agreement to commit to arbitration and to waive the right to a jury trial (Problem #4). Many arbitration provisions claim to be "voluntary" – if so, point this fact out to the nursing home staff member, and explain that you are *not* choosing arbitration. If you already have signed an arbitration agreement, the agreement might be unenforceable, depending on the circumstances – consult with an attorney for more information.
- Finally, also as discussed earlier, there is no reason for a family member or friend to personally take on financial liability (Problem #6). These provisions also are sometimes described as "voluntary," which should be pointed out to any staff member who demands a signature.

Be Strong

- ✓ Know your resources.
- ✓ Work with partners and allies.

Resources for You or Your Family

- The Long-Term Care Ombudsman Program has staff members and trained volunteers throughout the country, and may have one assigned to the nursing home with which you are dealing. Contact information for the ombudsman program in your state is available from the National Long-Term Care Ombudsman Resource Center, www.ltcombudsman.org.
- Complaints can be made against a nursing home with the state's nursing home inspection agency. The agency can take action if the nursing home has violated a federal or state nursing home law. Contact information for a state's nursing home inspection agency is available at www.nccnhr.org.
- Attorneys
 - You may want to contact your own attorney, if you have one.
 - Information on elder law attorneys and other attorneys is available from your state bar association, the Legal Services Corporation (www.lsc.gov), and the National Academy of Elder Law Attorneys (www.naela.org, or (520) 881-4005).

- More information about nursing homes is available from the National Senior Citizens Law Center at www.nsclc.org, or (202) 289-6976.
 - *Think Twice Before Signing: Improper and Unfair Provisions in Missouri Nursing Home Admission Agreements* – a study of Missouri nursing home admission agreements, available for free download at www.nsclc.org.
 - *The Baby Boomer’s Guide to Nursing Home Care* – a comprehensive consumer guide for nursing home residents and their families, including information on finding a nursing home, obtaining eligibility for Medicare or Medicaid payment, and getting the highest possible quality of care; available for purchase at www.nsclc.org.
 - *Twenty Common Nursing Home Problems – and How to Resolve Them* – detailed advice, in an easy-to-read question and answer format, on how residents and their families can recognize and solve the most common nursing home problems; available for purchase at www.nsclc.org.

About the National Senior Citizens Law Center

The National Senior Citizens Law Center (NSCLC) advocates for the rights of elderly people, especially those who live in poverty. Our attorneys played a key role in winning passage of the federal Nursing Home Reform Law and have promoted its implementation and enforcement ever since. NSCLC has recovered lost benefits and improved access to vital safety net programs for millions of Americans.

How a nation cares for its elders affects the quality of life for everyone, young and old. The National Senior Citizens Law Center works for:

- quality health care through Medicaid and Medicare;
- adequate retirement income through Social Security and Supplemental Security Income;
- quality nursing homes, assisted living facilities, and at-home care for those who need long-term care; and
- access to justice to enforce laws protecting elders and other Americans.

NSCLC trains attorneys and community groups to strengthen advocacy for elders in local communities throughout the country. NSCLC publishes three acclaimed newsletters on legal issues affecting the elderly poor and provides technical assistance to legal services programs, area agencies on aging, and other groups funded under the Older Americans Act.

Visit our website at www.nsclc.org for more information about our programs and services. Due to limited resources, NSCLC cannot provide legal assistance for individual cases.