



ACCESS TO JUSTICE FOR RESIDENTS OF LONG-TERM CARE FACILITIES: OPPORTUNITIES FOR COLLABORATION BETWEEN LEGAL SERVICES PROVIDERS AND LONG-TERM CARE OMBUDSMAN PROGRAMS

By Becky A. Kurtz and Mary Ann Parker¹

A man living in a nursing home needs assistance to appeal a notice of discharge. A woman living in assisted living wants to revoke her power of attorney because



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her agent is financially exploiting her. A resident of a board and care home has received a notice

that his services, covered by Medicaid, are being terminated.

Individuals living in long-term care facilities often face daunting legal problems at the same time that their health, financial or cognitive challenges create barriers to accessing justice. Long-term care ombudsman programs serve individuals with these problems every day. But are they able to successfully link these individuals to the legal assistance they need? Of course, the answer is “it depends.”

Across the country, long-term care ombudsman programs have developed close working relationships with attorneys, resulting in residents receiving access to high quality legal counsel and representation. They partner with legal services programs (including entities funded through the Legal Service Corporation (LSC) and/or Title IIIB of the Older Americans Act), the private bar (through referral lists as well as access to pro bono counsel), state legal services developers (created through the federal Older Americans Act), and law school clinical programs. In other places, residents — and the long-term care ombudsman programs that serve them — have a difficult time accessing legal services. In this article, we provide information about

long-term care ombudsman programs and examples of successful partnerships with attorneys. We hope to enhance collaborative efforts that meet the needs of our nation’s long-term care facility residents.

About the Long-Term Care Ombudsman Program

Created by Congress in the 1970s through the Older Americans Act (OAA), long-term care ombudsman programs serve residents living in long-term care facilities (*i.e.*, nursing facilities, board and care, assisted living and similar adult care settings). The programs provide person-centered assistance to resolve resident problems through alternative dispute resolution, including problems related to poor care, violation of rights, and quality of life. Ombudsmen also advocate at the local, state and national levels to promote policies and consumer protections to improve residents’ care and quality of life. *See*, Section 712 of the Older Americans Act (42 U.S.C. § 3058g).

The Administration on Aging, within the Administration for Community Living (ACL), administers the OAA. Like most OAA services, the programs are operated through grants to states. Each state (plus the District of Columbia, Puerto Rico and Guam) has an Office of the State Long-Term Care

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Ombudsman, headed by a full-time State Long-Term Care Ombudsman. Across the nation, thousands of local ombudsman staff and volunteers, designated by the State Ombudsman, assist residents and their families by resolving complaints and providing information related to long-term care. In some states, these ombudsmen are supervised directly by the State Ombudsman; in other states, they work within designated local Ombudsman entities (usually area agencies on aging or nonprofit entities).

Of course, many individuals prefer receiving long-term services and supports in their own homes. While the OAA does not authorize ombudsman services for people living in their own homes, some states have expanded long-term care ombudsman program authority and, with other funding, serve these individuals.

Nationwide, long-term care ombudsman programs investigated and worked to resolve 193,650 complaints related to residents of long-term care facilities in fiscal year 2012. The vast majority of these complaints were resolved to the satisfaction of the resident. The most common complaint types in nursing facilities related to:

- improper eviction or inadequate discharge planning;
- unanswered requests for assistance;
- lack of respect for residents, poor staff attitudes;
- quality of life, specifically resident/roommate conflict;
- medications — their administration and organization.

The most common complaint types in board and care, assisted living and similar facilities:

- medications — their administration and organization;
- improper eviction or inadequate discharge planning;
- quality, quantity, variation and choice of food;
- lack of respect for residents, poor staff attitudes;
- equipment or building hazards.

In addition to complaint resolution, ombudsman staff and volunteers provide a regular presence to facility residents, visiting residents in 68% of nursing facilities and 25% of board and care and similar homes (including assisted living) at least quarterly in fiscal year 2012. They provide information on rights, care and related services to hundreds of thousands of individuals each year. They also support resident and family councils in facilities; provide education to residents, facility staff and the general public; and work on

public policy — all with a goal of improving the quality of care and quality of life for residents.

How Do Ombudsmen Access Legal Support for Residents?

The Older Americans Act envisions that long-term care ombudsman programs are to have adequate, conflict-free legal counsel. In addition, the programs frequently work collaboratively with legal services providers to help meet the legal needs of residents. Not surprisingly, the relationships between long-term care ombudsman programs and legal services providers are different in every state — and may be varied even within a state. In a few states, long-term care ombudsman programs are located within a nonprofit legal services organization. For example, the Vermont State Long-Term Care Ombudsman and all of the program's staff and volunteers are part of Vermont Legal Aid, and in Colorado the State Long-Term Care Ombudsman is housed in The Legal Center (Colorado's protection and advocacy entity). In some states, the state unit on aging contracts with, and the state long-term care ombudsman designates, local legal services offices to house local ombudsman entities. Programs that are co-located often develop formalized referral processes and protocols to keep ombudsman work and record-keeping distinct from the legal services functions of the entity.

More often, the programs are in separate organizations. In those situations, successful collaborations have often been supported through memoranda of understanding or similar documents that delineate clear referral processes and working relationships. In some successful models, legal assistance developers in state units on aging have developed standards which support this collaboration. In other states, such as Washington, the State Long-Term Care Ombudsman has a contractual arrangement with a legal services provider in order to support both the program as well as to provide legal service access to residents.

The District of Columbia Long-Term Care Ombudsman Program (DCLTCOP), housed within AARP's Legal Counsel for the Elderly, uses in-house counsel to advise and represent residents. The DCLTCOP also accesses pro bono counsel for larger cases, such as filing for a writ of mandamus to compel the D.C. regulatory agency to implement the assisted living residence regulations. In addition, the DCLTCOP has brought to light neglect cases that were taken on by the private bar and successfully resolved for the injured resident.

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With its in-house legal counsel directly serving residents, DCLTCOP has provided residents with access to justice in many ways, including:

- *Avoiding an inappropriate discharge from facilities* — Federal regulations dictate that residents of nursing homes cannot be discharged from the facility without being given an opportunity to appeal the facility's decision. However, many residents and/or their family members do not know this or are ill-equipped to challenge the nursing home's decision especially within the formal structure of an administrative hearing. Residents may not know they could challenge the notice based on the fact that they were not given the appropriate thirty day notice or that the notice did not contain a location to which they are to be discharged. The DCLTCOP attorney has helped many residents avoid an involuntary discharge simply by identifying the legal insufficiencies of notices and filing appropriate motions.
- *Responding to (and preventing further) financial exploitation* — Immediate legal action is sometimes needed when a resident's agent is mishandling funds. In these types of cases, the DCLTCOP attorney has met with the resident, drafted a letter of revocation, and prepared a new power of attorney on short notice.
- *Preserving access to health and long-term care benefits* — Having ready access to legal representation is very important for Medicare and Medicaid appeals. If the resident cannot file timely, he or she may not only lose needed benefits but may find their continued stay at their place of residence threatened. The DCLTCOP attorney has ensured that appeal deadlines have been met and appropriate arguments presented to preserve resident access to needed services.
- *Identification of legal issues and overseeing legal referrals* — In the DCLTCOP model, the attorney is also instrumental in issue spotting and assuring that residents are linked to appropriate representation. For example, in a case of a conservator mishandling the sale of a resident's house and personal belongings, the DCLTCOP attorney identified the legal issues and assisted the resident in obtaining legal assistance to remove the conservator.

In addition to providing legal assistance directly to individual residents, legal counsel to some long-term care ombudsman programs also provide expertise at the policy, regulatory and legislative level to represent the program and to provide systemic solutions to resolve resident issues:

- *Strengthening state policy on financial exploitation* — In West Virginia, legal counsel for the local ombudsman entity is a leader of the States' Financial Exploitation Task Force through which stakeholders supported legislation to strengthen the protections related to durable powers of attorneys, to permit banks to report reasonable suspicion of exploitation and share needed information with adult protective services and law enforcement, and to increase penalties for those convicted of financial exploitation.
- *Strengthening long-term care consumer protections* — The legal counsel for the Washington State Long-Term Care Ombudsman has drafted proposed legislation that resulted in consumer protections such as requirements for deposit refunds and reducing Medicaid discrimination in assisted living facilities. The attorney reviews regulatory agency inspections and enforcement actions in board and care settings, bringing attention to the need for a strong inspection and enforcement process by the state.

What Value Can an Ombudsman Add to Legal Services?

Long-term care ombudsman programs can be important partners for attorneys who work to resolve legal issues for residents, for example:

- *On-going support for residents* — Before, during, and after legal actions, ombudsmen are an important resource for and support to residents. They can assist the resident in accessing legal counsel, support the resident while a legal process is ongoing, and provide follow up and communication with the resident after a legal process is complete. For example, a resident may have a restraining order against an abusive family member. While the legal process of securing the restraining order may be complete, the ombudsman may learn that the family member is obtaining access to the resident despite the order. Ombudsmen can be the eyes and ears to be aware that the problem did not get fully resolved and bring the need for additional interventions to the attention of legal counsel.

- *Providing information about the long-term care facility context* — As ombudsmen provide a regular presence to residents living in facilities, they are knowledgeable about specific facility operations, personnel, and trends. While resident-specific information may not be disclosed without resident permission, ombudsmen have aggregate-level data on the types and frequency of complaints received related to residents of specific long-term care facilities. State procedures regarding sharing aggregate data vary, so individuals seeking to access this data should contact the State Long-Term Care Ombudsman to understand the policy and process for the release of any Ombudsman Program data. In addition, ombudsmen often coordinate with state regulatory agencies, so ombudsmen are generally knowledgeable about how regulatory services operate in the long-term care facility context.
- *Systems and public policy advocacy* — The Older Americans Act requires long-term care ombudsman programs to provide advocacy services to residents on both the individual and the systems level. As a result, when ombudsmen see trends or problems facing residents that need a broader approach, they are expected to seek resolution through systems advocacy. So, for example, they may advocate at the state legislature to increase the Medicaid personal needs allowance of residents who live in nursing homes or they may advocate at the state regulatory agency to improve regulations for assisted living residents. As legal counsel identifies issues impacting residents that require a systemic approach, the ombudsman program may be a valuable ally.

Legal services attorneys and long-term care ombudsmen can develop strong partnerships that provide residents of our nation's long-term care facilities with access to justice.

For More Information:

- To locate the long-term care ombudsman program serving your area, you may get contact information from the National Ombudsman Resource Center at: www.ltcombudsman.org or 202-332-2275.
- To learn more about long-term care ombudsman programs, the Administration for Community Living (ACL) suggests:
 - » ACL web page on long-term care ombudsman programs: http://aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Ombudsman/index.aspx.
 - » National Ombudsman Resource Center: www.ltcombudsman.org or 202-332-2275.
 - » “State Long-Term Care Ombudsman Programs: A Primer for State Aging Directors and Executive Staff,” available at: http://www.nasuad.org/documentation/nasuad_materials/NASUAD%20Ombudsman%20Report%20final.pdf or copies can be requested from the National Association of States United for Aging and Disabilities (NASUAD) at (202)898-2578 or info@nasuad.org.

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