



The National **Long-Term Care** **Ombudsman** Resource Center

WORKING THROUGH ETHICAL DILEMMAS IN OMBUDSMAN PRACTICE

North Dakota LTCOP Training

May 3, 2016

Presented by Sara Hunt, NORC Consultant

Learning Goals

- ✓ Know key aspects of ethical decision-making
- ✓ Know how to apply LTCO Code of Ethics
- ✓ Have a set of questions to apply to stay grounded in the LTCO role
- ✓ Know how the LTCOP Rule supports an ethical approach in complaint processing

Learning strategies



What is ethics?

- **A set of moral principles**
 - a theory or system of moral values
 - the principles of conduct governing an individual or a group
 - a guiding philosophy



Code of Ethics for Ombudsmen

- **LTCO work is filled with ambiguity**
 - Client/resident characteristics
 - Right or Wrong courses of action unclear
 - Need to maintain credibility and work with integrity

- **Code of Ethics guides actions**



Code of Ethics for Ombudsmen

What are some of the provisions in these codes?

- Provides services with respect for human dignity and the individuality of the client, unrestricted by considerations of age, social or economic status, personal characteristics, or lifestyle choices.
- Respects and promotes client's right to self-determination.
- Makes every reasonable effort to ascertain and act in accordance with client's wishes.
- Acts to protect vulnerable individuals from abuse and neglect.
- Provides professional advocacy services unrestricted by his/her personal belief or opinion.
- Acts in accordance with the standards and practices of the LTCOP.
- Conducts self in a manner that will strengthen the statewide and national ombudsman network.

Doing Ethics

- **Ethics is about the process as well as what you do. It is about *how* you get there.**
- **Good ethics begins with good facts.**
- **There is always a range of morally acceptable actions.**

Jacqueline Glover, 2001 presentation to LTCO

Decision-Making Capacity

Is questioned when the decision someone makes differs from what professionals would choose.

Joan McIver Gibson, 1991



- Tip: When someone tells you why you can't trust or believe what a resident is saying, ask yourself *why*.

Principles for Decision-Making

- **Informed consent and autonomy**
- **Substituted judgment**
- **Best interest**

1327.19 Duties of the representatives

(b) *Complaint processing.*

(1) With respect to identifying, investigating and resolving complaints, and regardless of the source of the complaint (*i.e.* complainant), the Ombudsman and the representatives of the Office serve the resident of a long-term care facility. The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident's satisfaction and of protecting the health, welfare, and rights of the resident. [1327.19 (b)(1)]

- Including residents that are unable to communicate informed consent and do not have a representative (b)(2)(iii)

1327.19 Duties of the representatives

(b) *Complaint processing.*

(2) Regardless of the source of the complaint (*i.e.* the complainant), including when the source is the Ombudsman or representative of the Office, the Ombudsman or representative of the Office must support and maximize resident participation in the process of resolving the complaint as follows:

(i) Privacy...

(ii) The Ombudsman or representative of the Office shall personally discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, the resident's representative) in order to:

1327.19 Duties of the representatives

(b) *Complaint processing.*

(2) (A) Determine the perspective of the resident...

(B) Request the resident ...to communicate informed consent in order to investigate the complaint;

(C) Determine the wishes of the resident ...with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether Ombudsman or representative of the Office may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies.

(D) Advise the resident ...of the resident's rights;

1327.19 Duties of the representatives

(b) *Complaint processing.*

(E) Work with the resident...to develop a plan of action for resolution of the complaint;

(F) Investigate the complaint to determine whether the complaint can be verified and

(G) Determine whether the complaint is resolved to the satisfaction of the resident...

- Person-Centered complaint processing
- The OAA and the LTCOP Rule are clear—Role of the LTCO is to support informed consent, substituted judgment (resident representative), best interest.

1327.19 Duties of the representatives

(b) *Complaint processing.*

- Ombudsman program MAY disclose resident-identifying information under some circumstances:
 - No one available to communicate consent
 - or resident representative has taken action to harm resident;
 - Reasonable cause to believe that an action may adversely affect the resident's health, safety, welfare, or rights;
 - No evidence that resident would not wish a referral;
 - Reasonable cause to believe a referral is in residents' best interest;AND
 - Ombudsman approval (or otherwise follows Office policies)
- 45 CFR 1327.19(b)(6), (7)



Tips for LTCO Practice

- **Conflicts usually arise over the application of values, instead of over the values themselves.**
- **Values emerge from relationships.**
- **Values may evolve and change depending upon who's involved in the conversation.**

LTCO Action

- **Identify individuals to be involved in the conversation with the resident when conflicts arise.**
- **Be able to tolerate ambiguity.**
- **The key is the *process* used to sort out the options and arrive at a choice.**

Questions LTCO Ask in Dilemmas

- What “harm” will be prevented?
- What “good” will be done?
- What is the real issue?
- What needs to be known to make [assist] this decision?
- What are the client’s/resident’s questions or concerns?

Joan McIver Gibson, 1991

LTCO Actions and Ethics

- **Code of Ethics, OAA, LTCOP Rule**
- **Applying ethical concepts**
- **Identify situations for self-check**
 - What internal conflict am I feeling? Why?
 - Whose interests am I representing?
 - What if resident cannot express wishes?
 - Have I taken reasonable actions to support resident decision-making?
 - Have I followed LTCOP Policies? Will my actions support the credibility of the LTCOP as resident's advocate?
 - How have I used my influence?
 - Have I been honest with the resident and others?



CASE DISCUSSION

Mrs. Irons

The social worker at The Pines Nursing Facility calls and says the facility needs your help with a situation. A resident, Mrs. Julia Irons, is refusing treatment. Her doctor ordered a pureed diet and she refuses to continue eating it and insists that she wants a regular diet. Although she has a terminal illness she is not on hospice and she is mentally sharp, she can make her own decisions. Facility staff are concerned that she will aspirate and die if she eats a regular diet. Mrs. Irons says she is willing to take the risk in order to have food that tastes and looks like real food. Some of her family members support Mrs. Irons' decision, others are strongly opposed. They take out their frustration on the staff who feel caught between upholding residents' rights, complying with medical orders, and possibly contributing to Mrs. Irons' death. Will you come and work out a solution?

Mrs. Irons

1. Who is your client? Why?
2. What are the ethical and values issues?
3. What actions would you take?
4. What questions or uncertainties might you have about your actions?
5. How would you know if you've *done the right thing*?



CMS SOM

§ 483.10(b)(4) – The resident has the right to refuse treatment,...

§ 483.10(d)(3) – The resident has the right to... participate in planning care and treatment or changes in care and treatment.

Interpretive Guidelines: Whenever there appears to be a conflict between a resident's right and the resident's health or safety, determine if the facility attempted to accommodate both the exercise of the resident's rights and the resident's health, including exploration of care alternatives through a thorough care planning process in which the resident may participate.



CMS SOM

§ 483.20(k)(2) A comprehensive care plan

While Federal regulations affirm the resident's right to participate in care planning and to refuse treatment, the regulations do not create the right for a resident, legal surrogate or representative to demand that the facility use specific medical intervention or treatment that the facility deems inappropriate. Statutory requirements hold the facility ultimately accountable for the resident's care and safety, including clinical decisions.

Surveyor Probes: Was interdisciplinary expertise utilized...?

- b. Do the dietitian and speech therapist determine, for example, the optimum textures and consistency for the resident's food that provide both a nutritionally adequate diet and effectively use oropharyngeal capabilities of the resident?

Food and Dining Symposium

§ 483.35(i) Nutrition (2) Receives a therapeutic diet when there is a nutritional problem.

Receives a Therapeutic Diet

Therapeutic diet refers to two kinds of diets: restricted diets...and altered texture diets (such as mechanical soft or pureed). As might be expected,...residents on a modified texture diet would also sometimes prefer a regular diet, which might put them at risk for choking.

The Intent statement in the [CMS] interpretive guidance for this requirement currently states that care and services be *consistent with the resident's comprehensive assessment and that the therapeutic diet takes into account the resident's clinical condition and preferences.*

The resident's personal wishes are acknowledged with the following: *Goals and prognosis refer to a resident's projected personal and clinical outcomes. These are influenced by the resident's preferences.*

Tag F325 Nutrition guidance identifies that a person has *dislikes, preferences and preferred portion sizes.*

Food and Dining Symposium

CMS F325 Deficiency Categorization

The first instance is an example of Severity Level 4 - Immediate Jeopardy:

- *Substantial and ongoing decline in food intake resulting in significant unplanned weight loss due to dietary restrictions or downgraded diet textures (e.g., mechanic soft, pureed) provided by the facility against the resident's expressed preferences.*

Mrs. Delgado

While you are visiting residents in Peaceful Shores Convalescent Facility, a resident, Mrs. Delgado shares that she is very scared. Last night a staff person told her that if she keeps using the call light she will be punished by being discharged from the facility. Mrs. Delgado is totally bedfast and needs assistance from staff for all of her daily functions. She has no other place to go. Mrs. Delgado tells you not to do anything to assist her because she fears retaliation and no one will be able to protect her.

Mrs. Delgado

1. Who is your client? Why?
2. What are the ethical and values issues?
3. What actions would you take?
4. What questions or uncertainties might you have about your actions?
5. How would you know if you've *done the right thing*?
6. Would your actions change if Mrs. Delgado had cognitive impairments? If so, why? How?

LTCO Advocacy

- Explore the reason for the resident's reluctance, discuss her rights, the role of the LTCOP, the complaint process, and potential risks of not reporting the complaint.
 - Offer to investigate without revealing her identity.
 - Visit as frequently as possible, ask if she is interested in supportive services (e.g. counseling), and encourage her to give her consent to report the abuse.
 - Leave the door open for her to change her mind.
- Ask if she has shared this information with anyone else.
- See if there are other residents with the same issue, *very carefully*.
- Gather information regarding the allegation and if you find information supporting the allegation share the information with the facility if it is possible to do so without identifying the resident (e.g. here is information supporting allegations we've received that the nurse aide, Jackie, on the evening shift is...) and remind the facility of their responsibility to report and investigate abuse.

Touchstones:

LTCO Role Responding to Abuse Complaints

- Person-centered complaint processing approach.
- Resolution goal= resident satisfaction and protection of resident's health, welfare and rights.
- LTCOPs are not the “official finder of fact” to substantiate abuse complaints.
- LTCO are not mandatory reporters, but LTCO must support the resident to the extent the resident wants assistance.



QUESTIONS?

RESOURCES



Specialized Information for:

- Nursing Homes
- Assisted Living/Board & Care
- Home and Community Based Services

Program Management

- ▶ Assisted Living
- ▶ Collaboration/Working With Other Agencies
- ▶ Confidentiality and Information Sharing
- ▶ Culture Change
- ▶ Data & Software Management
- ▶ Ethics
- ▶ Home & Community-Based Services
- ▶ Legal Counsel for the LTCOP
- ▶ Mental Health/Mental Illness
- ▶ Ombudsman Best Practices
- ▶ Ombudsman Program Advocacy
- ▶ Ombudsman Program Funding
- ▶ Ombudsman Program Structure & Management
- ▶ Policies & Procedures
- ▶ Quality Assurance
- ▶ Volunteer Ombudsman Program Management

Program Promotion

Training

Ethics

Applying Ethical Principles to Individual Advocacy

Joan Gibson presentation summarized by Sara S. Hunt, National Ombudsman Resource Center (National Eldercare Institute on Elder Abuse and State Long Term Care Ombudsman Services) (1992)

This resource paper contains a discussion of the ethical dilemmas facing long-term care ombudsmen in their daily practice. It includes decisional capacity, the use of a values history and suggests a process ombudsmen might use for individual case advocacy.

Advocacy in Ethical Issues: A Multi-Disciplinary Approach: A Guide for Ombudsmen

Carolyn Wanner, National Long Term Care Ombudsman Resource Center (1995)

This technical assistance paper captures the panel presentations and the state long-term care ombudsman consensus during the "Advocacy in Sticky Situation" session at the 1994 annual state ombudsman training conference. A case study was presented followed by responses from different professional disciplines and a long-term care ombudsman. The unique role of the long-term care ombudsman and application to long-term care ombudsman program management were discussed and compiled.

Conflict of Interest and the Long-Term Care Ombudsman Program (July 2009)

Identifying and preventing, removing or remedying conflicts of interest is not a simple task. There is not an established solution for every potential conflict of interest situation. Addressing conflict of interest requires continual vigilance, dialogue, assessing the potential impact on residents, and thoughtful strategies to remove or remedy the conflict. The easiest solution is to avoid the conflict of interest. This paper discusses the Older Americans Act provisions and dimensions of conflict of interest. Key resources and approaches utilized by several state and local ombudsman programs are included as examples of program

Technical Assistance Guide

Responding to Allegations of Abuse: Role and Responsibilities of LTCO

- Overview
- Key Points
- AoA Statements
- What Can An Ombudsman Do?
- LTCO Advocacy Strategies
- Resources

http://ltcombudsman.org/uploads/files/issues/responding-to-allegations-of-abuse_0.pdf

RESPONDING TO ALLEGATIONS OF ABUSE: ROLE AND RESPONSIBILITIES OF LONG-TERM CARE OMBUDSMEN

OVERVIEW

Provisions in the Older Americans Act (OAA) state that Long-Term Care Ombudsmen (LTCO) shall “identify, investigate and resolve complaints” regarding “action, inaction, or decisions that may adversely affect the health, safety, welfare or rights of the residents” made by, or on behalf of, residents.¹ Complaints may include, but are not limited to, allegations of abuse, gross neglect and exploitation. Long-Term Care Ombudsmen are resident-centered advocates, directed by resident goals for complaint resolution and federal disclosure requirements; therefore, the LTCO role in investigating allegations of abuse is unique and differs from other entities such as, adult protective services and state licensing and certification agencies. These disclosure requirements mean that information shared with or gathered by the LTCO is confidential unless consent is obtained as described below in the OAA provisions. Furthermore, LTCO programs receive complaints from a variety of individuals (e.g. residents, family members, facility staff, representatives of other agencies), but due to strict requirements in the OAA, LTCO may not disclose the identity of the resident or complainant without receiving permission from the resident or complainant (or their legal representative).

The purpose of this guide is to discuss how Ombudsmen can respond to allegations and observations of abuse, neglect and exploitation when the resident does not or cannot give consent to pursue the complaint. In the absence of resident consent, ombudsmen can take other actions to adhere to disclosure requirements and work to ensure the resident receives quality care and is protected from harm. This quick reference guide will review the federal requirements regarding complaint investigations and disclosure, highlight statements from the Administration on Aging, and provide advocacy strategies and examples of program policies and procedures that address this specific situation.

Note: A few State Long-Term Care Ombudsman Programs (LTCOPs) receive allegations of abuse and investigate to substantiate the complaint (gather evidence to prove abuse occurred), but the primary focus of this resource is to discuss the role of the LTCOP in response to complaints according to the Older Americans Act and Administration on Aging technical assistance to states, not compare individual state LTCOP responsibilities.

KEY POINTS

What is abuse?

Since states have different definitions for abuse, neglect and exploitation, this guide will use the definitions provided in the National Ombudsman Reporting system (NORS) definitions of complaint codes and unless otherwise stated, we use the term “abuse” to include any willful act of “abuse, gross neglect and exploitation” throughout this resource.²

Older Americans Act Provisions

Under federal law, “the files and records” of the long-term care ombudsman program “may be disclosed only at the discretion of the [State] Ombudsman (or the person designated by the Ombudsman to disclose files and records).”³ Furthermore, the “identity of any complainant or resident with respect to whom the [Ombudsman] Office maintains

¹ Older Americans Act of 1965. Section 712 (a)(3)(A)

² Administration on Aging. Administration for Community Living. *Long-Term Care Ombudsman Program Complaint Codes*. OMB. NO. 0985-0005. Expiration Date: 07/31/2015. http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Ombudsman/docs/Complaint_Code2015.pdf
3 42 U.S.C. 3058g(d)(2)(A)

om
buds
man

The National Long-Term Care Ombudsman Resource Center

**The National Long-Term Care
Ombudsman Resource Center (NORC)**

www.ltcombudsman.org

**The National Consumer Voice for Quality Long-Term Care
(formerly NCCNHR)**

<http://www.theconsumervoice.org/>

*This presentation was supported, in part, by a grant from the Administration on Aging,
Administration for Community Living, U.S. Department of Health and
Human Services.*