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Senate Finance Committee Hearing on Nursing Home Abuse:

Only One Side of the Coin

On Mar. 6, 2019, the Senate Finance Committee, chaired by Senator Charles Grassley (R-Iowa), held a hearing titled *Not Forgotten: Protecting Americans From Abuse and Neglect in Nursing Homes*. The committee heard testimony on reported instances of abuse and neglect in nursing homes and on the federal-state oversight system's enforcement of laws and regulations designed to prevent these situations from developing.

This article will provide an overview of witness testimony before the Committee addressing the persistent concerns of Sen. Grassley. Notably, the day before the hearing, on Mar. 5, 2019, CMS made a pre-emptive strike to show that it’s addressing nursing home safety concerns. Seema Verma, the Administrator at CMS, in her blog post *Protecting the Health and Safety of all Americans,* stresses the “alarming stories” of abuse and neglect in the health care system “despite stringent safeguards” and then the STRIKE! She says that “CMS is issuing new guidance that takes a key step toward making across-the-board improvements in health care safety and quality.” The guidance relates to the Immediate Jeopardy “situations.” She explains that “this new guidance clarifies what information is needed to identify immediate jeopardy cases across all health care provider types, which we believe will result in quickly identifying and ultimately preventing these situations. This new guidance can be found in Appendix Q of the State Operations Manual that federal and state inspectors use.” I’ll review the new guidance next month. For now, be rest assured that we’ll hear plenty more about increased oversight and new guidance from CMS as the light is shined on it by the Senate Finance Committee.

Senator Grassley opened the hearings with familiar remarks about “horrible abuses” in nursing homes and his on-going efforts as the champion of the fight of the elders. While we can all agree that elder abuse (or any abuse of people or animals) is unacceptable. What Senator Grassley fails to spotlight, however, is that the extremely high expectations he expresses cannot be achieved in light of financial constraints placed on skilled nursing facilities by the government. More oversight and sanctioning are not the answers.

Before the committee were Patricia Olthoff-Blank and Maya Fischer who shared stories about neglect and an assault on their loved ones in nursing homes. Testimony was then received by David C. Grabowski, PhD, Professor, Department of Health Care Policy at Harvard Medical School. He “took on” two issues: 1) nursing home quality; and 2) the reasons for the focus on quality for fifty years. Dr. Grabowski addressed staffing, poor care practices, poor outcomes and adverse events, safety, low quality of life and concluding that “care is often directed by the facility rather than the resident” and, as a solution, offers that “a more participatory management structure that engages CNAs in the decision-making process would help with staff turnover and performance.” Why is nursing home quality “such a persistent problem?” According to Dr. Grabowski, “we get what we pay for.” Highlighting lack of funds, inconsistent oversight, Certificates of Need and lack of quality transparency, Dr. Grabowski summarizes that “these problems are related to system level issues in how we pay for care, how we regulate providers and the inability of residents and their advocates to monitor and oversee care.” No real solutions are proposed.

Dr. Kate Goodrich, Chief Medical Officer for CMS, essentially testified about the new Federal Regulations and the increased oversight and partnerships to improve quality of care. She expressed that CMS is “deeply concerned” with labor and staffing issues and believes the Payroll-Based Journal (PBJ) data will provide better information to address quality of care issues. As we’ve reported over the past month, the PBJ is being used now by Plaintiff’s attorneys to support claims of understaffing and poor-quality outcomes as the data is easily manipulated.

Annette Bacon, Associate Deputy Attorney General from the same-named office in the Department of Justice (DOJ), testified about the far-reaching work that the DOJ has done combatting elder abuse and fraud in civil and criminal actions. She was joined by Keesha Mitchell, Director of the Medicaid Fraud Control Unit in Ohio Attorney General’s Office. Director Mitchell testified about the role of the state Medicaid Fraud Control Units (“MFCUs”) in investigating and prosecuting patient abuse and neglect in nursing homes. She cited several examples of investigations and stressed, “We must also require nursing homes to properly report and detail incidents of patient abuse, neglect and misappropriation or face meaningful penalties.”

While the testimony of these witnesses is important to the continued conversation in this country about aging and elder care and abuse and neglect prevention, what is glaringly absent is testimony of the multitude of instances of high-quality and innovative services the nursing homes provide. I, alone, am aware of many nursing home organizations that collaborate with CMS and policy makers in establishing best practices. Consider the nursing homes that have eliminated restraints and reduced the inappropriate use of antipsychotic drugs, reduced hospital transfers, increased resident choice and patient-centered care initiatives and have had great success in improving the quality of care in nursing homes.

Those who commit illegal acts must be punished and improper care cannot be tolerated. There are already extensive regulatory systems addressing unacceptable situations and delivering appropriate remedies. How can more regulation really help the industry?

Let’s include in our conversations and committee testimonies how collaborative work might reduce incidents that we heard about through the witnesses.

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**About Rebecca Adelman**
Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm, established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm’s practice extends through the tri-states of Arkansas, Mississippi and Tennessee, and is a WBENC-certified business. Rebecca’s insurance defense practice includes representation of insurance companies and long‐term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation. Contact Rebecca at rebecca@adelmanfirm.com and visit [www.adelmanfirm.com](http://www.adelmanfirm.com/) and [www.rebeccaadelman.com](http://www.rebeccaadelman.com/).