

*Presenting a live 90-minute webinar with interactive Q&A*

## **Assisted Living Contract Terminations and Resident Transfers: Key Provisions, Enforcement, Litigation**

Level of Care Determinations, Disruptive Resident Behavior, Duty to Address Resident Issues, Discrimination and More

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TUESDAY, JULY 9, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Paul A. Gordon, Partner, **Hanson Bridgett**, San Francisco

Payam A. Saljoughian, Senior Counsel, **Hanson Bridgett**, San Francisco

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# **ASSISTED LIVING CONTRACT TERMINATIONS AND RESIDENT TRANSFERS: Key Provisions, Enforcement, Litigation**

**Paul Gordon**  
Hanson Bridgett LLP  
(415) 995-5014  
pgordon@hansonbridgett.com

**Payam Saljoughian**  
Hanson Bridgett LLP  
(415) 995-5135  
psaljoughian@hansonbridgett.com

## OUTLINE:

- Key Provisions in Admission Agreements/Handbook
- Practical Approaches Before Issuing Notice
- Defenses a Resident Might Present
- Preparing and Serving a Termination Notice
- The Eviction Process
- Post-Lockout Issues

# KEY PROVISIONS OF ADMISSION AGREEMENTS

- Make exception for evictions from any arbitration or mediation provision.
- Include any potential basis for eviction in agreement or resident handbook/house rules.
- Make sure eviction language in agreement (e.g. bases for eviction, notice period, appeal rights, etc.) is consistent with law.
- Identify Responsible Party, POA, Payer.

# BEFORE YOU START

- What do you hope to accomplish?
- Have resident stay with issue resolved?
- Have resident move?
  - Chronic payment issues
  - Family behavior
  - Resident behavior



# BEFORE YOU START

## *Best Practices*

- Keep written records of incidents involving residents:
  - Include date, time, staff and resident witnesses
  - Obtain incident report from staff witnesses
- Keep rate increase letters when resident monthly fees increase

# BEFORE YOU START

## *Best Practices*

- Account Ledger/Balance Sheets:
  - Should be clear/organized
  - Common issues:
    - Payments/Credits unclear
    - Ancillary charges not labeled
    - Two residents on one ledger

# AVOIDING LITIGATION

## *Practical Approaches*

- Communication with resident and/or family
- Ongoing, routine, and professional from the outset
- When an issue arises, immediate, direct communication
- Written follow-up

# AVOIDING LITIGATION

## *Practical Approaches*

- Try to get to the heart of the issue and address it
  - Is a medication change causing aggressive behavior?
  - Is resident smoking in room because there is no one to take her to the smoking area after meals when she wants to smoke?
  - Does resident have a personality conflict with particular care staff?
  - Does resident lack sufficient resources to cover additional costs of memory care?

# AVOIDING LITIGATION

## *Practical Approaches*

Practical solutions short of litigation

- Get Ombudsman involved
- Notify Licensing Agency
- Warning letter
- Meeting with family
- One-on-one supervision
  - Check agreement to see if cost can be passed on to resident/family

# AVOIDING LITIGATION

## *Practical Approaches*

Practical solutions short of litigation

- Active involvement in finding new housing
- Incentivize resident to leave
  - Financial incentive – waiving fees, cash payment
  - Assistance to cover expenses of move, processing fees of new community, or even rent

# DEFENSES A RESIDENT MIGHT OFFER

*(and how to anticipate/address them)*

- Defense: Misrepresentation, Concealment by Provider of Service Limits or of Grounds for Transfer
- Solution:
  - Include information in the residency contract re: limitations on services, license restrictions
    - May be due to regulatory restrictions or company policies
  - Maintain policies re: circumstances requiring change of level of care and communicate that information to prospective residents
  - Publish and distribute house rules: rules of conduct

# DEFENSES A RESIDENT MIGHT OFFER

*(and how to anticipate/address them)*

- Defense: Discrimination
  - Moving due to level of care needs as discrimination
    - Right to “age in place”
  - Disruptive conduct as a disability issue
    - Psychological issues
- Solution:
  - Maintain and publish a reasonable accommodations policy & procedure



# DEFENSES A RESIDENT MIGHT OFFER

*(and how to anticipate/address them)*

- Defense: Free Speech Rights
  - Voicing of Grievances / retaliation
  - Protection of Residents
- Solution:
  - Have a Grievance Process
  - Maintain and Publicize a Civility Policy
    - Protection of Staff (Hostile Work Environment)
    - Civility Limitations (sample policy)

# DEFENSES A RESIDENT MIGHT OFFER

*(and how to anticipate/address them)*

- Defense: Retaliatory Eviction
  - Notice issued in retaliation for complaints
- Solution:
  - Maintain sufficient evidence/documentation to support independent basis for eviction.

# DEFENSES A RESIDENT MIGHT OFFER

*(and how to anticipate/address them)*

- Defense: UnInhabitable Premises
  - As defense for failure to pay
- Solution:
  - Define uninhabitable premises under law.
    - Usually requires dilapidated premises.
  - Residents often cite “uninhabitable premises” defense as argument for failure to provide care or services.

# PREPARING A TERMINATION NOTICE

## *Assisted Living Regulations/Law:*

- Required Notice Period
  - Extend if termination date falls on weekend/holiday
  - Calculate days correctly
- Mandatory Language
  - May need to be verbatim
- Appeal Rights

# PREPARING A TERMINATION NOTICE

## *Assisted Living Regulations/Law:*

- Resources to Find Alternative Housing
- Copies to Licensing Agency, Ombudsman, and/or Responsible Party
- Calculation of Amount Due
  - Can Nonpayment of Ancillary Charges/Late Fees serve as basis for eviction?
  - What is the due date in the Agreement?

# PREPARING A TERMINATION NOTICE

## *Admission Agreement Language*

- What if Agreement and Law are inconsistent?
- Does Agreement place additional obligations not required by law? (e.g. opportunity to appeal to corporate)

# SERVICE OF A TERMINATION NOTICE

- Person to be served
  - Resident or Responsible Person?
- Conserved Residents
- Methods of Service
  - Personal Service
  - Post and Mail
- Sending copies of notice to other parties

# INVESTIGATION BY LICENSING AGENCY

- Avoiding complaint of unlawful eviction
- Communicate with licensing agency from pre-notice stage
- Maintain documents
- Approach if unlawful eviction allegation is ongoing
  - Rescind notice as part of plan of correction?
  - Pursue lawsuit?



# EVICTIION PROCESS

## *Self-Help Not Allowed*

- Can't lock the resident out
- Can't refuse to provide services
- Can't refuse to allow resident to return from hospitalization/skilled nursing

# EVICTION PROCESS

## *The Lawsuit*

- Verified Complaint filed in Court
  - At least one plaintiff should be party with right to property
- Summary Proceeding
- Once served, resident/defendant has limited time to respond
  - Courtesy copy to responsible party?
- Failure to respond will allow default
- Trial set
- Expedited discovery, if any

# EVICTIION PROCESS

## *The Trial*

- Court trial
- Jury trial
- Opportunities to try to settle – stipulated judgment
- Obtain a judgment and writ of possession

# EVICTION PROCESS

## *Pitfalls/Impediments to Success*

- Any technicality construed in favor of resident
- Faulty notice letter can be fatal
  - Service not proper
  - Timing off
  - Address wrong
  - Missing required information or language
  - Incorrect calculation of amount due in nonpayment cases

# EVICTIION PROCESS

## *Pitfalls/Impediments to Success*

- Lacking complete copy of residency agreement
- Lack of admissible evidence
  - Direct evidence
  - Avoiding hearsay
  - Proof of all elements

# EVICTON PROCESS

## *Pitfalls/Impediments to Success*

- Waiver or creation of new tenancy
  - Acceptance of payment for period beyond termination date
  - Statement – written or oral – that may be construed as a waiver of the right to terminate according to the notice letter

# EVICTIION PROCESS

## *Enforcement*

- Writ of possession goes to sheriff with instructions to execute
- Sheriff posts notice of lockout date
- Sheriff returns (usually within a week or so) and escorts resident from community
- Community changes locks

# EVICTON PROCESS

## *Enforcement Snags*

- Sheriff refuses to evict
  - Technicalities (incorrect address)
  - No alternative options for elderly, disabled resident
- Request to Stay Enforcement of Judgment
- Appeal



# EVICTION PROCESS

## *Post-Lockout Issues*

- Dealing with abandoned personal property
- Calling law enforcement if resident returns
- Obtaining/enforcing money judgment
- Public relations issues