Assisted Living Goes To Washington

Federal regulation is at stake as Congress summons assisted living professionals to state their case on Capitol Hill.

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In early 2003, someone reminded America's politicians about an industry called "assisted living." Almost immediately, calls for a White House summit on the profession resounded through the Capitol halls and pressrooms.

Then the talk turned to action as the Senate Special Committee on Aging scheduled a hearing on assisted living on April 26 (for a report on the hearing, see page 9).

The renewed cries for federal regulation of assisted living, dimmed by the recent states' rights mood in Washington, have begun with renewed fervor as proponents recognize their potential shot at laying more foundation for their ultimate goal.

Earlier Versus Current Scrutiny

This is not the profession's first time on the carpet before the U.S. Congress. Two years ago, the Senate Special Committee on Aging invited leaders to town — Walk, and the U.S. General Accounting Office (GAO) released its first-ever report on assisted living. The gist of assisted living leaders' first trip to the capitol was a warning — "consumers are confused, and the industry isn't helping much."

The assisted living profession was widely acknowledged to have escaped its first formal brush with the federal government extremely lightly. Wary to get busy cleaning up its house and giving consumers more and better information about services, prices, and discharge policies, assisted living at the time escaped any serious, long-term relationship with Congress and the White House.

So what will the profession fear on its second date with the feds? More of the same, no doubt. Assisted living leaders told Congress of the many strides, some truly substantive and significant, made to address issues raised by Congress, the states, and the general public. They unveiled new initiatives, under development for months, to prove to Congress that self-regulation in tandem with state regulatory oversight is working and needs more time to realize its full potential.

Of course, some detractors maintain that only the federal government can bring consistency and reliability to the chaotic jumble of labels, services packages, and pricing strategies that now typify assisted living.

And so — the envelope, please — what will result from the latest confrontation between the assisted living community and the federal government? The smart money (to onlookers' commendations for steps taken that reflect serious attention to the 1999 hearings and GAO report) holds that new problems are cropping up in some regions, including quality of care, financial instability of providers, and continuing consumer confusion that could

override states' claims that "we're just fine"; and c) suggestions for new regular federal oversight — not regulations just yet, but periodic reports, perhaps a more focused federal study, and more direct suggestions that quieter Capitol Hill telephones mean Congress will remain seen and not heard! The title of this year's Senate Special Committee on Aging hearing: "Assisted Living in the 21st Century," the hearing was slated to address providers' efforts to date to reduce consumer confusion and ensure quality care. There are some tough issues in that agenda, and the tough questions will reverberate for awhile. But this hearing was not billed as " Fraud and Abuse in Assisted Living" or "Assisted Living, the American Myth for Seniors." Not yet anyway.

Will Congress ultimately decide to not step in? The sitter will depend on another question: Can assisted living control the agenda by fairly portraying initiatives sufficiently different from two years ago, or will the pint-size panned be of a profession once swooning from its own success and now reeling in confusion, unable to focus on its problems?

Two Years Of Regulatory Changes

Legally, the hottest issue going in is also the hot topic for assisted living's Capitol Hill encore — disclosure. Since the profession's last D.C. trip when the GAO report singled out consumer confusion and "disclosure" as the seminal issue, a lot has changed.

Nearly every state now regulates assisted living, and many of them are on round two or three of regulatory revision, honing in on uniformity in seniors housing regul
season. "Disclosure" itself has changed, courtesy of the 1999 GAO report, from a catch-all term with no real meaning to a code word for honest, accurate, and comprehensive sharing of information with residents and prospective residents at a meaningful time. "Disclosure statements" are referenced in the regulations of many states, a fair number of which mandate that the content, form, or both, and admission agreements—singly or by GAO in 1999 as the major culprit of confusion for being too long, too short, based on outdated notions of real estate rental, or incomplete and inaccurate—have arisen center stage in the majority of states regulating assisted living. The National Academy of State Health Policy's 2006 study found that half the states now require providers to give potential residents a copy of their admission agreement prior to move-in, and half require it at move-in. Some states dispute the form of the admission agreement. Some simply designate the substantive issues that must be covered. Others have merged these concepts, mandating that certain designated topics be addressed and requiring specific language on other issues like discharge policies, deposits, resident rights, and provider versus resident responsibility for medical care and coordination.

Congress will also find the disclosure has become an operational issue in assisted living. Since the 1999 GAO report, state and national trade organizations have hosted "marketing and disclosure" seminars and training sessions and produced manuals and other educational tools. Convention sessions on marketing, once limited to "How to Market Your Community Successfully," now start top billing with session titles like "How to Market Your Community Legally."

The Law Wins in Law enforcement has weighed in on the issue as well in some states, capped by the Montana attorney general's lawsuit last year against a major national provider under the state's consumer protection laws for allegedly marketing more than it delivered.

And, some lawmakers in Washington have suggested that the Federal Trade Commission Act, similar in some respects to state consumer protection laws, arms the federal government to take similar action if necessary to ensure that providers make an promise kept in assisted living. So, Congress will find a gravitational pull toward more commonality in the profession on some issues. But, it will also find some disagreement remaining on issues like how much regulation is enough? Should regulation govern only disclosure or dictate programs and outcomes? Who decides what constitutes "assisted living"—state regulators willing to define it

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by regulation or consumers defining it by their choices and spending power?

Conflicting Philosophies

There is a quiet war brewing on the horizon, and contemplative students of assisted living know it well. That war is a tussle between two competing philosophies. One argues that consumers demand assisted living, helped define it, and should be the critical and primary decision maker in shaping its market and regulatory future. The other holds that the market is inherently unfair because wealth to buy services, location of service providers, and other factors that drive who can and cannot have assisted living services are not distributed equally among the populace.

Proponents of the first philosophy typically argue that states may dictate what issues are addressed in admission agreements, but not how those issues are addressed, and may require complete explanation of service packages offered but may not dictate which services are offered. They uniformly resist state-defined forms, including admission agreements, assessment forms, and discharge notices. They will submit to a review of their service offerings for accuracy, quality, and appropriateness for residents but never to regulatory definitions that box them into or out of a mandated and limited package of services. They count among their disciples the Michigan legislature, which shocked many long-time long-term care observers by openly defining an issue—whether state regulators or consumers and providers and their medical professionals with input from regulators should define who stays and who goes in assisted living communities and actually answering it in favor of consumer choice.

The competing philosophy might best be described as traditional. Government must define the service by mandating a minimum core set of services; must regulate it as precisely as possible; must ensure its accessibility to all regardless of location or income; and must dictate the forms, faxes, and techniques by which the service is discussed, marketed, and delivered. These are the champions of a standard national assessment tool, including mandatory quotas of Medicaid or similar less-affluent residents; uniform as model regulations that over time all states will adopt or the feds will implement; and regulations that dictate not only what level and type of information providers must offer but the nature, level, and price of services that can be classified as "assisted living."

Knowing into which camp a state, a provider, a consumer, or a regulator falls allows one to predict with almost alarming accuracy their position on a host of issues from how to regulate disclosure, to how to ensure access to affordable assisted living, to which facilities can call themselves "assisted living."

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The biggest danger facing these days is a potential federal repeat of those states that have adopted licensing regulations that, by default, embrace one of these two fundamental concepts without ever recognizing the two distinct approaches, measuring public and provider preference for one over the other, or understanding that it's better to acknowledge these two very different philosophies and select one than to pretend together regulations that, by default, embrace one over the other but leave all affected parties asking, "What just happened here?"

Many articulate writers, researchers, and policymakers have bemoaned the plight of the country's nursing facilities and asked, "How did we get here, and why?" Many have determined not to go there again with the assisted living profession. Few have realized that the nation's failure to articulate a national policy for long-term care left the nation unprepared to address a host of issues, creating a national long-term care "pitchfork" rather than policy.

Assisted living, on the whole, has come up with some promising initiatives. The profession naturally is well aware that life is not what it was for assisted living two years ago.

Most likely, assisted living will leave Washington sometimes in early spring without having seen the wheels of federal regulation in motion. If so, the profession has at least one more clear opportunity to help mold a national policy for the popular long-term care option.

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For More Information
The National Center for Assisted Living has developed a fact sheet guide to help providers negotiate the ethical marketing of services to consumers. To obtain a free copy, write to NCAL, 1201 L St., NW, Washington, DC 20005.