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OPINION COMMITTEE

COMMISSIONER  
James R. Hine

FILE # ML-44341-05

I.D. # 44341

August 19, 2005

**RQ-0381-GA**

Nancy Fuller  
Chair, Opinion Committee  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

Dear Ms. Fuller:

This is to request your formal opinion on the meaning of certain provisions in Chapter 247, Health and Safety Code, relating to the requirement to obtain a license as an assisted living facility and the right of a resident in a licensed assisted living facility to contract for certain health care services.

The Department of Aging and Disability Services (DADS) is authorized to enforce the Assisted Living Facility Licensing Act, Texas Health and Safety Code (HSC) Chapter 247. An assisted living facility is defined in Section 247.002(1) of this act, as an establishment that:

- (1) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and
- (2) provides personal care services.

Personal care services are defined in HSC Section 247.002(5) to mean:

- (A) assistance with meals, dressing, movement, bathing, or other personal needs or maintenance;
- (B) the administration of medication by a person licensed to administer medication or the assistance with or supervision of medication; or
- (C) general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in an assisted living facility or who needs assistance to manage the person's personal life, regardless of whether a guardian has been appointed for the person.

HSC Section 247.021 provides that a person may not establish or operate an assisted living facility without a license issued under this chapter.

In 2004, DADS received a complaint concerning an establishment that is characterized by its owners as a retirement community, where more than four persons unrelated to the owner reside. The owner of this establishment also operates a licensed nursing facility at a nearby location, and is a licensed home and community support services agency (hereafter, home health agency) under Chapter 142, Health and Safety Code. The DADS investigation revealed that, as part of the initial residential contract, residents of the retirement community must agree to the exclusive use of the owner's licensed home health agency to provide any personal care or home health care services that may be needed by the resident. If a resident wants to obtain personal care or other home health services from any other provider, the resident would be in violation of the residential contract and would be required to move. In such a situation, we understand that the contract permits the resident to terminate the contract with thirty days notice. At least one other health care provider that attempted to enter the retirement community premises in order to provide home health services at the request of a resident was prevented by the owner or the owner's agent from providing those services to the resident.

In Letter Opinion 90-085, the Office of Attorney General has previously considered the issue of whether retirement centers that also provide or arrange for home health services must be licensed as assisted living facilities.<sup>1</sup> This opinion noted that the legislative purpose in regulating assisted living facilities was not limited to regulation of the personal care services provided, but also extended to the physical facilities in which such services are provided, including the standards related to construction, lighting ventilation, plumbing, and other housing conditions, sanitary and related conditions . . . [LO 90-085, Page 5] On the issue of whether a retirement center may be said to be providing personal care services within the meaning of the statute, the Opinion stated that:

We do not think the legislature . . . contemplated that a residential facility could escape licensure and regulation under the chapter merely by contracting or otherwise arranging for the provision of additional services, where direct provision 'in cooperation with' a home health agency of such services would have brought the facility clearly within the ambit of [the chapter]. [LO 90-085, Page 6]

The opinion goes on to state the factors which should be considered in deciding whether a particular residential establishment may be considered to be providing services within the meaning of the assisted living facility regulatory chapter.

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<sup>1</sup> Note that at the time of this opinion, the statutory provisions for regulation of assisted living facilities were located in Chapter 242 of the Health and Safety Code, and the term used to describe such facilities was personal care institutions. The regulations for such facilities have since been moved to Chapter 247 of the Code, and the terminology has been changed to assisted living facilities; however, the definition of an assisted living facility remains essentially the same as the former definition of a personal care institution.

In reliance upon Texas Attorney General Letter Opinion 90-085, DADS, and its legacy agency the Department of Human Services, have interpreted the definition of an assisted living facility to include a residential establishment if there are four or more people unrelated to the proprietor living at the location and the proprietor exercises control over who may provide personal care services at that location. While the manner of control may vary from situation to situation, if the proprietor arranges for personal care services directly or indirectly, or requires the resident to use only a provider selected by the proprietor, the proprietor is deemed to be providing the personal care services and the establishment is deemed to be an assisted living facility. In this case, the owner controls the residents' access to personal care services by requiring that any such services be provided exclusively through the owner's home health agency.

The owner has argued that its home health license authorizes it to provide personal care services, and that therefore it need not obtain an assisted living facility license. While a home health license does authorize its holder to provide personal care services, it does not authorize the license holder to also operate a residential setting where it provides personal care services or other home health services to the residents.

Question One: Must the owner of a facility in which residents receive personal care services under the scenario described above obtain an ALF license, even if a licensed home health agency is providing all the personal care services?

The owner of the retirement community has indicated to DADS that it does not wish to obtain an assisted living facility license or to change the way it operates. The owner asserts that by limiting a resident's access to personal care or other home health services exclusively to the owner's own licensed home health agency, it is able to ensure a consistently high quality of care for those residents in need of such services. As a partial explanation for its unwillingness to become a licensed assisted living facility, the owner has expressed concern that if it were to become a licensed assisted living facility, it would be prohibited by HSC Section 247.067(c) from requiring the exclusive use of its home health agency and, therefore, would no longer be able to ensure the same quality of health care services currently provided to its residents. Section 247.067(c) provides that "a resident of an assisted living facility has the right to contract with a home and community support services agency licensed under Chapter 142 or with an independent health professional for health care services." The owner has expressed further concerns that if required to obtain an assisted living facility license, the owner would be forced to continue to serve residents whose health-care needs exceed a level of service that the owner is willing to provide.

It is our position that a licensed assisted living facility may place limitations on the type of resident it admits and retains, provided those limitations are not otherwise discriminatory and are made known in advance to the resident. Although an assisted living license authorizes a facility to provide a range of personal care services, a

particular owner is not required to provide the full range of personal care services that may be provided in an assisted living facility setting. A facility may refuse to admit, or may discharge, a resident whose needs exceed the level of services the facility has agreed to provide. However, *if* the facility allows a resident whose needs exceed the services the facility provides to remain at the facility, DADS believes the provisions of Health and Safety Code Section 247.067(c) would then require the assisted living facility to honor the resident's right to contract with a provider of the resident's choice in order to obtain the needed services.

Before requiring the owner to either obtain a license or change its business model, we would like your guidance on whether the owner could continue to operate within its current business model, as described herein, if it becomes a licensed assisted living facility provider.

A somewhat analogous issue exists with Medicaid certified nursing homes and Medicaid certified hospices. Under federal law, Medicaid recipients have the right of choice of health services providers. When asked whether a nursing home may insist that clients who choose the services of that nursing home also choose a particular hospice provider with whom the nursing home has a preexisting arrangement for services, the Centers for Medicare and Medicaid Services (CMS) responded in the affirmative. A nursing home may notify a prospective resident that it will only enter into contracts with a particular hospice provider. In a 1994 letter from CMS to the state of Texas (copy of which is attached), CMS opined that a Medicaid certified nursing home is not required to enter into a contractual relationship with a particular Medicaid certified hospice selected by the nursing home resident to be that resident's hospice provider. Essentially, CMS has determined that a Medicaid certified nursing home may limit the Medicaid certified hospice provider its residents may select. Under the Medicaid program, a hospice provider must have a contractual relationship with a nursing home if the patient lives in a nursing home. CMS has stated that nursing homes cannot be forced to enter into contracts against their will. If the resident selects a hospice provider with which the nursing home is unwilling to contract, the resident may be forced to move from the nursing home. In this context, the resident's right of choice is exercised at the same time that the resident chooses a particular nursing facility that contracts with a particular hospice provider.

Health and Safety Code Section 247.067(c) similarly appears to give residents of assisted living facilities the right of choice of home health providers. While this statutory framework differs somewhat from the federal law underlying the CMS 1994 opinion letter, it does appear to us that the rationale used in the CMS opinion to permit choice to be exercised at the front door of the facility would apply equally in the assisted living facility context.

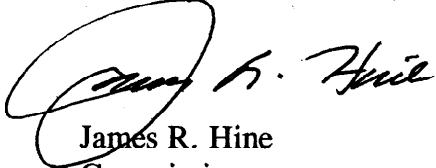
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Question Two: May a licensed assisted living facility require its residents to exercise their rights under Section 247.067(c) by selecting their home health care provider at the front door through a contractual agreement that restricts a resident's choice of providers to a single licensed home health agency?

Question Three: Assuming the answer to Question Two is in the affirmative, may a licensed assisted living facility enforce its contractual agreement with the resident regarding choice of home health providers by terminating the residential contract with thirty days advance notice, thereby requiring that the resident move elsewhere should the resident later wish to make a different choice of home health care providers?

Your guidance on this matter is greatly appreciated. If you have any questions about this request, or if additional clarification of the issues is needed, please do not hesitate to contact me or my General Counsel, Phoebe Knauer, at 438-3091.

Sincerely,

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James R. Hine  
Commissioner

JRH:pk

Attachment

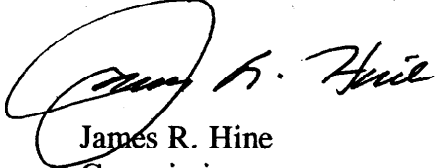
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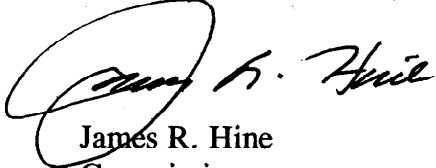
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