

Legislative Committee on Human Services
August 21, 1996

Testimony of David Marks

Introduction by Representative Hilderbran:

Next is David Marks. He is an attorney from Houston who has worked extensively on these issues and is going to advise the Committee on some ideas that he has for us. I might say that David also has long battled in these issues to the point that he lost his job as a prosecutor once that I know of, and I think he may have lost it twice. But thank you very much for being here. If you would state your name and who you represent for the record now. Thanks.

Testimony:

I'm David Marks and I'm here representing myself.

Members of the Committee and Mr. Chairman, I appreciate the opportunity to visit with you today about a subject that I have been involved in for some nineteen years that I have been practicing law as an attorney in the State of Texas. For seventeen of those years, I have been involved as either a public servant for the State of Texas or in a private capacity as an attorney in issues involving the rights of elderly nursing home residents.

I have served in the capacity as a District Attorney, prosecuting cases involving nursing home abuse and neglect. I was a Special Prosecutor over the years for the Attorney General's office, prosecuting cases involving nursing home abuse and neglect. I have served as an attorney for the Medicaid Fraud Division of the Attorney General's office and the Consumer Protection Division of the Attorney General's office of this state involved in the enforcement of the rights of nursing home residents. And for the past five years I have been practicing in a private capacity where the bulk of my practice involves the subject of nursing home abuse and neglect.

What I would like to share with you today are some of my thoughts, and primarily on two particular issues that I think are relevant to the current bill of rights and are relevant to the issues that nursing home residents are confronted with today. There are two issues, and one is accountability and the other issue is deterrence. And let me come first to accountability.

My concerns today flow really from the position that the nursing home industry has taken, not just recently but over the years, with respect to the rules and regulations that have been promulgated by the Texas Department of Health and Texas Department of Human Services for nursing home residents. As you know, those rules expressly are designed to protect the safety and the health of residents in nursing homes. However, the nursing home industry has taken the position consistently that these rules and regulations are not designed for the purpose of protecting the health and safety of nursing home residents. They take the position that these are mere administrative

guidelines for the purpose of a contract which exists between the nursing home and the State of Texas.

More specifically, the nursing home industry, in cases that I have been involved in, as well as cases that other lawyers that I am very familiar with have been involved in, have taken the position in briefs before District Courts across this State that the rules and regulations which were put into force and effect for the nursing home residents are not admissible. Those regulations are not admissible. Juries are not entitled to consider those regulations or violations of those regulations in any type of cause of action brought by a nursing home resident for harm that they may have suffered as a result of those violations.

I brought today briefs that have been submitted by the largest nursing home operator in the United States on this very subject, which I will be happy after my testimony to furnish the Committee for your own consideration.

But the concern that I really have here is that in any other context, for example, if you were walking down the street after leaving this hearing and someone driving a car had run five red lights, had been drinking, and hit you and rendered you a complete quadriplegic and then denied responsibility for having committed any wrongful conduct, in a case that you brought to enforce your rights in front of a jury, you would be entitled to present as evidence, the Traffic Safety Code of the State of Texas, which says, Thou Shalt Not Run Red Lights. The nursing home position is that a nursing home resident who is harmed by reason of a violation of regulations by the Texas Department of Human Services cannot bring to the attention of the jury these regulations; that those regulations are according to the nursing home industry, not designed to protect a class of persons to which a nursing home resident is a member, and therefore, they are not relevant to any claim or cause of action that may result as a result of the violations.

What that essentially translates to mean is that according to the nursing home industry, only the Attorney General's office and the Texas Department of Human Services has the right to enforce those regulations. They are the only one who has legal standing, according to the industry, to bring any type of action or proceeding for violation of those regulations. I believe that is wrong. I believe that affects the accountability and the subject of accountability and I think a lot of the issues that we are dealing with today with respect to legislation that has been passed recently and during the past years, emanate from this position, which is, according to the industry, these regulations are not safety regulations for nursing home residents, they are simply contract guidelines between the State and the industry.

You know, I have been involved a lot of years as a state prosecutor or special prosecutor involved in the AG's office. I know what kind of work the Attorney General's office does. I know the challenges that they have with respect to the resources that they have been given, in terms of

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enforcing a regulation. I also know, having been a criminal prosecutor in a District Attorney's office, those challenges. And the challenges, the huge challenges, that a criminal District Attorney's office faces in trying to enforce regulations that are created by the Texas Department of Human Services for elderly residents in nursing homes.

You know, I think it is absolutely unreasonable to believe that the Attorney General's office, the criminal District Attorney's offices across this State can adequately enforce these regulations to the extent that they can insure some degree of accountability on the part of nursing home operators who deliberately and willfully violate these regulations.

I mean, as a simple measure, if you were to take the amount of fines that have been collected by Attorney Generals over the past fifteen years; Attorney General Hill, Attorney General Mattox, Attorney General Morales; if you were to take all the fines together that they collected for violations of nursing home regulations, combine it with any fines that the Texas Department of Health or the Texas Department of Human Services collected, you would not even begin to approach the magnitude or the amount of money that the taxpayers of this State have paid as a consequence of nursing home abuse and nursing home neglect. The taxpayers have paid in the form of hospital bills, who pays when somebody is sent to a hospital with Stage IV pressure sores that are rotting down to the bone? Who pays for the surgery that has to take place? The taxpayers. We pay for it. And if you were to do a study of how much money has been paid out by the citizens for those types of problems and compare it to the fines, it would be a minuscule, a very minuscule amount.

I believe that the intent of this committee as well as the intent of the legislature was not to confine the enforcement of these regulations to the Attorney General's office and to the District Attorney's office. I believe that those rules and regulations were designed to protect all the elderly and were available to anybody who was harmed by those rules as to use as a yardstick as to whether somebody did right or somebody did wrong.

I think that we are now involved in a debate as to what are the expectations on the part of the nursing home industry with respect to care being provided to nursing homes. And I don't think we should be involved in this debate. I think the issue should be whether or not somebody complied with regulations or didn't comply with regulations. Not whether or not somebody has a duty or whether the industry has a duty and owes that duty to these nursing home residents.

If I might, for a moment, come to the second issue, and that's deterrence. Let me give you an example of what I am concerned about in the way of deterrence. Imagine with me that there is a young individual who is helpless and who is in a nursing home. Maybe she was injured in a car accident and she is a vegetable who is in a nursing home bed who is entitled to the protections of the laws of the State of Texas. And imagine there is a nursing home operator who hires criminals to serve as nurse aides to provide for the care. There is a regulation currently that requires a nursing

home operator to submit criminal history checks to the Texas Department of Safety or through the Texas Department of Human Services to DPS, and assume with me that they don't do it. But they then go in and dummy up the personnel files so it appears like this was done, when in fact, it was never done. And they are fully aware, for purposes of this hypothetical, that they have people who have been to the penitentiary for murder and for maybe rape and they allow these people to work. And in the course of this poor girl's residency, she is raped multiple times by the employees of this particular facility. Under the current hypothetical that I have given you, and under the industry's argument, the regulation which the Department passed obligating the facility to send in these criminal history checks would not be admissible in front of a jury because they argued that was not designed to protect the health and safety of this helpless individual. It was only a mere contractual guideline that was between the State and between the industry.

So argument 1 is, as it affects accountability, is that the jury does not get to hear or see an instruction from the judge informing them of what the yardstick would be for a nursing home licensed and certified in this state.

Now, the second argument which affects both accountability and deterrence is what are the damages that might be available under the current law to this individual? What kind of deterrence might society or might this person expect because of damages that a jury could award? Well, do you know in this case, the jury would get one issue on actual damages and that is this: what amount of money would fairly and reasonably compensate this poor girl for conscious pain and suffering? And do you know what that is? Zero. Because she had no conscious pain and suffering. She was raped, she was mutilated, but because she did not have, and because of her vegetative state, she could not collect a single penny.

Now what about punitive damages? Maybe we could punish them there. Do you know the answer for punitive damages is zero, because, under the law, for this poor person, and unfortunately many other people in nursing homes who suffer from Alzheimer's disease, who suffer from dementia and severe conditions which impair their ability to appreciate and experience such things as pain and suffering, that under the law, no punitive damages would be allowed, because under the current situation for our elderly, and under the current tort system, you have to have actual damages, and punitive damages have to be in relationship to the actual damages.

Is there any deterrents? Is there a shred of deterrents under this example that I've given you for somebody who is deliberately engaged in this activity? More importantly, do they have a reason to avoid this type of behavior in the future? Is there any reason they have to not engage, from an economic, a purely economic standpoint.

You know, if I was to ask anybody here if they were in favor of "why don't we take the penal code and revise it and change the maximum punishment or the punishment for homicide from

5 to 99, let's move it down to 2 to 10, I'm sure there would be no support. But in essence, what we have ... our situation, our problem that we have for people who are helpless, for people who have impairments such as Alzheimer's disease which affect this issue of actual damages, which is under the law what must be submitted, unfortunately, they are kind of in this predicament where because of their circumstances and because of arguments being made by the industry, they find themselves where rather than having maximum deterrents, they are faced with the situation of minimum deterrents because of these things.

I would wholeheartedly recommend that this Committee take a look at this issue. I know that you are interested in taking a look at the Bill of Rights. There are several states who have passed Bill of Rights that I would encourage and would be happy to provide the Committee with copies of that provide interesting ideas and models and I certainly appreciate the efforts of the gentlemen who testified before me, and I have not had the opportunity to review the bill that they have or their efforts, but it certainly was addressing a lot of the concerns that I have.

What I think needs to be done is to resolve once and for all this question of what duties does somebody who chooses to accept the benefits of operating a nursing home in this state, what duties do they have? That needs to be clarified.

I thank you for your time and I thank you for your interest in this subject. I am more than happy to answer any questions that you might have with respect to this subject.

Question:

David, thank you very much. Just so we all understand the status of the significant issue that you raised concerning the admissibility of rules and regulations, have the courts ruled on the admissibility question?

David Marks:

Well, I am not aware of a District Court who has ruled. I am not aware of an Appellate Court decision. I am aware that in the last briefs that we've had to deal with that this issue is about to be addressed and District Courts across this state are going to be forced to rule on this issue in the very near future and Appellate Courts will be dealing with it in the near future.

Question:

So another way for this issue to be satisfactorily addressed would be for the legislature to specify it's intent regarding the purpose for these rules and regulations.

David Marks:

That's correct.

Question:

And is this what you're suggesting and that this Committee considers?

David Marks:

That is one of the things that I am suggesting.

Question:

And if we ask you to come up with some guidelines or suggested language, this is something that you would be willing to work with us on?

David Marks:

Absolutely.

Question:

Okay. The second question has to deal with any suggestions or recommendations you might have concerning how (tape ends on Side 1). Other states have Bills of Rights which I assume address this in some way. But would you have either now or hopefully soon, specific legislative recommendations that would get at the issue which you have described to us?

David Marks:

I would, and I have reviewed some statutes from other states which address some of those issues and I would be more than happy to provide input in the future with respect to that issue as well.

Question:

Thank you.

Chairman:

Are there any other questions, members? I have a few, David.

So your testimony is that, and I guess following up on Elliott's question about the legislature specifying our intent, that we should make it clear that not only that the rules and regulations are what their intent is, make it clear that, you know, that the intent is to be able to use it in the courts, but also to spread the responsibility of enforcement, not only from agencies of the state, but to the individual.

David Marks:

That's correct.

Chairman:

That's it. That's what it is in a nutshell. Let me ask you this. In your experience, both recently and in the past, both in your job, before you were in private practice, and then of course, what you've cited in the recent cases with the briefs, what is your opinion in terms of the effectiveness in terms of being a deterrence that the current system offers based on when it was back in 1977 through now, not any particular AG, not any particular commission or Department of Human Services, or any legal Department of Health, but has the system of enforcement worked effectively as a deterrence in that period of time?

David Marks:

I would say that the system of enforcement has had some impact. I don't think it has had near the impact that anybody anticipated or hoped for. You know, over the years, the Attorney General's office has been provided with some additional tools. There are now civil penalties that were not, when back at during the times that I was involved, were not available to the Attorney General's office, and that has had, certainly, there has been some impact. But in terms of whether or not ...

Chairman:

It could be improved upon much.

David Marks:

Absolutely. I don't think if you look as a trend of the type of enforcement, and I think that's what we have to do in trying to be realistic as to what the Attorney General's office can do. I mean, if you look back ... because it's not a personality ... but if you look back over the past terms at the

efforts that have been made and the results, the results are not anything that I would think anyone would be particularly proud of in terms of the quantity and the scope of the enforcement activity. There have certainly been successes by respective Attorney Generals' offices, but in terms of having the ultimate impact of causing the industry or somebody who is a provider who is deliberately choosing to violate, I don't think it has had that effect. I frankly, don't think the industry would be making the argument that they are making today that the AG ought to be enforcing these regulations, they wouldn't be making that argument if they really sincerely believed that there was going to be a quantity of enforcement that would result in a real adverse impact on them.

Chairman:

Do you think that even if we had the most spectacular enforcement throughout the history of everything went the way we wanted it to go, the way to really get to the bottom and address the problem is to spread that responsibility to the individual?

David Marks:

Absolutely, because the choice is really to spread the responsibility or to make government bigger. I mean, part of the problem that exists is one of resources. Part of the problem exists in terms of manpower and personnel. And I think that a much more efficient solution is to provide private citizens the right to be able to enforce their own wrongs.

Chairman:

In these claims being made before courts in some of the recent cases where they cite past legislation from past the last session, and sessions before that, they tie them together and try to make that case. When you read that language in the code and in those proposed legislative efforts, do you read the intent to be what those attorneys make the argument in those claims to be the same?

David Marks:

Absolutely not. I mean, I just cannot conceive of the legislature, at any time, taking the position or adopting the belief that these are really kind of technical regulations solely for the purpose of contract administration between the state and the industry, as opposed to being designed to protect a class of helpless people. I think that the true intent is that those regulations, and it is the hope of the legislature, that nursing home industry will comply with those regulations for the purpose of making sure that folks who we taxpayers are paying for, and anybody else who happens to be in the predicament where they need a nursing home, is provided with a minimal level of safe and adequate care.

Chairman:

All right.

Question:

On that comment, you've mentioned compliance now. And I think up until this point your discussion has focused on penalties for violations, where none of us want to be when an actual violation occurs. What, in your opinion, is being done to ensure that aside from all that you've discussed, that the AG is the only entity that can come in to represent ... has the legal standing, on the day-to-day operation of these facilities. And when we look at these rules and regulations that are in existence, is it naive of me to think that ... I mean, are we just not in that discussion? Is that not part of the discussion to think that we can ensure better compliance so that we do not get to the point of violation?

David Marks:

Oh, I understand the point you are making, and of course, the Texas Department of Human Services is presently charged with the responsibility of performing surveys, investigations, to make sure that the rules and regulations are being complied with. Historically, the Texas Department of Human Services is able to detect only a small percentage of what is wrong in nursing homes. The Department is not designed to be in a facility every day. They can't be everywhere at once. And so we are, as the public, we expect them to, by doing samplings, to be able to come up with views as to whether or not compliance is occurring and whether or not things should be done by facility to come into compliance. The problem, of course, is this. They can only be so many places at one time. And, I think it is unreasonable to expect that regulation will cure and can guarantee compliance. I mean, if you look over the past thirty years at the regulatory efforts, and the studies that have been done, the message is that regulation has a positive effect. We can expect improvements, but it is not the end-all solution for the problems that exist in the nursing home environment. The Institute of Medicine made a study in 1985 and 1986 on what was the problem with regulation and why wasn't regulation able to do more. As a result of that study, we got a whole new set of regulations, both from a Federal and State standpoint, which resulted in improvement. However, even under the new regulations, the issue again comes back to accountability. That's what the bottom line is.

Question:

But in terms of deterrence, then, do you believe that expanding the ability for monitoring compliance to the individual also in terms of expanding the rights, the definition of their rights, and understanding what type of care they should be receiving, would also help them?

David Marks:

Oh, I believe it would. Anything that can be done to increase detection, because that's the role really that the Department has. They're there to detect problems and to try to intervene. But anything that you can do to encourage detection of problems, whether it be by the government or by the private sector, I think will have a positive impact on this issue.

Question:

I just have one intensive comment then a question, Mr. Marks. I want to be clear that you're not here criticizing the Attorney General's office. You point out that the Attorney General has been doing what the Attorney General is empowered to do and has limited enforcement abilities and resources and this would be a way to expand this so that the problem could be better addressed from the private sector as well as the public sector.

David Marks:

No, that would be absolutely correct. I am not here in any way to criticize the Attorney General or anyone for that matter concerning enforcement activities.

Question:

But the current system itself has problems.

David Marks:

I think yes. And I think from ... I'm here to try to be a realist and to try to look what has happened in the past. You know, you probably all have to deal with balancing a checkbook, and you know, sometimes as I sit down to balance my checkbook, I can't pull an elephant through the eye of a needle. I can look at my spending trends, I can look at my wife's spending trends, and I say I can't adjust those things. That's reality. I'm going to have to adopt and I'm going to have to realize that in terms of how I'm going to budget and behave in the future. What I'm saying is from a realist's standpoint, I think you need to look at trends and look at what has happened in the past, not just during this administration, but over the past 3 or 4, and ask the question, has this been effective? There have been successes. There have been. But I'm just saying from the standpoint of how it overall and how it impacts on things, I think there is room for great improvement.

Chairman:

One more question and we've got to go.

Question:

Okay. I think you bring to us some very necessary information and to expand on that just a little, I understand that when either residents or families of residents of nursing homes have complaints and go to the State Board or Commission that's overseeing this, that therein are some problems also, in that when the procedures that are now in place are followed to check into these violations and, say a director of a nursing home is found to be in violation of rules and regulations, especially in some nursing home facilities that are chains, and maybe even nationwide, that the system that's in place provides for the transfer of these individuals who might be individually responsible at certain facilities either to be transferred within the State of Texas or to other states and for the record, basically to be wiped clean of that individual nursing home administrator, for instance, his record that we don't really have a way of violations or problems to go with the person that may be ultimately responsible for that. Do you have any suggestions on how we might be able to improve that area as well?

David Marks:

Well, the Texas Department of Human Services has a tremendous amount of computer capability. And those are things that ought to be tracked. I mean, those are indicators that could be used and should be, as part of a system of making sure that somebody who has some questionable conduct, with respect to the operation of the nursing home, is at least the Department is aware of it. The way that the current survey and certification system is set up and designed, it is for the sake of limited resources. The Department attempts to focus on those facilities where they believe there are problems or potential problems. Certainly, somebody who has a history such as you have suggested, who is in a position of operating a nursing home, would represent a facility that might need to be looked at a little more closely and monitored more closely, or that individual should not even be in the position and allowed to operate the facility, depending on what the problems have been in the past. But in answer to your question, I think that there are a lot of things that can be done that need to be considered, with respect to tracking facilities, tracking owners, tracking the administrators and folks who are in key positions and with respect to any issues that directly might involve them.

Chairman:

Thank you very much.

David Marks:

Thank you.