

# In Search Of Intelligent Solutions

**In a time of setbacks and unsettling disappointments, an initiative from the Bush administration provides a ray of hope for long term care.**

K E N N E T H L . B U R G E S S

In her one-woman show, “The Search for Intelligent Life in the Universe,” actress Lily Tomlin seamlessly morphs from character to character as she brilliantly demonstrates the strengths and foibles of being human in the modern world. During roughly 90 minutes of stunning comedy, drama, sadness, and suspense, Tomlin’s characterizations leave an audience breathlessly bereft of pretense and ostentation, marveling in the sheer wonder of the complex, silly, serious, magnificent experience of simply being. This performance is not for the faint of heart. It can be tough sitting among several hundred strangers while layer by layer of adulthood, responsibility, and coping skills are stripped away to reveal the vulnerable, strong, unreasonable, caring, selfish creatures that humans are.

## Long Term Care Parallel

Tomlin’s on-the-mark characterizations were not lost on a group of nursing facility professionals who attended a recent revival of the award-winning show. The ongoing struggle to provide high-quality, affordable care for America’s frail elderly is fraught with competing “characters”—providers, consumers, government regulators—all apparently seeking the same goals. Yet, the very “human” characteristics of each—the inability to see beyond self-interest, the inconsistency of thoughts and actions, the unwillingness to find common ground—have stood squarely in the path of consensus. As a result, American long term care policy has been locked in a 30-year stranglehold that threatens to wreak further havoc on the very people it is designed to serve—the elderly, the frail, and the disabled.

The profession is subject to a fragmented government that first defines long term care—because it pays for, analyzes, reports on, and regulates it—but then simultaneously distances itself from the profession, blaming providers for everything from poor management to inadequate staff training to criminal fraud and abuse. Meanwhile, skilled nursing facilities (SNFs) have attracted a chorus of detractors, each with his or her own story of how the profession has failed. Over the past three years, the noise has gotten louder, expectations and demands more extreme, and assessments more antagonistic.

In the 1980s and early 1990s, SNFs were bombarded with wave after wave of new government mandates and regulations that, inadvertently or not, forced providers to play defense. Then, in 1997, Congress repealed the Boren amendment, essentially freeing states to develop Medicaid reimbursement rates without much federal oversight or accountability to the profession. Providers were left with no alternative weapon to ensure that rates at least approximated the actual costs of caring for Medicaid patients. SNFs in most states have never really recovered from the loss of the Boren amendment.

## Shattered Illusions

Always in the past providers could rely with confidence upon one universal truth—America needed SNFs, and, when push came to shove, the public or the government or both would work with the profession. But any illusions that govern-

ment, ultimately, would protect SNFs were shattered when the Clinton administration allowed the Department of Health and Human Services’ Office of Inspector General to declare open season on providers for alleged fraud and abuse under the federal False Claims Act, and told the Centers for Medicare & Medicaid Services (CMS) and the states to develop contingency plans for the closure of facilities, to define underperformers within the profession, to reduce overall public spending on long term care, and to “get tough” on nursing facilities.

And with the arrival of the prospective payment system, Medicare payment rates were dangerously slashed while increasingly higher care expectations were being enforced with heavy civil and sometimes criminal sanctions. It seemed that one government agency didn’t know, or seem to care, how other branches of government interfaced with, paid for, regulated, and evaluated the long term care profession.

During late 1999 and early 2000, pleas by providers for serious long term care reform became, almost overnight, a “do or die” situation in which America awoke to find that, consistent with the predictions of long term care insiders, 10 percent of the nation’s nursing facilities were already in bankruptcy, with more on the way.

In recent months, there has been a real and tangible look of bewilderment on the faces of shell-shocked providers and leaders of the profession nationwide. The message was passionately expressed by one Southern lobbyist facing a state Senate Finance Committee chairman:



“This is not a story of isolated CEOs in private nursing home chains making too much money. ... This is the police with guns arresting nurses at 6 a.m. for judgment calls on medicine. This is the highest cop in this great nation threatening FBI wiretaps of charitable organizations helping seniors unless they ‘settle’ false claims

cases built on negative press and innuendo. This, sir, is a national crisis that threatens an important industry. ... We are not asking for charity for nursing homes. We are asking for equity, fairness, and your handshake on a partnership. Mr. Chairman, please. I ask you for the love of God and country, can’t we stop

pointing fingers and start pointing toward solutions?”

### **A Ray Of Hope**

If, as elders teach, it’s always darkest before the dawn, maybe things will have to improve for SNFs and their patients. There is at least one significant ray of hope off in the distance. In November 2001, the Bush administration announced its new Nursing Home Quality Initiative to be launched in six states—Colorado, Florida, Maryland, Ohio, Rhode Island, and Washington.

The initiative consists of pilot programs designed to identify and evaluate the most effective ways to disclose information to consumers about nursing facility quality using a predetermined, single set of quality indicators.

CMS has contracted with the National Quality Forum, a private, nonprofit research group whose sole mission is to report on the quality of health care in the United States, to coordinate the initiative. The forum already has assembled a consensus panel and, through the panel, has identified a core set of 11 quality measures, consisting of seven chronic care measures and four subacute measures. Providers in the participating states will begin applying and tracking these quality measures and, by April 2002, will begin disclosing the results of these measurements to the public.

Underlying the initiative is the philosophy that where the profession consistently measures itself against a reliable, uniform set of measures and then shares those results with the public—whether good or bad—consumers can make more informed decisions about long term care options and providers can focus on quality improvement in a meaningful way.

### **Why Initiative Is Important**

The quality initiative is important for many reasons. First, at its core, the program at least implies if not admits that in the long term care arena, the providers, regulators, and consumer watchdogs who comprise long term care still don’t have it right when it comes to measuring or en-

suring quality. This is important since providers have argued this point for years, supported by study after study showing unacceptable levels of variation and error in the survey program.

Second, the program is a cooperative effort between consumers, government, and long term care. It builds on earlier quality outcome and measurement work commissioned by CMS, and by the profession, and brings on board for the first time an outside, objective, nonpartisan entity to implement and oversee the program. This will bring a measure of certainty that results are not simply designed to further the political agenda of either CMS, national consumer groups, or providers and should silence those who have historically complained that self-regulation or self-reporting of performance data by the profession amounts to the proverbial fox guarding the henhouse.

The problems created for SNFs by the pervasive negative attitude of consumers are evident in state and federal licensing and certification surveys where family members or families of other patients often become witnesses or sources of complaint information, at legislatures where state laws governing SNFs are developed, and in the courtroom through skyrocketing civil judgments and punitive damage awards.

Third, the initiative is one of the first efforts in several years in which the federal government will measure quality by relying on market theories and consumer choice, rather than by prescriptive regulations backed by sanctions. In that sense, it is, at long last, a creative and positive approach to quality that the profession can embrace and nourish.

Fourth, as the primary architect of this program, CMS will find that if systemic quality issues are uncovered by the quality measures, it will be forced to ask the next question, "Why do these problems persist, and what is required to fix them?" Even in the complex world of health care for elders, there are a finite number of possible explanations for inadequate care. CMS may ultimately be forced to admit that many of long term care's woes and per-

ceived quality problems stem from inherent characteristics of both the Medicare and Medicaid programs, including inadequate levels of payment.

At first blush, the Bush initiative may seem little more than another president trying to make his claim for caring about seniors. But, if fully implemented as con-

ceived, this program has the potential to create a true working partnership between government, the long term care profession, and consumers. ■

.....  
***Kenneth L. Burgess is a partner in the San Francisco office of Hooper, Lundy & Bookman.***