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Negotiated Risk Agreements

Jane has always liked to dance. Her doctor, however, has told her not to dance anymore because, at 82, she has balance problems and is at risk for falling. Although employees at the facility have encouraged her to follow her doctor's orders and use balance assistance, they are understandably reluctant to restrain her. In fact, in a licensed facility they might face a survey deficiency if they did restrain her.

What should a facility do when its resident does not want to do what is advised to be in her best interest? In a new effort to address this problem, the long term care industry is abuzz with the idea of Negotiated Risk Agreements ("NRA's") as a method to balance a patient's desire for autonomy and a facility's interest in maintaining a safe environment for its residents and avoiding legal liability for the outcome of the patient's choices.

In February of 2006, the U.S. Department of Health and Human Services published "A Study of Negotiated Risk Agreements in Assisted Living: Final Report." The study provided a detailed analysis of how negotiated risk agreements are being used in a select sample of long term care providers.

The report found that while the states differ in their approach, all 15 that specifically regulate NRA's view them as a means to support residents' choices that conflict with the facility's interest in safety, by managing the risks associated with such choices. Wisconsin is the only state that actually requires persons entering a specific type of assisted living facility to have an NRA signed at admission.

NRA's have primarily been used in the assisted living world to address specific resident behaviors or preferences that carry associated risks. NRA's



Caplan and Earnest LLC
1800 Broadway, Suite 200
Boulder, CO 80302
303-443-8010

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Caplan and Earnest LLC**

CAHSA / Legal Lines
1888 Sherman St. #610,
Denver, CO 80203
303-837-8834



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permit a provider 1) to identify areas of individualized resident risk; 2) to document attempts to accommodate or provide alternatives to the resident's behavior or preferences; 3) to spell out how the parties intend to address the issue; and 4) to have the resident acknowledge and accept the risks associated with his or her actions.

There currently is debate among healthcare providers regarding the propriety of the use of NRA's. Advocates believe that NRA's are a useful tool for identifying, communicating about, and reducing risks. They believe NRA's can facilitate a resident's right to make choices that involve risks and thereby promote autonomy and informed decision making.

Opponents, however, view NRA's as having the sole purpose of permitting facilities to avoid liability for negative outcomes resulting from their own negligence. They claim that "bad" providers will use an NRA to force residents to accept substandard care due to lack of alternatives, or fear of discharge and possible transfer to a nursing facility.

The main concern appears to be with liability waivers that are associated with an NRA. Whether these are express or implied, if a provider doesn't have the benefit of limited liability when dealing with a resident's high-risk choices, it is argued that the only alternative is to restrict that resident's autonomy in favor of safety.

The Report correctly found that Colorado was not among the states specifically regulating NRA's in the assisted living context. Independent residential facilities and day activities programs also would not be subject to regulations in this arena. Certain Colorado regulations applicable to long term care facilities are, however, relevant to the analysis.

Specifically, there are certain mandatory post-accident investigation and response procedures that include the development and implementation of "an individualized plan as part of the care plan prescribed . . . for prevention



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of future accidents.”¹ Similar language is found elsewhere for “residents with behavior problems.”² The Colorado regulations also provide that within two weeks of admission, a facility must develop a personalized overall care plan for each resident that contains “a list of resident problems and the [professional] discipline that will address each problem in its own more detailed plan of care.”³

The processes outlined in the regulations are clearly amenable to inclusion of behaviors that carry risk of accident or deterioration of health condition. Accordingly, an NRA might be a useful tool in dealing with high-risk resident behaviors, or a resident’s life preferences, such as a vegetarian lifestyle choice that might slow wound healing.

If a facility chooses to utilize NRA’s to address specific behaviors or resident preferences, either upon admission or post-accident, such a document should, at a minimum, contain the following provisions:

- a detail of the particular behavior or resident preference of concern;
- the potential or actual risk associated with the behavior or preference;
- the potential accommodations or alternatives suggested to the behavior or preference that would reduce the risk;
- the resident’s whole or partial rejection of the facility’s suggestions;
- the negotiated resolution to the matter; and
- the resident’s acknowledgment and acceptance of the potential negative consequences of his or her actions.

Ideally, an NRA would be a part of a facility’s standard admission policy and could be integrated into the interdisciplinary care planning process already in existence at the facility.

¹ 6 CCR 1011-1 Chapter V, § 5.1.3(e)

² 6 CCR 1011-1 Chapter V, § 5.1.4

³ 6 CCR 1011-1 Chapter V, § 5.7



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Although critics on either side of the debate aren't in agreement as to the legal effect of NRA's from a liability protection standpoint, an NRA would undoubtedly be effective evidence in the event of litigation. If nothing else, the NRA would show that the injured resident was fully aware of the risks involved in the behavior at issue, and that the facility had tried to address the behavior prior to the accident or deterioration while attempting to preserve resident autonomy. This would at least partially demonstrate that the facility was attempting to take reasonable actions, and that the resident assumed the risk.

In sum, NRA's provide a means to achieve that balance between a patient's right to self-determination and the facility's interest in the safety and protection of its residents. If used correctly, they can provide a useful tool in a facility's risk management program. If the facility can't keep Jane safe from falling, at least it might avoid a lawsuit or survey violation that ensues as a result.