PUBLICATION

Baker's Dozen – Negotiated Risk Agreements in the Assisted Living Community Setting

Authors: Catherine F. Wrenn, Alissa D. Fleming
September 27, 2022

Falls and other incidents are often the source of liability for assisted living communities and are the basis for litigation and other enforcement action. Not all falls and other incidents are preventable despite a community's reasonable plan of care and provision of acceptable care and services.

Communities may help mitigate litigation exposure and protect themselves from liability for falls and other types of incidents by executing well-drafted negotiated risk agreements (NRAs) with residents and their families.

Below is a baker's dozen of top points to know about NRAs.

1. What is an NRA?

A negotiated risk agreement is a written agreement between the resident (or his power of attorney) and the community that recognizes and identifies a resident's specific safety or health risk, such as for falls, while living at the community. It contains:

- A clear statement of the risk or potential risk in question for the resident
- Probable consequences of the risk for the resident (e.g., serious injury)
- Acknowledgment and explicit acceptance by the resident of the specific risk and possible injury from the risk
- Recognizes that the resident and his family are aware of the opportunity for the resident to move to a higheqar level of care or alternative residency community but are choosing not to do so
- A negotiated plan of care for the risk
- A clear explanation of what care the community will and will not provide to theresident regarding that risk (e.g., the community does not provide 24/7 or 1:1 care to the resident)
- A negotiated waiver or limitation of the community's liability regarding the risks at issue
- Statements regarding the voluntary nature of the agreement

2. NRAs should be specifically tailored to a resident's unique risks.

Communities may have standard NRAs with blanks to be filled in. However, an NRA should not be general or overly broad.

Rather, an NRA should be specific to each resident's needs in order to fully inform the resident of the risk that he is assuming. To the greatest extent possible, NRAs should be particular and detailed about that resident's personal risk. For example, if the resident has a known tendency to not use a needed assistive device while walking, the NRA should address that specific risk as opposed to only generally addressing the associated risk.

3. NRAs should be limited to a single topic (e.g., falls).

To be narrowly tailored, the NRA should only address a single risk topic, such as falls.

4. NRAs can be used to address a multitude of risks.

NRAs can address a multitude of different resident risks such as, elopement, noncompliance with a prescribed diet, refusal to use a walker or wheelchair, etc. If the community needs to address more than one risk, best practices include drafting and utilizing separate NRAs to do so.

5. NRAs are consistent with allowing individuals autonomy and the right to assume risks.

Many states' regulations and statutes governing assisted living communities require that the communities maximize residents' autonomy and treat residents with dignity and respect. Allowing residents to acknowledge and accept an identified risk of residency aligns with these mandates. NRAs allow residents (and their families) to make informed, knowledgeable decisions about continued residency in the face of an identified risk.

6. Although complementary, NRAs are separate documents, distinct from the residents' plan of care.

The terms of an NRA are preferably set forth in a separate document that constitutes a formal contractual agreement.

7. When are NRAs executed?

NRAs should be executed *and* updated as a resident's care needs change and as safety risks become known. For instance, once a community recognizes that a resident is a fall risk, a potential plan includes proposing a specific NRA for the resident addressing this risk and have a meeting with the resident and/or his family to discuss and execute the NRA.

8. Who should execute the NRA?

The community and the resident, if mentally competent, should both execute the NRA.

If the resident is not mentally competent, the resident's legal representative, such as his acting power of attorney, should execute the agreement. If a POA is executing the document, the community should attach a copy of the POA document to the NRA to evidence that POA had the legal authority to execute the agreement on the resident's behalf.

9. The community should perform follow-up assessments for the risk and update the NRA if needed.

A resident's needs and risks may change and evolve over time. Continually performing follow-up assessments of the resident's condition and risks allows the community to ensure that the NRA remains reflective of the actual and specific risk and encourages ongoing communication between the community and the resident or his family regarding risks.

10. NRAs are a helpful tool for communicating with the family.

Families often express concerns that communities failed to adequately communicate their loved one's risks or allege that they did not clearly understand certain risks. NRAs serve as documentary evidence that the community explicitly communicated with and informed the resident and/or his family about the resident's risks and the risks associated with the decision for the resident to continue to live in the community (as opposed to a higher level of care). NRAs also help set the family's expectation for the type of care and services the community is licensed to provide to their loved one (and ones that it will *not* provide). In other words, NRAs can be used as contemporaneous documentation of a discussion about certain agreed to risks.

11. Execution of an NRA may mitigate the risk of litigation and other complaints.

Effective communication with and "buy in" from the resident and his family about a risk and the community's plan of care for the risk (including what that plan does not involve) can mitigate the risk of litigation based on those risks.

12. In the event of a lawsuit, an NRA may be helpful.

Negotiated risk agreements may also be helpful in the event of litigation. They can serve as a basis for arguing that the resident (or his family) assumed the risk of being injured from a fall at the community and aid in establishing possible comparative/contributory negligence defenses.

Additionally, they provide communities the ability to argue that the resident and/or his family waived any alleged liability of the community associated with the risks identified in the NRAs. Whether courts will enforce such waivers or limitations of liability remains to be determined, but NRAs may serve as a basis for advancing these defenses.

13. NRAs cannot be used to allow residents to remain in an assisted living community if the community can no longer meet their needs.

Applicable state statutes and regulations identify circumstances when a community can no longer meet the needs of a resident, who should be discharged to a different care setting. NRAs cannot circumvent those statutory and regulatory requirements.

If drafted appropriately and timely, NRAs may help assisted living communities firmly set residents' and their families' expectations about risks and probable consequences of the risks and allow them to make informed decisions about whether to accept such risk and more fully understand the community's plan of care for addressing that risk. In doing so, NRAs may reduce a community's risk of liability and more appropriately identify and address resident risks and reducing the consequences of those risks.

While the majority of states do not have laws or regulations related to NRAs, some do. As a result, it is wise to analyze your local law or consult with an attorney in drafting or evaluating the effectiveness of your community's NRA.

If you have any questions about this topic, please contact Catherine Wrenn and Alissa Fleming.