Healthcare

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Negotiated Risk Agreements: When and How Should They Be Used?

As the aging services field evolves, many organizations are seeking to implement a "culture change" agenda and satisfy mandates for resident-centered care. In this atmosphere of industry-wide change, negotiated risk agreements (NRAs) have become an increasingly popular means of managing potential liability while accommodating resident preferences that may be contrary to organizational policy and/or caregiver advice.

NRAs are written contracts, voluntarily entered into, that serve to document changes in resident care plans while notifying residents, families and significant others in writing of the risks associated with their choices, requests and decisions. By signing an NRA, residents assume a degree of risk for specified occurrences, such as falls, skin breakdown or wandering.

If a service plan must be modified at the insistence of the resident or family, a freely negotiated risk agreement can help the parties arrive at a mutually acceptable compromise that balances resident autonomy and organizational loss exposure. Used most often in assisted living communities, NRAs enable a more customized approach to care, permitting residents to age in place despite a changing service profile.

However, NRAs remain controversial in both assisted living and skilled care settings, in part because no nationwide legal framework applies to these agreements. While most states' assisted living regulations address aging-in-place rights, the vast majority of states do not offer specific guidelines for conducting risk agreement negotiations or otherwise address the use of NRAs.[1] In those states that do expressly permit use of NRAs, requirements vary in scope, and most are silent with respect to their application to cognitively impaired residents. Opponents of NRAs note this lack of consistent regulation and contend that in the name of free choice and flexibility, these risk-sharing tools restrict residents' right to bring meritorious claims, thus protecting organizations from liability associated with substandard care.[2] Proponents argue that NRAs do not prevent the filing of lawsuits or safeguard facilities from the legal consequences of provider negligence.

This edition of *CareFully Speaking*® is designed to help aging services organizations implement effective NRA-related policies by describing the major provisions of risk agreements, reviewing their pros and cons, and offering a range of strategies to ensure that NRAs serve the interests of both parties. In addition, this resource contains practical drafting tips intended to help administrators enhance the clarity, utility and legal enforceability of risk agreements.

Used most often in assisted living communities, **NRAs enable** a more **customized approach** to care, permitting residents to **age in place** despite a changing service profile.

1 For a summary of assisted living regulations by state, including negotiated risk provisions where recognized, see Carder, P. et al. "Compendium of Residential Care and Assisted Living Regulations and Policy: 2015 Edition," from the U.S. Department of Health and Human Services, June 15, 2015. (Scroll down to "State Regulatory Profiles.")

2 See, for example, Carlson, E. "Protecting Rights or Waiving Them? Why 'Negotiated Risk' Should Be Removed from Assisted Living Law." *Journal of Health Care Law & Policy* 287, 2007, volume 10:2, article 5.

Major Features of NRAs

To be enforceable, NRAs must avoid both the reality and the appearance of constituting improper liability waivers. For this reason, risk negotiation should be framed as an extension of the traditional resident care planning process, encompassing such additional issues as resident preference, compliance and assumption of risk. In order to underscore the agreements' basis in individual choice and mutual concurrence, many organizations have replaced the term *negotiated risk* in written policy with such phrases as *managed risk*, *shared responsibility* or *compliance agreement*. (To compare the content of standard agreements, see "Sample NRA Forms" at right.)

While aging services-related risk agreements may vary in name and/or content, most contain the following basic provisions:

- **A clear description of the service(s) at issue and possible modifications,** including a full disclosure of the reasonably foreseeable risks associated with each option.
- **A statement of resident preferences,** as well as family and advocate input.
- **A list of the provider's relevant standing policies and practices,** as well as professional recommendations.
- **An account of the policy/practice modifications** agreed upon by the parties.
- **A delineation of each party's responsibilities,** including terms, conditions and behavioral expectations.
- **An acknowledgment that the resident/family understands the risks** and the available alternatives.
- **A summary of the final agreement reached** between the resident/family and the organization.
- **Provisions for reviewing and updating the agreement** in the event of changes in the mental and/or physical condition of the resident.
- **A declaration that the resident has had a meaningful opportunity to review and discuss the agreement** with family, legal counsel, medical professionals and other relevant parties.
- **Dated signatures of all parties to the agreement,** which is witnessed and notarized.

Some agreements include language absolving the organization of responsibility for injuries or other damages associated with accommodation of the expressed resident care choices. While such liability waivers may not entirely protect organizations and providers from litigation, they can lessen the degree of allocated blame in case of an adverse event. The inclusion of such waivers, however, remains a contentious issue among consumer advocates and aging services providers. (See "Express Liability Waivers: Should They Be Included in NRAs?" at right.)

Sample NRA Forms

- Consumer Directed Negotiated Risk Agreement (scroll down to Appendix A).
- Managed Risk Agreement, Ageia Health Services.
- Negotiated Risk Agreement and Release (scroll down to Appendix F).
- Negotiated Risk Agreement Example, California Department of Aging, Multipurpose Senior Services Program.

Express Liability Waivers: Should They Be Included in NRAs?

While broad liability waivers are not generally considered legally enforceable, some experts believe that a narrowly constructed liability waiver could potentially mitigate the negative consequences of an occurrence emanating from a resident's expressed choice, so long as the incident does not involve provider negligence or violation of regulatory requirements. However, there is not a great deal of precedent to support this viewpoint and the protectiveness of express liability waivers remains uncertain. (See Jenkens, R. et al. "Study of Negotiated Risk Agreements in Assisted Living: Final Report." U.S. Department of Health and Human Services, February 13, 2006. Scroll down to "Ability of NRAs to Limit Liability.")

A growing number of aging services organizations have shifted away from including express liability waivers in their agreements with residents, believing that a well-documented NRA can potentially achieve the desired protection even absent such a waiver. The existence of a signed document recording the risk negotiation process – including identification and acknowledgment of known hazards by both parties – may help improve an organization's defense posture in the event of a lawsuit relating to the resident's preferences. At a minimum, the NRA indicates that the resident has been made aware that certain choices contain an element of risk, potentially increasing the burden of proof on the resident to demonstrate actionable negligence.

If liability waivers are included in NRAs, they should be carefully constructed and narrowly defined around injuries directly caused by the named risks. Consult legal counsel regarding both utilization and wording of express waivers before incorporating them into risk agreements.

NRA Benefits and Criticisms

Risk agreements are utilized most commonly when an organization is prepared to provide an appropriate level of care, but the resident rejects providers' advice, potentially increasing risk exposures for both resident and facility. Common examples include eating sweets despite a diabetic condition, smoking cigarettes or drinking alcohol habitually, refusing daily baths or medications, or insisting on self-care notwithstanding the availability of staff assistance.

Advantages of NRAs. Risk agreements do not insulate an organization from litigation or liability. For example, they probably would not protect against claims involving a fall caused by failure to provide requisite safeguards or an elopement through an unlocked and unwatched door. However, when drafted appropriately, NRAs can provide a number of benefits to both residents and organizations. Most notably, they …

- **Foster useful dialogue about risks** with residents and families.
- **Promote greater autonomy** and resident-directed care.
- **Help residents and leadership arrive at creative and mutually acceptable solutions** to any conflicts that may arise concerning delivery of care.
- **Strengthen resident care documentation** by recording providers' awareness of care-related issues and efforts made to address them.
- **Mitigate potential liability** by helping organizations defend their decision-making in the event of a claim.

Criticisms of NRAs. As noted earlier, among the most commonly expressed concerns is that NRAs may shield providers from the consequences of inadequate care. Some consumer advocacy organizations argue that NRAs are inherently exploitative, as they potentially permit understaffing and retention of unsuitable residents in an effort to boost census and profits at the expense of safety. Opponents also characterize risk negotiation as an unfair practice that places residents in an unequal bargaining position due to their compromised physical and/or mental condition and fear of being discharged if they do not accept the organization's terms.

Pro-NRA commentators contend that while NRAs may offer some potential mitigation of liability for aging services settings and providers in the event of a negative outcome, these protections are limited and do not negate state regulations. Even states that are legally permissive toward risk agreements would still hold aging services facilities accountable for meeting minimum staffing requirements and other basic safety standards. Thus, NRAs could not effectively protect organizations that fail to provide quality care.

Negotiated Risk and Informed Consent

The doctrine of informed consent is a fundamental legal principle underlying negotiated risk. Prior to negotiations, administrators must ensure that the resident possesses the requisite capacity to understand the nature and consequences of the agreement, actively participate in the discussion and make a genuinely informed decision. Typically, this involves an assessment by a physician or other healthcare provider, as well as input obtained from the resident's family and staff. In skilled care settings, where the mental acuity of residents may be more of an issue than in other residential settings, a documented assessment process is especially critical.

Where mental capacity is in question, the majority of states that provide regulatory guidance on risk agreements permit a responsible party, such as a legal guardian or an appointed advocate with power of attorney, to sign an NRA for the resident as a proxy. As requirements for surrogate decision-makers – which may include family members – vary, always consult legal counsel before entering into an NRA with a resident's designated representative.

When obtaining informed consent, engage the resident and ensure that he/she understands the risks and consequences of the identified behavior, utilizing pictures, videos and other explanatory material as necessary. The resident care record should contain a summary of the consent discussion, including the date, names of all participants and their relationship to the resident, concerns raised by the resident and solutions offered. The decision to enter into an NRA should be noted in the resident care information record with a statement similar to the following: *"The resident is able to understand his/her own needs for supportive, personal or nursing services; is capable of choosing services to meet those needs; and understands the outcome likely to result from that choice."*

Prior to negotiations, administrators must ensure that the **resident possesses** the requisite **capacity to understand** the nature and consequences of **the agreement**.

NRA Guidelines and Strategies

Negotiated risk is not a universal solution for organizations seeking to manage resident noncompliance, nor will courts generally exempt providers from liability for violations of state laws and regulations. However, when drafted appropriately, NRAs can serve as evidence that providers alerted residents to increased risks in a timely and responsible manner, and offered alternatives that respect their preferences.

The following recommendations can help ensure that NRAs serve their intended purpose of increasing resident autonomy while managing related potential liability:

1. **Use risk negotiation selectively,** and only in circumstances where it is determined that the resident's preference, while diverging from standard organizational protocol, poses an acceptable degree of risk.
2. **Refrain from using NRAs if the resident has care needs beyond the organization's capabilities.** NRAs are appropriate for situations where a facility can provide the disputed services, but they are refused by the resident. In addition, NRAs should not be utilized to circumvent state requirements – such as rules mandating discharge if a facility is unable to safely meet the resident's needs or the resident's behavior is a threat to the safety of others – unless state law or regulation expressly permits NRAs to do so.
3. **Draft a formal policy governing negotiated risk discussions.** The policy should help providers decide whether a specific risk is suitable for inclusion in an NRA by considering such factors as the resident's physical and mental condition, the type and degree of hazard, and the severity of potential negative outcomes. This sample policy statement for use in aging services settings can be adapted as necessary.
4. **Ensure that residents and family members participate fully in negotiations.** Written policy must frame risk negotiation as a fair and mutual process, designed to accommodate the choices and preferences of residents and family members. The resident care information record should reflect that an interdisciplinary team – comprising representatives from nursing, medical, therapeutic services and social work – thoroughly discussed risk implications with the resident, family and/or resident advocate, and answered all questions.
5. **Prior to execution, document the NRA in the resident care information record,** as well as any previous discussions with the resident and family regarding care issues, noting when these meetings occurred and who participated in them.
6. **Establish parameters for acceptable risks.** Generally speaking, negotiable issues include noncompliant behaviors apt to occur in a home environment, such as the following:
   - Deviating from a prescribed diet.
   - Not monitoring vital signs on a daily basis.
   - Refusing to use a walker or wheelchair.
   - Opting not to use bed rails.
   - Taking unaccompanied walks.
   - Going barefoot or in stocking feet.
   - Self-managing medications.
   - Rejecting housekeeping assistance.
   - Declining one-on-one supervision.

   Actions that potentially place other residents and staff at risk of harm, are legally prohibited or are potentially annoying to others – such as drinking to excess, playing loud music, using abusive language or taking illicit drugs – should be excluded from negotiations.
7. **Carefully consider the timing of negotiations.** Some organizations enter into risk agreements with residents upon admission, while others initiate negotiations as issues arise or only in cases of resident noncompliance. Whatever the organizational philosophy, written protocols and guidelines regarding NRAs should be consistently followed with all residents.
8. **Create an explanatory brochure or online graphic for residents and families about risk negotiation.** Emphasize the seriousness of the decision to enter into an NRA and note that residents have the right to consult independent legal counsel.
9. **Execute NRAs in a manner similar to other legal documents, such as advance directives.** The document should include a statement clearly indicating the resident's intent, be signed and dated by all parties, and be formally witnessed and notarized.
10. **Provide signed copies of the NRA to the resident, family member and/or other resident advocate.** Record the names of recipients in the resident care information record.
11. **Review agreements annually** or sooner if residents experience any change in mental or physical condition that may affect negotiated risks.

As the aging services industry continues to shift from an institutional, cookie-cutter model toward more resident-directed care, new tools and methods are required to reconcile the sometimes conflicting goals of maximizing individual autonomy and minimizing organizational liability. NRAs add flexibility and creativity to the care planning process, enabling organizations to respect resident choice, address noncompliance and enhance legal defensibility. To fully obtain the advantages of risk negotiation, administrators must be cognizant of the proper uses and limitations of NRAs, and must draft individualized, mutually satisfactory, legally reviewed documents that reflect the full participation and informed consent of residents.

Quick Links

- Grubman, J. "Methods for Managing Risk and Promoting Resident-centered Care in Nursing Homes." *Columbia Journal of Law and Social Problems*, 2016, volume 49:2, pages 217-249.
- Mitty, E. and Flores, S. "Aging in Place and Negotiated Risk Agreements." *Geriatric Nursing*, March-April 2008, volume 29:2, pages 94-101. (Available for purchase.)

Enhancing the Enforceability of Negotiated Risk Agreements

The following general tips are designed to help organizations draft meaningful, effective and legally valid risk-sharing agreements. As laws and circumstances vary, always consult with legal counsel before modifying organizational policies/procedures or drafting agreements.

- **Accentuate the importance of resident choice.** State in an introductory paragraph that risk negotiation is an extension of the organization's commitment to resident-centered care.
- **Note that *managed risk* does not mean *zero risk*.** Risk exposures are ever-present in aging care environments and conflicts should be resolved in a mutually agreeable manner. By underscoring the "quid pro quo" nature of risk agreements, organizations can better manage resident and family expectations and reduce the likelihood of litigation.
- **Draft agreements unambiguously,** thus avoiding later disagreements or misinterpretations regarding terms or conditions. If a liability waiver is included in the NRA, the release language should refer expressly to the waived claims – e.g., "Slip and fall injuries related to the resident's refusal to use a walker, despite being advised to do so" – so that all parties understand the nature and extent of the provision.
- **Avoid boilerplate language.** The final agreement should include a precisely and individually worded description of the resident's expressed preferences, related risks, services to be provided or withheld, and any other actions to be taken by staff, family members and other parties to the agreement.
- **Cite organizational policies, practices and protocols that conflict with resident preferences,** specifying how waiving these policies increases risk.
- **Include contingency plans** in the event that unforeseen circumstances prevent the agreement from being implemented. Additional measures may include, but are not limited to, the following actions:
  - Convening the interdisciplinary team to renegotiate the agreement.
  - Providing backup or support services in case of emergency.
  - Requesting greater involvement from the resident's family or other advocates.
  - Employing private-duty staff at additional expense.
- **Within each agreement, indicate the resident's equal position in the bargaining process.** For example, mention that the resident entered freely into the arrangement, and note that all parties had the opportunity to discuss and modify terms and conditions.
- **State within the agreement that the resident or surrogate decision-maker had a meaningful opportunity to review and discuss the document** with an independent attorney, medical professionals, family members, and/or other experts or advocates.

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