The importance of managing rising acuity levels

Legal risks warrant an inventory of responsive strategies

By Paul Gordon

In recent years, acuity levels have been rising for all property types: independent living, assisted living, and nursing. Residents with chronic conditions who were once served by nursing facilities are now in assisted living.

Levels of care within assisted living have been rising, including care for bedridden residents, hospice, and those with severe dementia. Even in independent living properties, private duty aides often provide residents with a type of care typically provided in assisted living.

Standards of care shift

The legal standard of care for a senior living facility operator can be determined by the contract with the resident, customs and practices in the industry, applicable regulations and fundamental legal concepts. That includes the duty to act reasonably to prevent foreseeable harm where the parties have a special relationship.

One problem with rapidly increasing acuity levels of residents is that a higher-than-expected standard of care may be applied to a property type that historically housed lower-acuity residents.

For example, plaintiffs’ lawyers may argue that standards applicable to nursing care should be applied to assisted living because the current acuity level of the residents is of the kind historically treated by skilled nursing facilities.

Moreover, rising acuity levels have caused some assisted living facilities to increase staffing by hiring licensed nurses to help with resident needs, even though licensed personnel are not required by licensing regulations for the facility.

Similarly, an independent living operator may take false comfort that it has no regulatory or contractual duty to monitor resident safety.

Liability exposure can exist if a plaintiff shows that a custom and practice has been established for such properties by other providers.

For example, if most other independent living providers perform a daily safety check to determine if the resident is incapacitated in his or her apartment, or investigates when a resident unexpectedly fails to attend a meal, that can become the standard for the property type.

Is aging in place required by discrimination laws?

When resident acuity levels strain the capacity, or willingness, of management to provide appropriate service, some difficult alternatives may need to be considered and implemented. Among the options:

- Allow the resident to remain in place and receive care, as needed, from private duty attendants.
- In a multi-level property, ask that the resident move to a higher level of care on-site.
- In a stand-alone property, ask that the resident leave the premises to receive appropriate care elsewhere.

Although there is no inherent legal right for a resident to “age in place,” many residents and resident advocates have attempted to use the Fair Housing Act and/or Americans with Disabilities Act to prevent resident transfers or restrictions on private duty aides.

For example, it is clear from federal cases that in unlicensed independent living, management must allow a disabled person to use private aides. On the other hand, in one federal fair housing case, an independent living property was found to have the right to evict residents whose behavior was disruptive or who posed a safety risk, despite the presence of their private duty aides.

In another case, a continuing care retirement community was found to have the right to require a resident who used a 24-hour private duty aide in her apartment to transfer to skilled nursing to receive appropriate care.

Legal challenges to dining room restrictions that affect disabled residents have had mixed results. This is an evolving area of the law that requires careful legal analysis of specific situations.

The problem with private aides

Private duty aides may be effective in temporarily filling gaps between a resident’s needs and the retirement community’s ability, or willingness, to meet them. However, over time, private duty aides can pose serious management and liability problems.

By definition, they are not employees of the retirement community and are not supervised by community management. Yet, they are conducting their business on the retirement community premises and interacting, often intimately, with the community’s vulnerable elderly residents.

Operators are faced with the strategic dilemma of whether to refrain from becoming involved with the activities of private duty aides, in the hopes of avoiding liability for any bad outcomes, or exerting some control over the situation and accepting corresponding responsibility.

In most cases, it is prudent to have policies governing private duty aides that include criminal record screening, rules of conduct, resident approval of services such as use of an automobile, and reporting to management any significant changes in the resident’s condition.

Full disclosure minimizes gaps in expectations

With the blurring of lines between levels of care, the proliferation of different care models and facility types, private caregivers and changing acuity levels, plaintiffs are sometimes able to make credible claims that they did not fully understand the scope and level of service they could expect at their senior living property.

If retirement community operators do not fully disclose the extent and limits of services offered and available, the risk of liability can be exacerbated.

In these challenging economic times, both parties may also be complicit in adding to the confusion and risk. Service providers seeking to fill vacancies may be less strict about screening potential applicants for their health care needs and less apt to assure that those needs can be met, either by the provider’s staff or the resident’s private assistants.

To save money, families may be inclined to place their elder relatives in a setting with fewer services when they know that a higher acuity setting would be safer and more appropriate.

If permitted by the resident, it can very important to include family members in the process whenever possible to review and approve the service plans in advance. This can significantly mitigate the likelihood that a family member will object to the plan after a bad outcome has taken place.

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Under these circumstances, it is critical for retirement community operators to scrutinize and edit their advertising, contracts, admission and transfer policies, and other documents to specify exactly what services are offered, what are not offered, and when residents may be asked to relocate due to care needs.

For example, residents and family members should understand from the outset whether the resident needs to move to access full-time personal care, memory care or nursing services.

Residents should know whether their activities will be closely monitored, not monitored at all, what kinds of incidents will warrant a response from staff, and the kind of response that can be expected. Who, for example, responds to the emergency call button?

**Adapting to changing needs**

Many seniors housing operators decide to embrace the problem of increasing acuity levels by adding facilities, staff and services to meet resident needs. This may not only solve some liability problems, but also create new business opportunities and revenue streams.

For example, rather than try to regulate private duty aides, some providers have established their own home care agencies and encouraged or required residents to use them rather than private employees.

Another strategy for new property developers is to design independent living buildings to higher fire safety standards so they can become licensed as care facilities in future years when residents’ needs increase. Multi-level projects, such as independent and assisted living campuses, or continuing care retirement communities with nursing, are another way to anticipate and adapt to increasing resident needs.

**Use liability limitation agreements**

Oftentimes, circumstances arise where an individual resident’s needs exceed the usual parameters of service available at the senior living property. In some states, a “negotiated risk agreement” can be utilized to establish an agreed upon course of action whereby the resident assumes the risk of harm and releases management from liability.

Even in states where such an agreement may not be strictly enforceable, it is prudent in such circumstances to have all interested parties (resident, family, physician and provider) agree on a plan, their respective roles and responsibilities, the desired outcome, and the consequences if stated goals are not met.

Other documentation that can limit provider liability includes waivers and releases. For example, a waiver of liability is appropriate if a resident declines to use a pendant-type emergency call button. An “assumption of risk” form, such as physician consent for strenuous health club or recreational activities, can mitigate risk.

Finally, arbitration agreements that are enforceable under the Federal Arbitration Act may serve to resolve disputes more economically and efficiently than court or jury trial proceedings.

**9 point checklist: Minimizing legal risks associated with rising acuity levels**

- Disclose in detail the scope and extent of services offered and available to residents.
- Identify services and benefits not available at the retirement community, but which may be available at other, similar, types of communities.
- Inform prospective residents of the circumstances under which they may be asked to leave the premises or change levels of care, giving specific but not exhaustive examples.
- Carefully review policies, with expert assistance, for compliance with disability discrimination laws.
- Adopt a private duty aide policy with criminal record clearance, rules of conduct, service authorization and reporting requirements.
- Consider providing home care directly to residents through an in-house managed agency.
- Develop service plans and other documents that include and involve residents and their family members, and solicit their approval, questions and/or objections in advance, before an incident occurs.
- Develop buildings that can be adapted to increasing care needs of residents over time.
- Use releases, consent forms, arbitration agreements, and other legal devices to limit exposure to risk and liability.

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