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A Path to independence

with Individual Service Plans

Assisted Living's mission is to provide residents with independence, dignity, and choice. However, with independence and choice comes risk. Much in the same way that residents have a variety of needs, their choices can introduce a wide variety of risks.

By Joel Goldman, Partner, Hanson Bridgett, LLP

For example, a resident may wish to engage in an activity that poses a fall risk. They may express a desire to not receive assistance with medication management or a particular activity of daily living. They may even offer to sign a release or a waiver of liability.

Over the years, I have been asked by providers whether they can enter into a negotiated risk agreement with a resident or resident's responsible person. A number of states have adopted the concept of negotiated risk into their Assisted Living laws and regulations. In those states, an Assisted Living provider can enter into a legally enforceable negotiated risk agreement that limits its liability to the resident.

California, however, is not one of those states. The Department of Social Services (DSS) has consistently taken the position that a Residential Care Facility for the Elderly (RCFE) cannot absolve itself of its obligation to provide appropriate care and supervision to its residents. In the late 1990s, I had a conversation on this topic with Martha Mills, who was the first statewide RCFE Program Administrator. During the conversation, I posed a hypothetical situation to her: a resident requires assistance with bathing, but does not want any assistance. I noted that the Personal Rights regulation included a right to refuse services, thus precluding the licensee from forcing the resident to accept bathing assistance. Ms. Mills replied by saying, "You cannot force the resident to accept bathing assistance, but you cannot retain the resident because you cannot meet her needs."

Not only will a negotiated risk agreement not protect an RCFE from regulatory enforcement action by DSS, it may well be used as evidence in a personal injury lawsuit that a provider failed to meet its regulatory obligations to a resident. What, then, can a provider do?

There are some instances where a regulation is clear on what a provider must do. For example, a common situation that arises is when a responsible person insists that RCFE staff not call 9-1-1 in the event of an emergency. This is simply not something to which a licensee can agree. The regulations are very clear as to our obligation to call 9-1-1 in certain circumstances, and providers should explain this requirement if family requests—or even demands—that you not call 9-1-1.

But suppose we are faced with another fairly common situation in which a resident has a condition that makes her a moderate fall risk. The resident tells us that she wishes to go for walks in the neighborhood. While we cannot enter into a negotiated risk agreement that absolves the community of responsibility, we can develop a **mutually agreed upon individual service plan** that addresses this wish. Ideally, the service plan would be discussed among the provider, the resident, the resident's responsible person, family members, and the resident's personal physician.

What results might be along the lines of the following:

Mrs. Smith enjoys going for walks in the neighborhood. Because of her medical condition, Mrs. Smith may be at risk of falling while she is taking her walks. In order to mitigate the risk of falling, Mrs. Smith and the Community agree on the following protocols:

- 1) The Community will provide Mrs. Smith with an emergency pendant. Mrs. Smith agrees to wear the pendant when she goes for a walk.
- 2) Mrs. Smith agrees to take walks only during daylight hours and agrees not to take walks during stormy weather or when she is ill.
- 3) Mrs. Smith will advise the front desk when she is departing for her walk. Mrs. Smith will advise as to her intended course and will provide an estimated return time. Mrs. Smith will notify the front desk when she returns from a walk.
- 4) If Mrs. Smith does not return from her walk within _____ minutes of the estimated return time, the Community will attempt to locate her.

It may be appropriate for the community to take on other specific responsibilities here, such as having the front desk person make sure she has her pendant with her, or encouraging her to walk with other residents—perhaps even organizing group walks. The community also has an obligation to update the service plan as appropriate upon a change of condition. The foregoing will not eliminate the risk of a lawsuit, but it will help to reduce the risk. Perhaps more importantly, it will help to produce realistic family expectations, while at the same giving the resident the ability to enjoy her walks with added safety.

It may also be helpful to imagine possible consequences. For instance, what will the community do if the resident has multiple serious falls while out on walks, but insists on continuing with her walks? Do we reach a point where we can no longer meet her needs and thus must give a 30-day eviction notification? Prior to taking that step, providers should engage in a conversation with their LPA or LPM. Bringing the Ombudsman into the conversation might also be helpful.

There may be instances when regulations preclude a provider from fulfilling a resident or family member's request. However, by opening lines of communication and developing a **mutually agreed upon individual service plan**, providers can take steps to fulfill their purpose of promoting a resident's independence. ■

Joel Goldman is a partner at Hanson Bridgett, founding board member of CALA, and nationally known expert on Assisted Living.