Are you ready to RESIDE?

Resident agreements
Expensive mistakes
Sexual activity
Intimacy and dementia
DNR orders and the Evening news

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Residency Agreements

Weighing the risks and benefits of arbitration clauses
The Residency Agreement in a nutshell

This document is a legal contract

- The sales/marketing team should review the Agreement in detail with the resident (and family)

- If an option, the team should provide the adult children with copies of the Agreement

- Taking the time to review the agreement ensures that the resident’s expectations are both met and managed
A strong agreement covers 5 areas

1. Services & Service Plans
2. Level of Care
3. Cost
4. The Rights & Responsibilities of Resident and Facility
5. Grievance Procedures
• Detail the included amenities

• Explain “add-on” services under separate header to reduce confusion and avert complaints
• If more than one care level exists on property, indicate this clearly to avoid confusion
• Outline process/cost if resident needs to transfer to a higher level of care
• Review with adult child, if possible
The 5 Components

Cost

- Clearly state rate increase policy
- Define “significant change in health status” and discuss with prospective resident
- If IL or AL, make clear that a person can be discharged/evicted
The 5 Components

• The Resident’s Bill of Rights
• Define any facility policies or rules
• Reference and incorporate handbook

Rights & Responsibilities
The 5 Components

Grievance Procedures

• Determine your legal forum
  • Resolution through traditional lawsuit
  • Resolution through arbitration
Fredericksburg Care Co. V. Perez

- The Texas Supreme Court held that a nursing home was entitled to arbitrate a dispute even though the arbitration provision did not conform to the Texas Medical Liability Act (TMLA).

- TMLA required that all clauses be:
  - printed in large, bold conspicuous lettering
  - warn residents that they were giving up their rights
  - signed by the resident’s lawyer
Arbitration

Fredericksburg Care Co. V. Perez

- The Texas Supreme Court decision lessens that burden by making the following findings:

1. The Federal Arbitration Act did apply because the facility was paid by Medicare

2. Even though Texas requirements were not met, the clause satisfied the FAA requirements that it be in writing, agreed to by all parties, and cover the claim at issue
3. The TMLA requirements were preempted by the FAA requirements

4. The McMarran-Ferguson Act, which exempts state insurance law from federal preemption, did not apply
Should you choose arbitration?

Long-term care providers should consider the advantages and disadvantages

- Public policy favors arbitration in many instances and it’s viewed as efficient and cost-effective

- But it may or may not be less expensive than litigation
  - End result is not subject to appeal
  - The state monetary limits on a nursing home resident’s recovery do not apply
Expensive mistakes

Preventing Fair Housing Act violations and complaints
The FHA prohibits discrimination in the sale, rental, and financing of housing based on membership in a protected class.
What is a protected class?

IT IS ILLEGAL TO DISCRIMINATE BASED ON:

1. Race
2. Color
3. Sex
4. National Origin
5. Religion
6. Family status
7. Disabled
Disability is defined as:
an impairment limiting one’s major life activities, a record of an impairment, or being regarded as having an impairment.

It can be physical, mental, auditory, or visual.
When it comes to a protected class, never make assumptions.
The Fair Housing Act Applies to you

All dwellings fall under Fair Housing law, including:

- Independent Living
- Assisted Living
- Skilled Nursing
- Adult Foster Care
What is Illegal Housing Discrimination Under the Fair Housing Act?

- Restricting choices;
- Denying access;
- Discouraging applicants;
- Steering applicants;
- Refusing to make reasonable accommodations or modifications;
- Communicating preferences.
Avoiding Mistakes in Sales & Admissions

- Discrimination comes in the form of a prohibited inquiry
  
  - Asking whether an applicant has a disability or into the nature or severity of a disability is PROHIBITED
  
  - It is illegal to steer an applicant to another community based on a perceived disability
  
  - It is illegal for an independent living community to tell a prospective resident he or she should choose an assisted living community
What religion are you?

NO

If you enjoy religious activities, we offer X services and/or transportation to X churches/temples.

YES!
Easy mistakes & quick fixes

Do you have a hearing aid?

NO

We offer audiology services on Wednesdays as a complimentary service

YES!
We recommend that you take a first floor apartment

NO

We have both first and second floor units available

YES!
You may enjoy the assisted living side more; more residents use wheelchairs there

As you know, we offer both independent living and assisted living. Which property are you most interested in?
The Texas Workforce Commission can fine a property upwards of $100,000 for any of these violations.

Recent Experiences with the FHCOGSA
Sexual activity & education

Understanding and appreciating the sexual needs of residents
A recent study by the New England Journal of Medicine found that over half of people in their seventies and eighties are having sex multiple times a week, and this number increases if they are in a senior living community.
The Risks are Real

HEALTH RISKS

- Sexually Transmitted Infections (STIs)
  - 52% increase in diagnoses of syphilis and chlamydia
  - Nearly 1/3 of all newly diagnosed HIV+ seniors are suburban, white men, over 65

- STIs are often misdiagnosed

LACK OF SAFE SEX PRACTICES

- Lack of sexual education
- Residents often have multiple partners
- Lowest rate of condom usage, but high rate of transmission
Recommendations for Senior Housing Providers

- Offer sexual education classes or handouts
- Make condoms available on property
- Educate staff members to ensure an appropriate and respectful reaction
- Reach out to adult children
Intimacy & dementia

Sexual consent in the context of dementia
Many seniors suffer from severe cognitive decline, either from Alzheimer’s Disease or another form of dementia.

The challenge facing memory centers is balancing the intimacy needs of residents with maintaining a safe and legally compliant environment.
Intimacy & Dementia

**Decreased sexual interest**

- Occurs most often in early stages

**Increased sexual interest**

- As dementia progresses, residents may have an increasingly strong sex drive
Intimacy & Dementia

Improved functioning from Sexual Activity

• Many residents find sex fulfilling
• Intimacy has been found to promote consciousness and make consciousness more meaningful
Concerns for family and staff

SEX WITH A NEW PERSON
- Beginning a relationship with someone who is not their spouse
  - Confusing a spouse with someone else
  - In some instances, a person will change his or her sexual orientation

AGGRESSIVE SEXUAL BEHAVIOR
- Increased aggression can occur
  - inability to recognize boundaries
  - sudden confusion or frustration
- Staff should be aware of activity to keep residents safe
Cognitive Capacity to Consent to Sexual Activity

State of Iowa v. Henry Rayhon, charged with felony assault
SEXUAL ASSAULT DEFINED UNDER TEXAS LAW

- Actor “compels other person through violence”
- Actor knows other “person is unconscious or physically unable to resist”
- Actor knows that as “a result of mental disease, or defect the other person is incapable of appraising the nature of the act or of resisting it”
- Actor knows the other person is unaware that the assault is occurring
Texas law applied to dementia

- A strict reading makes clear that engaging in sexual activity with someone with dementia may be assault.

- Equally clear that the law was not intended to be construed that anyone suffering from dementia must be celibate.
Conflicts with Adult Children

Donna Rayhon’s daughters had consent document signed

Discuss sexual activity with adult children

- explain benefits of intimacy
- protocol to keep residents safe
Care Providers Must Strike a Balance

- Develop a policy
  - Value Statement
  - Employee training

- Utilize an Intimacy History Assessment

- Get to know the residents
  - Learn how resident expresses emotions
  - Observe reaction to intimate behavior
  - Intervene when safety becomes an issue
Do Not Resuscitate

The Out of Hospital DNR in the Long-Term Care setting
Out of Hospital DNR

- This document allows Texas residents, including those in senior housing, to declare that they do not want to be resuscitated.

- People can specify which resuscitative measure will NOT be used. The OOH DNR lists CPR, airway management, defibrillation, artificial ventilation, and transcutaneous cardiac pacing.
“Out of hospital” is defined as a “location in which health professionals are called for assistance, including long-term care facilities, private homes, and vehicles during transport.”

This document can be revoked at any time.

Parties should share wishes with adult children and wear an approved bracelet.
OUT-OF-HOSPITAL DO-NOT-RESUSCITATE (OOH-DNR) ORDER

TEXAS DEPARTMENT OF STATE HEALTH SERVICES

This document becomes effective immediately on the date of execution for health care professionals acting in out-of-hospital settings. It remains in effect until the person is pronounced dead by authorized medical or legal authority or the document is revoked. Comfort care will be given as needed.

Legal name

Date of birth

I am competent and at least 18 years of age. I direct that none of the following resuscitation measures be initiated or continued for me: cardiopulmonary resuscitation (CPR), transcutaneous cardiac pacing, defibrillation, advanced airway management, artificial ventilation.

Date

Printed name

Legal guardian, agent or proxy on behalf of the adult person who is incompetent or otherwise incapable of communication:

☐ legal guardian; ☑ agent in a Medical Power of Attorney; ☐ proxy in a directive to physicians of the above-noted person who is incompetent or mentally or physically incapable of communication.

If the person is incompetent and the person’s closest relative or the person’s physician is not known, I direct that none of the following resuscitation measures be initiated or continued for the person: cardiopulmonary resuscitation (CPR), transcutaneous cardiac pacing, defibrillation, advanced airway management, artificial ventilation.

Date

Printed name

By a qualified relative of the adult person who is incompetent or otherwise incapable of communication: I am the above-noted person’s:

☐ adult child, ☐ parent, ☐ nearest living relative, and I am qualified to make this treatment decision under Health and Safety Code §166.088.

If the adult person is incompetent or otherwise mentally or physically incapable of communication and is without a legal guardian, agent or proxy. Based upon the known desires of the person or a determination of the best interest of the person, I direct that none of the following resuscitation measures be initiated or continued for the person: cardiopulmonary resuscitation (CPR), transcutaneous cardiac pacing, defibrillation, advanced airway management, artificial ventilation.

Date

Printed name

By physician based on directive to physicians by a person now incompetent or nonwritten communication to the physician by a competent person: I am the attending physician and have:

According to his/her previously issued directive to physicians by the adult, now incompetent; or observed his/her issuance before two witnesses of an OOH-DNR in a nonwritten manner.

None of the following resuscitation measures be initiated or continued for the person: cardiopulmonary resuscitation (CPR), transcutaneous cardiac pacing, advanced airway management, artificial ventilation.

Date

Printed

Lic#
An New Area of Concern

Implantable Cardioverter Defibrillators (ICDs)

- Small device placed in chest or abdomen to treat arrhythmias. Small wires attach to the heart.

- An ICD uses electrical pulses or shocks to control arrhythmias that can cause sudden cardiac arrest
How the ICD Works

- If the ICD detects an irregular rhythm in your ventricles, it sends low-energy electrical pulses to restore a normal rhythm.

- If the low-energy pulses don't restore normal heart rhythm, the ICD switches to painful high-energy pulses for defibrillation.
ICDs and End of Life

- When the heart is failing, the ICD continues to shock the patient.
- This causes substantial distress and pain until it is turned off.
- Most patients and physicians aren’t aware of or don’t consider that the device must be deactivated.
- Many emergency physicians do not know how to deactivate the device.
“Implanted cardioverter defibrillators represent another new life-extending technology for which examination of its ethical implications lags behind its use.”

“Generally, medical organizations are more attentive to developing indications for use of new technologies than to assessing appropriate treatment withdrawal.”

Ethical Considerations

- Discussing de-activation is often overlooked when a person is first diagnosed with dementia.

- De-activation is not required for an OOH DNR order – however, it will continue to shock the resident until he or she arrives at the hospital and it is de-activated.
Considerations for Senior Housing Providers

- Independent living providers may want to consider adding a question about an ICD on the EMS emergency form.
- Assisted providers and memory care providers should be aware of those patients that have ICDs.
- In memory care, care staff should be able to recognize when a resident is dying and at risk for repeated shocks.
Q&A
You have Questions
We have Answers