



Risky Situations: Should We Negotiate With Patients?

AzSHRM
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Objectives

- Describe the use of negotiated risk agreements with patients in healthcare settings
- Relate the impact of negotiated risk agreements in liability claims
- Implement strategies to manage patients and families in risky situations

Today's Healthcare and Litigation Environment

- Patients with higher acuity levels
- Aging patient population
- Challenging economic environment
- Changes in reimbursement
- Consumerism
- Higher expectations of patients
- Focus and influence from regulatory bodies
- Severity and frequency of malpractice claims increasing

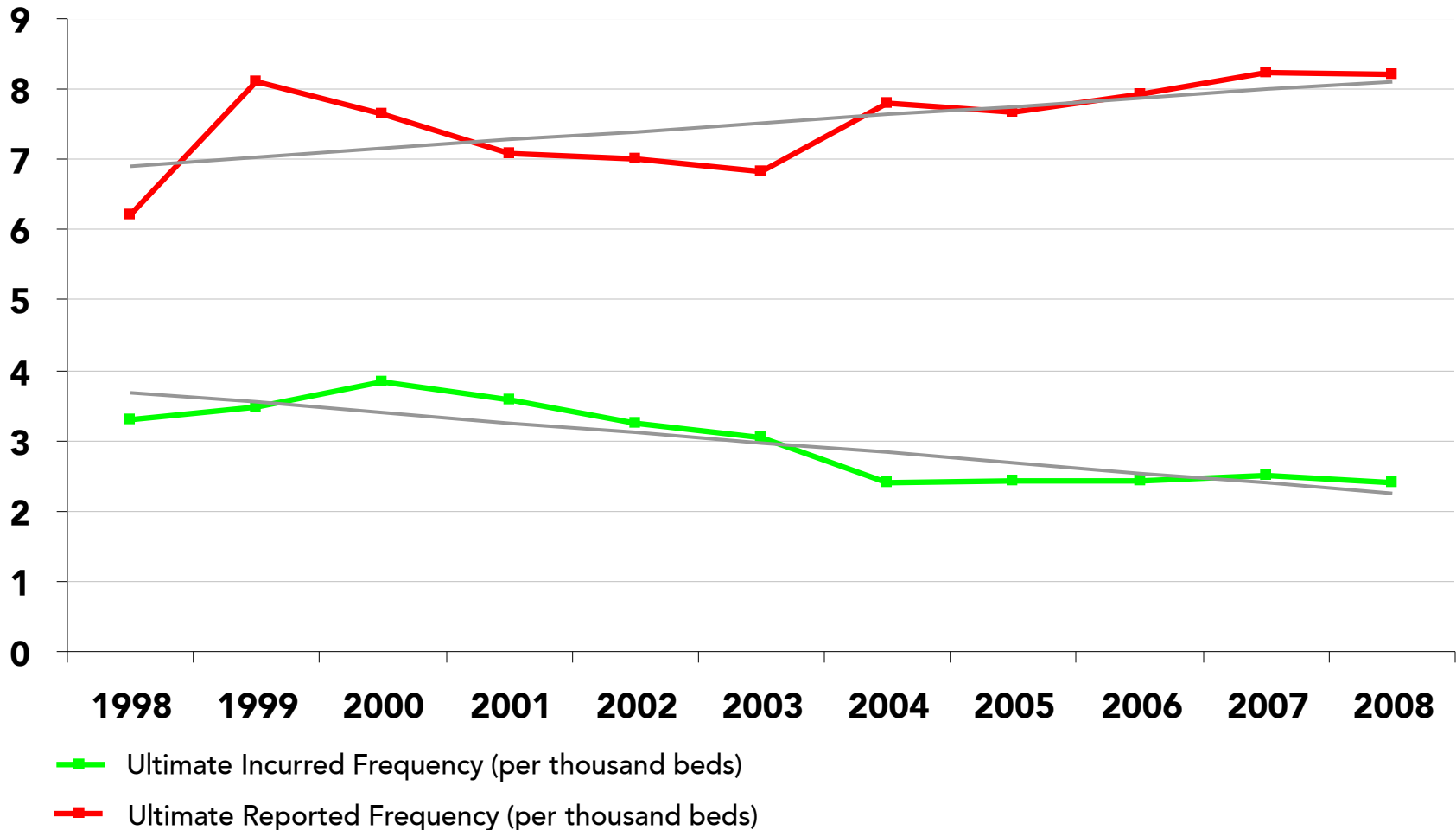
Medical Malpractice Award Trends

<u>Year</u>	<u>Median</u>	<u>Mean</u>
2002	\$ 971,250	\$4,379,033
2003	\$ 850,000	\$3,498,970
2004	\$ 870,000	\$3,697,055
2005	\$1,013,000	\$3,340,113
2006	\$1,200,000	\$3,950,827
2007	\$1,000,000	\$3,699,916
2008	\$1,200,000	\$3,722,204
Overall	\$1,000,000	\$3,770,644

Source: Current Award Trends in Personal Injury 49th Edition, Jury Verdict Research, 2010

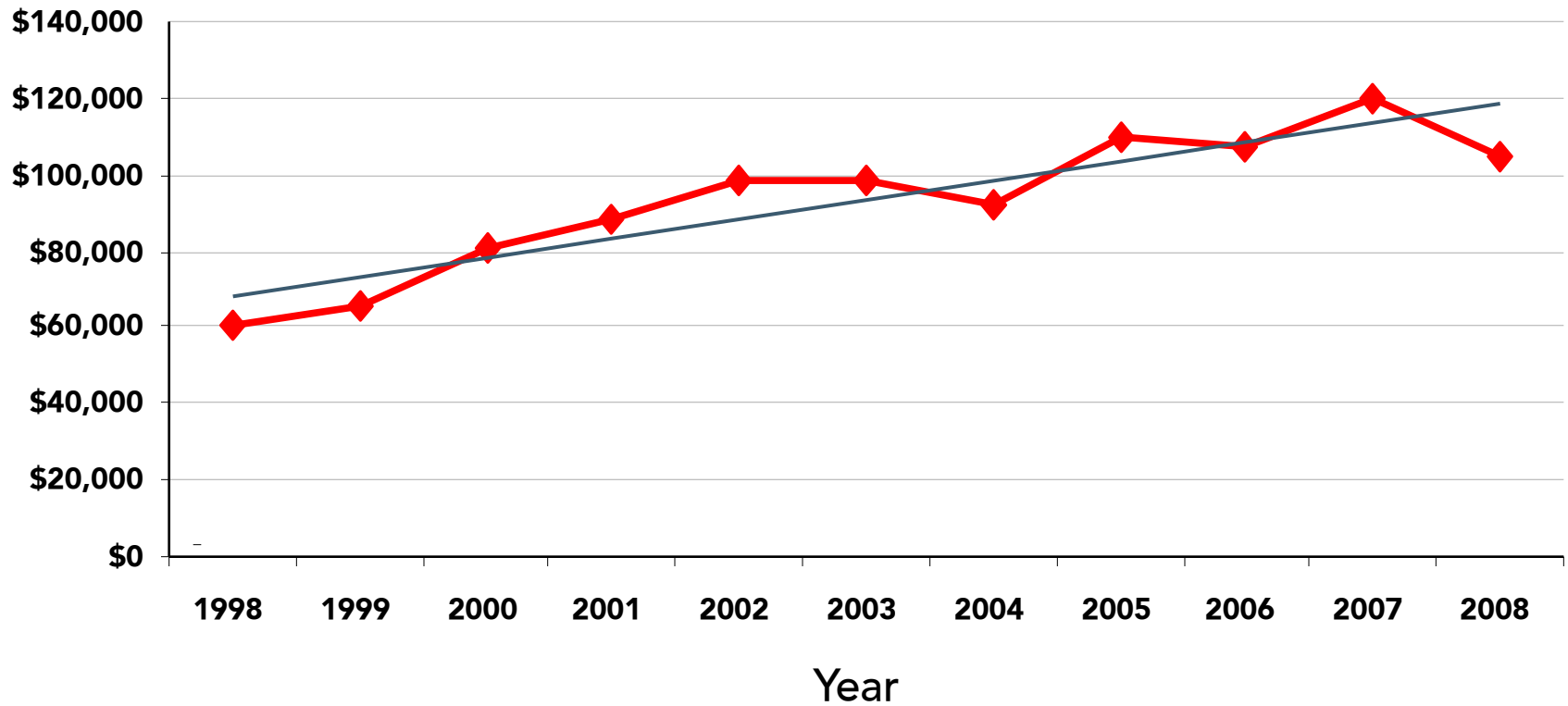
CNA HealthPro Aging Services Claims Data 2004 – 2008

Frequency of Claims per 1,000 Licensed Beds by Year Reported



CNA HealthPro Aging Services Claims Data 2004 - 2008

Ultimate Severity of Claims by Year Reported – Indemnity Payments



Consumer Bill of Rights and Responsibilities

(President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, 1997)

“Consumers have the right and responsibility to fully participate in all decisions related to their health care. Consumers who are unable to fully participate in treatment decisions have the right to be represented by parents, guardians, family members, or other conservators.”

Source: <http://www.hcqualitycommission.gov/cborr/exsumm.html> (accessed 2/17/11)

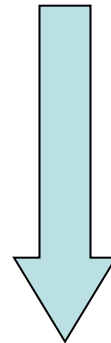
Consumer-directed Care

- Promotes personal autonomy and self-determination
- Enhances satisfaction with services
- Provides greater sense of empowerment
- Improves perception of better quality of life
- Fosters cost-effective provision of services



Source: http://hcbs.org/files/7/332/Negot_Risk2.pdf (accessed 2/18/11)

**Balancing of Consumer Rights vs. Statutes and Regulations
Governing the Provision of Care**



**Consumer-directed care > Informed consent > Negotiated risk
agreement**

Negotiated Risk Agreements (NRAs)

- Primary utilization in assisted living facilities
- Potential use in other settings and services such as long-term support services
- Other references - “shared risk,” “managed risk”, “shared responsibility”
- Definition by the Assisted Living Federation of America (ALFA):
- Formal mechanism to allow residents to make informed decisions about their care and to document that the parties have had an open and frank discussion regarding the decision and possible outcomes

<http://www.alfa.org/alfa/PublicPolicyPositions.asp?SnID=875938434> (accessed 2/18/11)

Proponents of NRAs Cite the Following Advantages

- Help identify potential risks
- Foster discussions about risk issues with patients and families
- Seek creative alternatives to lessen risks
- Formalize informal exchange between healthcare providers and patient/resident and/or family through documentation of awareness and efforts to address identified concerns



Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Opponents of NRAs Cite the Following Disadvantages

- National Senior Citizens Law Center
 - Coercive and unfair when included in admission agreements
 - Illegal and unenforceable waivers of liability
- Other Opponents
 - Attempt to avoid liability for negative outcomes
 - Force patients/residents to accept substandard care
 - Present unequal bargaining position due to compromised condition, lack of alternatives and relocation
 - Provide excuses for understaffing and retaining patients/residents to improve profits

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Concerns with Negotiated Risk Agreements

- Consumer decision making
 - Decision-making ability
 - Legal capacity
- State licensing laws
- Liability



Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Consumer Decision Making

- Decision-making ability
 - Understanding and evaluation of potential consequences of selecting an option, as well as personal values and preferences
- Legal capacity
 - Capacity to sign contracts, provide for their own needs, manage property or finances, consent to medical treatment, etc.
 - Defined by state laws and court decisions
 - Durable power of attorney and court-appointed guardians

Source: http://hcbs.org/files/7/332/Negot_Risk2.pdf (accessed 2/18/11)

Licensing, Health and Safety Laws

- State licensing laws may restrict types of services, staffing, levels of care.
- State licensing laws may impose fines and penalties for health and safety violations.
- Medicare/Medicaid program may require certain safeguards to protect patients' health and welfare.

Source: http://hcbs.org/files/7/332/Negot_Risk2.pdf (accessed 2/18/11)

Limitation of Liability

- Individual with signed NRA may be less likely to file lawsuit
- Healthcare provider may use NRA in defense of claim
- Waiver of liability sometimes included in NRA
- Enforceability of waivers of liability depends upon:
 - NRA design and implementation
 - State laws
 - Public policy
 - Contract law

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Laws/Regulations

- State laws/regulations may expressly allow/prohibit use of NRAs relating to discharge requirements.
- Federal laws may affect the use of NRAs when admission/discharge criteria are successfully challenged relating to disability and “reasonable accommodations.”
 - Americans with Disabilities Act of 1990
 - Fair Housing Act of 1968
 - Fair Housing Amendments Act of 1988

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

State Laws/Regulations and NRAs

- Provisions in 15 states
- NRA format/process
 - Required signatures
 - Part of service plan
 - Method of recordkeeping
 - Timeframe for review
- Characteristics and requirements
 - Autonomy and choice
 - Capacity to understand
 - Provider liability
 - Residency criteria and role of NRA in discharge
 - References in resident rights

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Negotiated Risk Agreement Processes

State	Resident's Signature Required	Provider's Signature Required	Defined as Part of Service Plan	Method of Record-Keeping Specified	Timeframe for Review Specified
Alaska			X	X	X
Arkansas	X			X	X
Delaware	X	X*	X	X	X
District of Columbia	X		X	X	
Florida			X		
Hawaii				X	
Illinois	X	X	X	X	X
Iowa					
New Jersey				X	X
Ohio				X	
Oklahoma				X	
Oregon			X	X	X
Vermont	X	X	X	X	
Washington	X		X	X	X
Wisconsin	X		X		X

* Provider's signature required only if the agreement is part of the service plan.

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Characteristics of States' NRA Provisions

State	NRA Required	Rules Reference Autonomy & Choice	NRA Process/Format Defined ¹	Capacity to Understand NRA is Addressed ²	Provider Liability Addressed ³	Residency Criteria Addressed ⁴	Role of NRA in Discharge Defined ⁵	Residents' Rights Reference NRAs ⁶
Alaska		X	General	---	---	General	General	General
Arkansas	X*	X	Specific	General	---	Specific	Specific	Specific
Delaware		X	Specific	Specific	Specific	Specific	---	---
District of Columbia		X	Specific	Specific	General	---	---	Specific
Florida			General	General	---	---	---	---
Hawaii		X	---	---	---	---	---	---
Illinois		X	Specific	Specific	General	---	General	Specific
Iowa	X*	X	---	---	General	---	---	---
New Jersey		X	Specific	General	Specific	---	---	---
Ohio			General	---	---	---	General	Specific
Oklahoma	X*		General	---	---	---	---	---
Oregon		X	Specific	Specific	---	General	General	Specific
Vermont	X*		Specific	Specific	Specific	---	Specific	---
Washington	X*		General	Specific	Specific	---	---	Specific
Wisconsin	X	X	Specific	Specific	Specific	Specific	Specific	Specific

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Examples of State Regulatory Provisions

- **Arkansas**
 - Compliance agreement – written plan, shared responsibility, specific process outlined
- **Oregon**
 - Managed risk - process/plan, reviewed quarterly
- **Wisconsin**
 - Risk agreement – jointly signed at occupancy

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Elements of Negotiated Risk Agreements

- Circumstances
 - Deviance from accepted standard, protocol, policy
 - Lack of consensus on course of action
 - High risk of adverse outcome
- Goals
 - Empower individual to exercise choice
 - Identify preferences
 - Perform assessment of potential harm due to preferences
 - Identify potential outcomes
 - Seek consensus of decision
 - Document negotiation and decision process
 - Provide acknowledgement of discussion

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Elements of Negotiated Risk Agreements - Sample

- Cause for concern: _____
- Person's preferences: _____
- Possible consequences for preferences: _____
- Possible alternatives to minimize risk: _____
- Final consensus reached by all parties: _____
- Frequency of follow up and reassessment: _____
- Staff involved: _____
- Signatures:
Names: Relationships: Dates:

**Sample Negotiated Risk Agreement
A Study of Negotiated Risk Agreements
in Assisted Living: Final Report
February 2006**

Source: <http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm> (accessed 2/18/11)

Implementation Considerations for NRAs

- Updated knowledge of applicable state statutes/regulations
- Review of marketing materials, Website and contract terms
- Adequate staffing based upon patient population needs
- Policies/procedures address level-of-care changes, discharge criteria
- Policy and staff training, if NRAs allowable
- Policies/procedures to address high-risk issues (falls, wandering, refusal of care, etc.)
- Programs and staff training for patients with cognitive impairment
- Communication/negotiation skills and training
- Collaboration with patient advocate, risk manager, legal counsel
- Communication with state ombudsmen, as applicable

Case Study # 1

- 82 year-old woman admitted to assisted living facility
- History of stroke, memory loss, speech and balance difficulties
- Mobile, no assisted walking device, balance concerns, some falls but not in recent past
- Daughter (durable power of attorney) signed residency agreement upon admission
- Six months after admission, two falls in one month
- Initiated fall protocols, including bed and chair alarms
- One month later, daughter wanted bed alarms removed
- Negotiated risk agreement signed by daughter
- Four additional falls with noncompliance of safety measures
- Developed dehydration, urinary tract infection, admitted to hospital, treated and returned to the facility

Case Study # 1

- What do you think could be done to manage this situation?
- What measures can be taken to address health, safety and communication concerns?
- Should another negotiated risk agreement be initiated? If so, what steps should be taken?

Case Study # 2

- 45 year-old man with history of debilitating neuromuscular disease is admitted to hospital for pneumonia
- Wheelchair bound with history of pressure ulcers
- Noncompliant with turning and heel protection measures
- Pressure ulcers developing and worsening
- Patient seeks support from nursing/hospital staff

Case Study # 2

- What do you think could be done to manage this situation?
- What measures can be taken to address health, safety and communication concerns?
- Should a negotiated risk agreement be initiated? If so, what steps should be taken?

Resources

- A Study of Negotiated Risk Agreements in Assisted Living
<http://aspe.hhs.gov/daltcp/reports/2006/negrisk.htm>
- Assisted Living Federation of America
<http://www.alfa.org/alfa/PublicPolicyPositions.asp?SnID=875938434>
- Negotiated Risk Agreements in Long-Term Support Services
http://hcbs.org/files/7/332/Negot_Risk2.pdf
- Sample Negotiated Risk Agreement
<http://www.med-pass.com/Docs/Products/samples/a11019sp.pdf>

Questions?