

I. Introduction

Slide 1:
Title

A. My topic: Risk and Choice – Negotiated Risk Contracts: Assuming Risks to Secure Benefits of Consumer Direction

II. What is a Negotiated Risk Contract?

A. Agreement between person or person's legal surrogate (guardian, DPOA) and provider

B. Shifts legal responsibility for injuries or property damage caused by provider doing what person wanted, as set forth in the agreement

C. Based on informed consent: knowing, voluntary decision to waive liability for injuries, knowledge of risks and alternatives

D. Example:

1. High heels – stilettos
2. pca objects contrary policy (balance problems)
3. PCA's concern is liability for falls
4. Ordinary negotiations don't work
5. Discuss risks and alternatives
6. Sign agreement: Achieve goal
7. If fall happens, can't sue provider if the agreement is enforceable – person takes responsibility for consequences of decision-making

Slide 2: Yellow
Arrow

Slide 3:
responsibility for
consequences

E. Why use negotiated risk contracts?

Slide 4: Key
Issues

1. Lets the person get the kind of supports he or she wants, even if the supports are too “risky” for the provider to otherwise provide &
2. Gives support team structured opportunity to make sure that person or surrogate decision-maker knows risks and alternatives

III. How can negotiated risk contracting overcome objections to consumer direction?

A. Major practical impediment to consumer direction is provider reluctance to depart from policies and practices

B. Objections fall into three categories:

Slide 5: Provider
Objections

1. **Liability:**
 - a) **Will I be liable and have to pay?**
 - b) **Will court throw out the agreement and make me pay anyway?**
2. **Licensing:**
 - a) **Will I lose my license?**
3. **Competence or capacity:**
 - a) **Can person make this decision?**
 - b) **What about surrogates and family?**

IV. Looking Licensing and Effectiveness of agreement first: public policy issues

Slide 6:
Licensing &
Public policy

A. Licensing & state health and safety regulations: generally can't be altered by a contract (staff ratios, for example)

1. Can't put nursing home patient in residential care home without adequate supports, even if patient wants to accept that risk, prohibited by state law
2. BUT: Can use agreement to justify formal waiver of regulations – NH DD regulations saying that standards can be altered if legitimate service considerations and just as safe as standards

B. Effectiveness of agreement not to sue provider

1. Courts don't like liability waivers,
 - a) Injured person with disabilities v. provider who did something it knew was risky, will find a way to make sure the person is compensated
 - (1) *Strictly construe agreement (as narrow as possible) – covered injuries when shoes were put on, not walking in shoes “I will not sue if I am injured because provider helped me wear high heels.”*
 - (2) *Void agreement*
 - (a) Unequal bargaining power (factual matter)
 - (b) Special relationship – duty of public service (matter of law- may require change to state law to fix in some cases)
 - (c) Capacity?
 - b) Good in individual case, but less valuable to overcome provider objections to personal preferences in day-to-day matters.

2. How to make them enforceable?

a) Court concerns: Follow good process to address:

(1) Strict interpretation

Slide 7: Elements

(a) Formal, written, signed, and clear! - say “negligence” if that’s what you mean to waive

(2) Unequal bargaining power – not foisted on person

(a) Knew what getting into: Informed consent (knowledge of risk and alternatives)

(b) Equal ability to change terms:

(i) Opportunity to confer

(ii) Review provisions

Slide 8: Contract contents

(3) Special relationship:

(a) may need laws to change this,

(b) emphasize value of consumer direction by saying so in contract – quid pro quo

V. Capacity & authority

A. Make enforceable & deal with provider concerns

1. Legal capacity v. decision-making ability

Slide 9: capacity and decisions

a) Capacity needed to contract legally

(1) Presumed in adults, overcome by court-order

(2) Not present in family

b) D-M desirable to negotiate risk (enhanced through informed consent & formality of process)

2. Authority

Slide 10:
Capacity and
authority

- a) **Make sure guardian/DPOA has authority in state law**
- b) **Example: withholding treatment in NH requires court order**

VI. Review examples

Slide 11, 12, 13
Cases, Examples
A&B

VII. Questions, conclusion, website: www.hcbs.org/reports.htm