

**Resident Sexual Consent in Assisted Living:
Considerations to Reduce Your Community's Risk**

NCAL's Risk Management Work Group

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OVERVIEW

Assisted living communities are the homes to an ever-increasing number of people who seek a home-like environment in a residential setting that provides services and demonstrates a commitment to individual autonomy and quality of life. Sexual health is part of quality of life for many assisted living community members and a means to express themselves. Cultivating a positive attitude and increasing the level of comfort by staff in approaching sexuality in the community will decrease stress and agitation for the staff and the resident. Philosophies and policies around sexual consent may be complex, and opportunities for staff awareness and sensitivity may be missed due to lack of education and understanding. Consequently, it is challenging to manage issues that arise from sexual relations between community members and their expectations and needs, as well as those of their families.

NCAL's Risk Management Work Group prepared this checklist for assisted living communities to be prepared in managing issues that may arise regarding resident sexual consent. Sexual consent for assisted living residents requires ensuring resident rights regarding confidentiality, the right to make independent choices, and the right to private unrestricted communications with others, which must be balanced with concerns about resident capacity to give consent. Different issues arise in various contexts, including two residents with capacity to give consent, one resident with capacity and one without capacity (or where capacity changes), between married and unmarried couples, and between staff and a resident. Generally, communities should review relevant state requirements, have policies on how to identify and address issues around sexual consent, and provide staff education on these issues. Including these issues as part of any mentoring program(s) is also suggested.

The following checklist is not intended as legal advice and should not be used as or relied upon as legal advice. It is for general informational purposes only and should not substitute for legal advice. Always seek knowledgeable counsel for advice that is tailored to the actual facts and circumstances and takes into account all relevant laws and regulations.

KEY CONSIDERATIONS

The following is a checklist of considerations and tasks for providers to ensure awareness and respect of the sexual rights of residents in assisted living communities, while also protecting against harmful situations.

1. State Requirements

- Identify relevant state requirements for assisted living, including those that cover:
 - Employee and resident sexual relationship
 - Specification of who can or must assess competency of residents to make decisions regarding sexual relationships and whether specific forms are necessary for assessing competency
 - Consider role of the physician or other licensed staff
 - State may require certain forms
 - Documentation in the service plan
 - Required employee training
 - Residents' rights
 - Requirements specific to memory care communities or residents with Alzheimer's or dementia
 - Fair Housing Act, which varies by state and may include a prohibition on discrimination based on sexual orientation and gender identity

- Consult:
 - General Counsel
 - Your state NCAL association
 - Resources from the state agency that licenses assisted living

- Review your communities' internal policies, guidelines, and training curriculum to ensure best practices and compliance with state requirements

2. Ability to Consent

- Assess each resident's ability to consent to sexual relations, for which considerations should include:
 - Mental capacity
 - Degree of physical involvement in the relationship
 - Length of the relationship
 - Observation of negative effects (e.g., physical or emotional)
 - Resident's rights
 - If applicable, the legal representative's comfort level with the relationship

- Involve a physician to assess resident's ability to consent
- Ensure an ongoing process for re-evaluation to determine potential changes in condition and/or continued ability to consent

3. Employee Awareness/Training:

- Identify and comply with state requirements regarding staff trainings on sexual relationships and consent
- Create written guidelines for staff that cover:
 - How to address various situations that can arise, including a description of which staff have designated responsibilities
 - Community policy on sexual activity and consent in various circumstances with sensitivity training, including relationships that are: resident and resident, resident and employee, or resident and family
- Ensure staff training covers:
 - Community policies regarding sexual activity and consent
 - Relevant resident's rights, including to privacy
 - Resident's service plan and interventions related to the sexual relationship
 - How to identify negative effects
 - Reportable events and who to report observations to, if necessary
 - Resident's cognitive ability and assessing when decision-making may be compromised
 - Alerting competent residents who seek relationship from a cognitively impaired resident, including about the potential for dependent adult abuse
 - Addressing a potential relationship between two residents that are both cognitively impaired, as well as communications with their families or guardians
 - How to communicate with families about resident's rights
 - Sensitivity training on adhering to company policy, particularly if company policy conflicts with staff's personal beliefs

4. Appropriateness of the Relationship

- Spouse or long-term partner
- Length of relationship
- Exclusive relationship or polyamorous
- Any negative effects

5. Family

- Consider family comfort level with the relationship, subject to resident's rights related to confidentiality, HIPAA, and privacy regarding sexual orientation

6. Harassment/Bullying

- Determine if there is harassment from other residents, residents' families, staff, or others and identify steps to protect and provide a safe environment
- Train staff to identify and report harassment/bullying and their effects (e.g., threats of move outs, refusal to eat at same table, public displays of affection, etc.)
- Determine whether choice in roommates is needed
- Provide a safe environment
 - Including for LGBT residents
- As needed, seek information on harassment from state Adult Protection Services or Ombudsman

7. Special Considerations for Inappropriate Relations Between Employee and Resident

- Address in company policy and employee guidelines that such a relationship is not appropriate
- Community leadership should seek legal counsel
- Analyze the potential for the relationship to be considered dependent adult abuse

CONCLUSION

These various checklist items can assist communities to facilitate sexual expression in a manner consistent with state guidelines, policies and practices. There is no single answer that can address every sexually-related situation that may arise. Adopting an individualized approach to each situation and a focus on the needs and preferences of the community member will address their rights. Having a meaningful dialogue about sexuality in adulthood and among individuals with diminished capacity will further the autonomy of our community members and increase community awareness about sexuality.