LEGAL ISSUES SUMMARY
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MARKETING YOUR ASSISTED LIVING COMMUNITY:
AVOIDING RISKY PITFALLS

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EXECUTIVE SUMMARY

Providers of assisted living services market their communities in many ways; through written materials, web based advertisements, testimonials and broad based advertisements to name just a few. These marketing materials, once created, circulate beyond the control of the operator. The materials create a look, feel and impression of the community and sometimes make implicit, if not explicit, promises of results. Whatever the purpose of your marketing materials, you simply must have the ability to stand by them. If not, those materials can create exposure for operators. This legal brief is designed to identify areas of legal exposure and to offer you tools to mitigate your risk by working with your marketing team toward a mutual goal of accurately communicating what you provide to your residents, setting reasonable expectations for the residents, and mitigating risk.

NCAL would like to extend a special thanks to Lane Powell for developing this issues brief document for NCAL’s membership.

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I. THE FAIR HOUSING ACT

The Fair Housing Act (hereafter “the Act”) makes it unlawful to discriminate in the sale, rental, and financing of housing because of race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. 3600, et seq. Section §3604(c) of the Act makes it unlawful to make, print, or publish, or cause to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling, that “indicates” any preference, limitation, or discrimination violating the provisions of the Act. Any material or marketing used to promote a community is covered by the Act. These include print material, television, radio and other electronic media, brochures, pamphlets, annual reports, billboards, pictures of the facility posted in a sales office, specialty marketing devices, and even business cards.

Because Section 3604(c) of the Act bans any housing-related communication that “indicates” discrimination, courts have adopted essentially a strict liability standard with respect to discriminatory advertising. In other words, because a legal analysis turns on what a particular advertisement “indicates” to the ordinary reader, courts are usually not concerned with whether the message was intended to be discriminatory but with whether the advertisement indicates a prohibited “preference” on its face. Accordingly, the use of language and imagery in advertising that can be construed or that tacitly communicates a preference or limitation with respect to race, color, religion, sex, handicap, or national origin are deemed to violate the Act. However, the prohibitions of the Act regarding familial status do not apply with respect to housing for older persons. 42 U.S.C. § 3607(b). Accordingly, senior housing providers can indicate a preference for older adults in compliance with the “55 or older” and “62 or older” provision of the Act.

In general, the Act and related cases, commentaries and regulations address three particular areas of concern with respect to advertising content that may violate the provision of the Act. These areas are (1) the use of problematic language; (2) the use of human models; and (3) other questionable practices.

A. Problematic Language.

Use of certain terms or phrases that convey a discriminatory preference may be considered unlawful under the Act. However, it is acceptable for communities to describe themselves and their activities, but not the preferred prospective or “hoped for” resident. By doing so, the community can avoid the implications that admission may be limited based upon
the applicant’s ability to participate. For example, an advertisement describing current prospective residents as “active” may imply that disabled residents are unwelcome, while a description of “activities” offered at the community would pass muster.

Guidelines published by the federal Department of Housing and Urban Development (hereafter “HUD”) lists numerous words and phrases that could be interpreted as conveying illegal discrimination under § 3604(c) of the Act. These words and phrases include terms related to designations of race, ethnicity, religion, sex, and disability. Advertisements should not contain explicit exclusions, limitations, or other indications that protected classes are not welcome or are exposed to different criteria than other potential residents.

HUD guidance prohibits the use of language that could directly or indirectly be interpreted as conveying a discriminatory intent. Examples include:

- Adjectives describing the community or preferred resident in racial, ethnic, or sex-based terms;
- Words indicating preferred race, color, religion, natural origin, sex, disability, or familial status; and
- Explicit exclusions indicating discrimination based on disability (e.g., “no wheelchairs”).

Communities must also be careful not to convey perceived religious discrimination. Any examination of perceived religious discrimination must undergo a preliminary determination as to whether the community is covered by the Act’s rather narrow religious exception. If the community does not qualify under the narrow religious exclusion, HUD has specifically determined that “advertisements should not contain an explicit preference, limitation, or discriminate on account of religion.” According to HUD, words and phrases to avoid include “Jewish Home,” and indeed any reference to the words “Protestant,” “Christian,” “Catholic,” or “Jew” in the designation of a dwelling or its residents. Similarly, HUD warns against the use of symbols or logotypes which imply or suggest a preference for members of a particular religion. HUD also suggests that the use of religious symbols, such as a cross or a Star of David without further explanation could communicate a discriminatory preference. HUD has also opined that directions to the community that refer to a synagogue, congregation, or parish could also indicate a religious preference.
Therefore, although a retirement community may very well be sponsored by religiously affiliated groups or ethnic and cultural societies, advertising should be written to make it clear that the message being conveyed in the advertisement is not unlawful discrimination. For example, display of the Fair Housing logo within the advertisement and a corresponding statement that persons of all faiths are welcome can dispel claims of religious discrimination.

In addressing communities with religious names, HUD has taken the position that:

Advertisements which use the legal name of an entity which contains a religious reference (an example, Roselawn Catholic House) . . . standing alone, may indicate a religious preference. However, if such an advertisement includes a disclosure (such as the statement “This house does not discriminate on the basis of race, color, religion, national origin, sex, handicap, or familial status”), it will not violate the Act.

Thus, while communities must use caution in describing themselves in religious terms, these potential problems can be mitigated by clearly distinguishing that the community does not discriminate based on religion. However, mitigation or explanation is not required with respect to a description of the community or service offered. HUD has thus determined that descriptions of communities and services are generally permitted, even descriptions indicating that the facility has a “chapel” on the campus or that “kosher meals” are served daily. HUD does not see such descriptions as violating the Act as they “do not on their face state a preference for persons likely to make use of these facilities or services.”

B. Use of Human Models.

HUD advertising guidelines cite the “selective use of human models” as a potential violation of §3604(c). The use of human models in advertisements raises the issue of whether the community is communicating a preference for one group of persons or another. In determining whether an illegal preference is being communicated, both single ads or entire multi-ad campaigns will be scrutinized.

For example, in Sanders v. General Service Corporation, the court scrutinized a housing complex’s pictorial brochures and its newspaper advertising campaign. Sanders v. General Service Corp., 659 F. Supp. 1042 (E.D. VA 1987). The community’s 68 advertising photographs contained “a virtual absence of black models,” thus indicating a racial preference. Id. at 1058.
In order to avoid allegations of “preference,” communities should ensure that human models used in advertising reasonably represent minority and majority groups in the surrounding areas. Models should portray a mix of racial groups as well as sexes. The community should also ensure that the use of human models in advertisements include models with disabilities in order to avoid allegations that the community is attempting to communicate a preference for non-disabled residents. All models should be of equal social standing. Communities must avoid portraying minorities or women in subservient positions.

C. Other Advertising and Marketing Techniques.

Advertisers and marketers select advertising media that is intended to reach a specific market. In some instances, this effort to target a specific audience can result in claims of illegal discrimination.

HUD guidelines specifically address the possibility that the selective use of advertising can lead to discriminatory results in violation of the Act. HUD guidelines provide two relevant examples for how marketing selection can potentially violate the Act. One marketing technique that can potentially violate the Act is distribution of the advertisement within a limited geographic area. If the geographic area is not ethnically or racially diverse, a conclusion can be drawn that the advertiser is indicating a preference in violation of the Act.

Another marketing technique that may violate the Act consists of advertising in newspapers of limited circulation which are mostly advertising vehicles for resettling particular segments of the community. By limiting advertising to such media and failing to publicize to the broader community as a whole, an implication can be drawn that the advertiser is stating a preference for a particular group or class.

Additionally, limiting advertising to media that uses or focuses on one particular language or ethnic preference can also be considered a violation of the Act.

Thus, communities should not completely exclude marketing to areas with diverse populations. For example, marketing that is targeted to certain zip codes may be problematic if the campaign is not also balanced with similar ads to a broader population.

In attempting to determine whether an advertising campaign suggests a preference for a particular type of resident, advertisers should ensure that the content as well as the circulation of the advertisement is sufficiently diverse. Communities engaged in advertising should take into
II. RISK MANAGEMENT.

It is common knowledge that over the past decade, the Plaintiffs’ Bar has taken great interest in suing providers of senior housing and senior care. Plaintiffs’ attorneys initially focused on established and emerging tort theories as their basis for recovery against senior housing and care providers. However, with the advent of tort reform in many jurisdictions, the Plaintiffs’ Bar has looked to new legal theories that are not subject to the tort reform caps, that they feel “artificially” limit the potentially recoverable damages.

More recently, plaintiffs’ attorneys have focused on legal theories such as breach of contract, violation of Consumer Protection Act laws, negligent and intentional misrepresentation, and fraud. In advancing these theories, the Plaintiffs’ Bar is attempting to use senior housing and care providers’ own words against them by focusing on descriptions and depictions used in advertising campaigns and brochures.

Senior housing and care providers are now much more attuned to the verbiage and descriptions they use in their ad campaigns. There has been a conscious attempt to stay away from language or descriptors that can later be construed as ambiguous, open-ended promises, or phrases promising care that meets or exceeds specific standards. Use of such words has proven to start a provider down the slippery slope toward suits by newly energized plaintiffs’ attorneys.

Plaintiffs may use the language in an advertising brochure to try to strengthen a negligence claim. In one case, the family of an elderly resident who died after drowning in a hot-tub sued the facility offering independent and assisted living for both negligence, neglect, breach of contract, and violating Washington’s Consumer Protection Act. Plaintiffs argued that the facility’s advertisements, and promises made by marketing staff, emphasized that they were “skilled providers, properly staffed, supervised, and equipped” to meet the needs of all residents, when, at least as to the resident who died, they were not. McKay v. Lifestyles Senior Managers LLC, 2004 WL 5436759, *2 (Wash. Sup. Ct. 2004). Although the Consumer Protection Act and breach of contract claims were dismissed prior to trial, a jury found for the plaintiffs on the negligence claim. McKay illustrates how advertising language and statements by marketing
staff may be employed for multiple theories of recovery. Other examples of where phrases from the brochures of assisted living communities have been cited in plaintiffs’ complaints include:

- Arden Court has “a highly trained staff, specially trained and educated to deal with Alzheimer’s patients.” Its staff members “receive continual updates and refresher courses,” the staff provides “24-hour supervision” and care of Arden Court residents, and Arden court has “high staffing ratios” and is a “safe environment.” Beaty v. Manor Care, Inc., WL 24902409, *2–3 (E.D.Va., 2003).

- Rosewood Manor provides “high quality care” to its residents and has: (1) a nurse, “not unlike a maitre d,’’ who is available in the dining room to look after the quality of the food and service and well-being of the residents during each meal; (2) a unique system of nursing shifts, with overlapping shifts in the morning, so that residents can be greeted, changes in condition can be reported and morning routines completed; (3) registered nurses and licensed practical nurses on duty day and night, seven days a week; and (4) a physician giving regular reports on the medical condition of the patients. Corley v. Rosewood Care Center, Inc. of Peoria, 388 F.3d 990, 996, 1008 (7th Cir. 2004).

- Leisure Lodge Nursing Home and Healthcare Centers will “care for your loved ones” and “provide the best nursing care available.” Mulligan v. Beverly-Enterprises Texas, Inc., 954 S.W.2d 881, 882 n.3 (Tex. App. 1997).


The court did not impose liability upon any of these long-term care communities based on the language in their brochure. However, it shows the language the Plaintiffs’ Bar will seize upon in bringing an Unfair Trade Practices or Consumer Protection Act claim.

Providers can limit their exposure to this recently developed plaintiffs' tactic by following five basic rules in preparing and circulating their advertising materials, websites and brochures:

1. **Sensitize Your Marketing Department to Risk Management Issues Early.**

   The marketing department's objective is to present a provider and its communities in the best possible light. There is nothing inherently wrong or problematic with this desire. However, given the sales-oriented nature of many marketing representatives, they may become a little over-zealous in their use of overstatement and flowery language to portray a facility's attributes and amenities. A risk manager and/or an administrator should be tasked with reviewing all proposed marketing material and brochures to ensure that they do not overstate what the
community is capable of doing, or that it can or will provide services that it does not. Plaintiffs’ attorneys take great joy in presenting videos, brochures and other marketing materials that are “over the top” to a jury. So, the best advice is to use plain language free of promises.

2. **Avoid “Meets/Exceeds Standards” Language.**

Many providers’ brochures and advertising materials contain phraseology stating or suggesting that a provider “meets or exceeds” government regulations or standards. This type of statement is fodder for a plaintiff’s argument that a community’s citation by a surveyor or other governmental agency demonstrates the inherent misrepresentation of such statements. Similar problems arise from vague and open-ended promises of the type of care provided. Words such as “quality,” “professional,” “superior” and “pre-eminent” are frequently cited in plaintiffs’ claims and litigation. Providers should focus advertising efforts on the services that they provide to prospective residents, rather than making the general statement that they provide “quality” or “professional” care.

3. **Keep Advertising Materials for Independent Housing and Assisted Living Different.**

Much of the general public is unaware of the differences between independent retirement housing and assisted living apartments. To many, the two are identical, or nearly identical. The marketing challenge is to make clear they are different and provide different service. It is in a provider’s best interest to prepare separate brochures for independent retirement housing and assisted living facilities, even if the two different types of residents actually live in the same building or buildings. You can distinguish the products and services provided and limit some confusion. Plaintiffs’ attorneys frequently seize on representations regarding the assisted living services provided, even where a person enters the facility as an “independent resident.” The public’s (and a court’s) limited or non-existent knowledge of the differences between the two types of housing, will make it difficult to defend claims brought by independent residents who are only provided brochures describing assisted living apartments. In the event a provider chooses to produce only one brochure, that brochure should make it clear that independent housing and assisted living units co-exist on the provider's property and separately describe the services and amenities provided in each setting.
4. **Use Realistic “Daily Life” Orientation Depictions.**

Providers can blunt claims of misrepresentation, breach of contract and fraud by preparing and showing “reality-based” orientation depictions such as videos and DVDs to prospective residents and their families prior to the execution of admission documents. Production of these depictions should have significant input from the administrative staff and those that have involvement in the day-to-day operations. It is a good practice for a community to have the prospective resident and/or his or her family view the depiction on site. Some providers give the depiction to the prospective resident or the family to review at their leisure. Under either circumstance, the best practice is to have the resident and/or an authorized family member sign an acknowledgement that they have viewed the depiction and understand both the services and limitations of services that the community is capable of providing. This provides the facility/community with written documentation that the resident and/or his or her family have been fully educated about the available range of services and the limitations of those services prior to signing any admission documents. Importantly, the trier of fact in any subsequent lawsuit can view the depiction and see exactly what representations were made by the provider at the time the resident entered the community.

5. **Give Written Notice to Residents of Any Changes/Reductions in Amenities or Services.**

It is not unusual, especially in a period of a tightening economy, for providers to alter, modify or reduce the range of service they provide once a resident has moved in to a community or facility. Many states have specific regulatory notice requirements for such changes. However, even if notice is not required as a regulatory matter, good risk management dictates ample notice should be given. Well-documented and advance notice of a change in service or amenities can assist in defending a later claim that the resident was lured to the community with false promises or representations that were immediately made false by changing the terms of the residency. Providers can save themselves significant liability exposure by being more vigilant in documenting any changes to the type of housing and/or the types of services and amenities it is capable of providing to its residents, and providing written notice of the same to the residents.

To be sure, there are many other practices that can assist providers in limiting exposure created by their advertising efforts. However, providers that take care to follow the five basic
steps outlined above will minimize the “appearance” of misrepresentation as defendants in the plaintiffs’ attorneys new world of “eat your own words” litigation.

III. USING RESIDENT IMAGES AND TESTIMONIALS IN MARKETING MATERIALS.

A. Consider Whether HIPAA Applies.

In designing and implementing a marketing program, senior housing and care facilities should be aware of state and federal laws granting privacy rights to residents. In particular, regulations under the federal Health Insurance Portability and Accountability Act (hereafter “HIPAA”) impose restrictions on using a resident’s name, image or other identifying information in marketing materials without the resident’s prior authorization.

HIPAA applies to “covered entities,” which would include a senior housing or care facility that both (a) provides health care and (b) conducts one or more HIPAA-covered transactions electronically. “Health care” is very broadly defined to include preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, as well as counseling, assessments, and procedures that affect the physical or mental condition, or functional status, of the body. All skilled nursing facilities and many assisted living communities provide health care as defined by HIPAA.

There are ten HIPAA-covered transactions, which, if conducted electronically, will satisfy the second part of the “covered entity” test. In the context of senior housing and care facilities, the transactions that are most likely to be implicated are electronic billing for services (e.g., to a private health or long-term care insurer or to Medicare or Medicaid) or electronic referrals to providers. It is important for each facility to conduct its own analysis of whether it satisfies both tests to be a “covered entity,” and, if it does, to adopt policies and procedures for HIPAA compliance. Many providers of assisted living services may assume they are “covered entities” but the results of a thorough analysis may be surprising. Consult your legal counsel on this issue.

If the facility is a covered entity, it may not disclose identifying information about a resident for marketing purposes unless the resident has signed a HIPAA-compliant written authorization before the information is disclosed. Identifying information includes the obvious (e.g., a resident’s name) as well as the less obvious (e.g., a resident’s photograph, even if the
resident’s name is not included with the photograph). Particular areas of concern are photographs and testimonials in marketing brochures, videos, and Web sites. HIPAA imposes penalties on a “per disclosure” basis, so the monetary fines can add up rapidly, depending on how broadly the marketing materials are disseminated.

B. Always Obtain the Resident’s Permission Before Using Their Image or Testimonial.

For an authorization to comply with HIPAA, it must be revocable by the resident at any time. Obviously, the facility does not have to “un-do” any prior disclosures made while the authorization was in effect, but the facility must immediately stop any further disclosures of that resident’s identity once the authorization is revoked. Because of the revocability requirement, brochures and other marketing materials can become immediately obsolete as soon as any resident featured in them revokes an authorization. As a practical matter, this means using “de-identified” information in marketing materials, including “stock” photos and testimonials that do not identify the resident on whose behalf the testimonial is given (e.g., attributing the testimonial to “resident,” “child of resident,” or similarly neutral references). Even if HIPAA does not apply, you should obtain a release. Many states protect privacy and publicity rights separate and apart from HIPAA. To avoid any misunderstanding as to what you intend to use in your advertising and the extent of that use, you should get an acknowledgement of release from the resident. Consult legal counsel on the precise language of such a release.

V. FRAUD, ABUSE, AND ANTI-KICKBACK

A provider who benefits from federal funds should also consider federal fraud and abuse laws when formulating promotional materials. Typically these laws present themselves in areas such as billing, coding, and relationships with medical providers, ambulances, hospitals and pharmacies. However, the seriousness of these federal laws require that providers be aware of them in all areas of their businesses, including advertising.

Given the types of representations found in advertising or promotional materials, the most relevant of these federal laws involve kickbacks and, to a lesser degree, physician self-referrals. In a broad sense, both focus on relationships. In a nutshell, anti-kickback laws prohibit knowing and willful solicitation or receipt of or offer of payment of renumeration, in return for
referring a federal program patient or to induce the purchasing, leasing or arranging for or recommending purchasing or leasing items or services paid by the program. Physician self-referral laws and regulations, also known as the Stark regulations, state that when a physician (or an immediate family member of such physician) has a financial relationship with an entity, then the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under Medicare (and to some extent Medicaid).

Coupled together, these laws govern the relationships providers have with referral sources or vendors of supplies and equipment. Simply put, these laws prohibit providers from unfairly profiting from these relationships at the expense of federal programs. For example, an assisted living provider may not be permitted to accept payments or gifts from a home health agency or pharmacy in exchange for directing all of its resident needs to that particular company. Receiving impermissible discounts from certain types of vendors or providers is another example of potentially illegal conduct.

A detailed discussion of these laws is beyond the scope of these materials, but providers can, and should, scrutinize their promotional materials and remove any representations touting cozy relationships with other providers and suppliers. For example, looking to impress a potential resident, a provider may be inclined to boast of its “connections” with equipment suppliers, medical providers, or area hospitals – explicitly or implicitly suggesting that these “connections” would deliver the most value to the resident. A provider may also be tempted to promise that as a result of its dominant market share, the provider will be able to pass along the benefits of volume discounts from vendors and suppliers.

Whether or not the types of arrangements suggested by these examples are permissible under the law is complicated and depends greatly on the individual circumstances. However, due to the seriousness of the kickback and referral prohibitions, representations suggesting that the provider receives value from its relationships should be omitted from all advertising and promotional materials.
CONCLUSION

The sure way to avoid all advertising and marketing risk is to do none, which is not an option for most providers. Like most operational challenges, some front-end analysis and thorough review can avoid costly problems later on. Your marketing team can assist in the effort if you sensitize them to the risks and offer specific solutions.

To review, administrators or individuals responsible for the content of marketing materials can use the following eight steps to minimize liability risks:

(1). Avoid problematic language, such as adjectives describing the community in a manner that would give preference to certain residents based on race, ethnicity, gender, religious affiliation, or national origin.

(2). Avoid explicit exclusions, such as those based on a certain disability.

(3). If the community has a religious affiliation, prominently include language stating that the community does not discriminate on the basis of race, color, religion, national origin, sex, handicap, or familial status.

(4). Consider the effect of human models in advertising brochures, and that selective models might have the effect of communicating a discriminatory message. Ensure models capture a mix of racial groups, sexes, and disabled and non-disabled models.

(5). Be aware that advertising to limited geographic markets, linguistic communities or socio-economic groups may give rise to a conclusion of discrimination. While broader advertising dissemination may be less cost-effective, it may also avoid litigation costs.

(6). When considering flowery advertising language in sales brochures, make the brochures as facility-specific as possible and avoid generalities that might create expectations that do not uniformly apply. In particular, (i) sensitize marketing departments to the risks that come from overly-optimistic advertising language; (ii) avoid “Meets/Exceeds Government Standards” language; (iii) have different materials for independent housing and assisted living facilities; (iv) use realistic “daily life” orientation depictions; and (v) give written notice to residents of any changes or reductions in amenities or services that do not comport with the representations in the advertising materials when they arrived.

(7). If using resident images and testimonials in marketing materials, consider whether HIPAA applies. If so, and if a resident’s image or testimonial will be included in marketing materials, obtain permission from that resident to use his or her image.
(8). Avoid using (or remove if already in advertising materials) any representations of special “cozy” relationships or connections with equipment suppliers, medical providers or area hospitals.