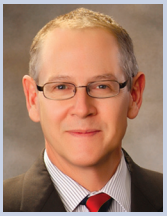
Caveat Vendor

By Warren E. Babb, Jr., and Robin Dale

Avoiding Marketing Pitfalls That Could Bring Litigation to Your Doorstep

Most providers of senior housing and 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. Once created, an operator cannot control these materials' circulation. The materials create a look, feel and impression of a community, and sometimes they can make implicit promises of results. These materials can create exposure for an operator. The following discussion will identify areas of legal exposure and offer suggestions 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.

■ Warren E. Babb, Jr., and Robin Dale are shareholders in the firm of Lane Powell PC in Seattle. Mr. Babb represents numerous long-term care and senior housing providers, as well as other health-care professionals and pharmaceutical manufacturers. He is a member of DRI's Long-Term Care Subcommittee. Mr. Dale's practice focuses on governmental regulatory law with a special emphasis on long-term care issues. He represents long-term care providers in a wide range of disputes including certification, licensing, certificate of need, survey, reimbursement, and the Fair Housing Act.



Risk Management: Flowery Language May Result in the Sting of Litigation

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 theory in litigation against senior housing and care providers. However, with the advent of tort reform in many jurisdictions, the plaintiffs' bar has argued other, sometimes creative, legal theories that bypass the tort reform caps that they feel "artificially" limit potentially recoverable damages.

More recently, plaintiffs' attorneys have advanced 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 has attempted to use senior housing and care providers' own words against them, focusing on descriptions and depictions used in advertising campaigns and brochures, websites, and other marketing and promotional material. Providers can limit their exposure to this shift in plaintiffs' attorneys' tactics by following these five basic rules in preparing and circulating their advertising materials, websites, and brochures.

Rule One: Have a Risk Manager Review Marketing Materials to Catch Risk Early

Risk managers and marketing departments have long been engaged in a tug-of-war over what is appropriate and legally permissible content in a facility's or a community's ad campaign or marketing materials. A 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 can become a little overzealous, overstating and using flowery language to portray a facility's attributes and amenities. A risk manager or an administrator should review 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 or cannot actually deliver. Plaintiffs' attorneys take great joy in presenting to a jury videos, brochures, and other marketing materials that are "over the top." Use plain language, free of promises, exaggeration, or overstatement.

Rule Two: Avoid "Meets" and "Exceeds" Standards Language

Many providers' brochures and advertising materials state or suggest that a provider "meets or exceeds" government regulations or standards. This type of statement is fodder for a plaintiff's argument that a facility's or community's citation by a surveyor or other governmental agency demonstrates the inherent misrepresentation of these statements. Similar problems arise from vague, open-ended promises about the type of care provided. Words such as "quality," "professional," "superior," and "preeminent" are frequently cited in plaintiffs' claims and litigation. A provider should focus advertising efforts on the specific services that it provides to its prospective residents, rather than merely make a general statement that it provides "quality" or "professional" care.

A provider can create a very attractive image of its facility or community by positively describing the services, amenities, or options that the facility makes available to a resident. This type of description is highly unlikely to serve as a basis for a plaintiff's suit. Of course, a provider needs to monitor its promotional material to ensure that it does not promote or promise services that have been discontinued, withdrawn, or significantly modified.

Rule Three: Separate Advertising Materials for Independent Housing and Assisted Living

Unlike those of us involved in senior housing and elder care, much of the general public is unaware of the differences between independent retirement housing and assisted-living apartments. To most, the two are identical, or nearly identical. Your marketing challenge is to make clear that they are different and provide different services. 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, distinguishing the products and services provided in each setting, which will limit confusion and minimize potential allegations of false or exaggerated promises or representations. Plaintiffs' attorneys frequently seize on representations regarding the assisted-living services that a facility provides, even when a person enters a community as an "independent resident." The public's, and a court's, limited or nonexistent 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.

Plaintiffs' attorneys take great joy in presenting to a jury videos, brochures, and other marketing materials that are "over the top."

In the event that a provider chooses to produce only one brochure, that brochure should very clearly specify that independent housing and assisted-living units coexist on the provider's property and separately describe the services and amenities provided in each setting.

Rule Four: Use Realistic "Daily Life" Depictions

Providers can blunt allegations of misrepresentation, breach of contract, and fraud by preparing "reality-based" video or DVD depictions and showing them to prospective residents and their families prior to executing admission documents. During production, these depictions should have significant input from staff that have involvement in day-to-day facility operations.

It is a good practice for a community to have the prospective resident or his or her family view a video depiction onsite. Some providers give a DVD or to a prospective resident or his or her family to view at their leisure. The best practice under either circumstance, is to have the resident or an authorized family member, if applicable, sign an acknowledgement that he or she has viewed the DVD or video and understands both the services and limitations of services that the community is capable of providing. This provides a facility with written documentation that the appropriate person with decision-making authority has fully understands the available range of services and the limits of those services prior to signing admission documents. Most importantly, a trier of fact in a subsequent lawsuit can view this depiction to see exactly what representations the provider made at the time that the resident entered the community.

Rule Five: Give Written Notice to Residents of All Changes in Amenities or Services

It is not unusual, especially in a tight economy, for providers to alter, modify, or reduce the range of service that they provide, after a resident has moved into a community or facility. Many states have specific regulatory notice requirements for these changes. However, even if state law does not require notice, good risk-management practice dictates a facility to give ample notice. Well-documented and advance notice of a change in service or amenities can assist in defending or defeating a claim that a resident was lured to the community with false promises or representations that were immediately made false by changes in the terms of the residency.

Providers can significantly decrease liability exposure by vigilantly documenting through written notice all changes to the type of housing or the types of services and amenities they will provide to residents. Whenever possible, send notice to each resident. At a minimum, post notices in numerous, conspicuous locations, such

as the dining room, activity room, front desk, and nurses' stations.

Many other practices can assist providers in limiting exposure created by their advertising efforts. However, providers that carefully follow the five, basic, rules outlined above will less frequently become defendants in the plaintiffs' attorneys' new world of "eat your own words" litigation.

The Courts React

In the recent past plaintiffs have filed suits in several jurisdictions but settled prior to court rulings on the substantive claims. Fortunately, in the limited cases that the courts have considered, they have issued unreceptive rulings when plaintiffs have alleged that senior or assisted-living communities breached a contract or engaged in fraud or misrepresentation. Nor have courts granted class status. The court in *Burnstein v. Extendicare Health Care Services, Inc.*, 607 F. Supp. 2d 1027 (D. Minn. 2009), granted defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss the plaintiff's class action. The plaintiff claimed that the provider's statements that it "always maintains quality standards above government regulations…" and that it had "established rigorous standards to ensure that we meet the physical, spiritual, social and emotional and intellectual needs of our residents and health care consumers" constituted actionable misrepresentation in violation of the Minnesota Consumer Protection Act. Specifically, the plaintiff contended that the misrepresentations constituted material omissions of fact upon which the defendants intended the plaintiff and "other similarly situated persons to rely on Internet website and the facility admissions agreement."

In rejecting the claim, the court noted that "none of the statements" referenced by the plaintiff referenced "any particular standard or made any specific promise." *Id.* at 1032. The court concluded:

> It is possible that Defendants are violating state laws and regulations and are not providing adequate care to residents. Plaintiff may have rights in remedies available to her under applicable laws for any such violations. A consumer protection action simply is not the path to resolution of those issues and neither of the Plaintiff's original Complaint nor her Amended Complaint, stated cause of action. Plaintiff's claims must therefore be dismissed.

607 F. Supp. 2d at 1032.

In a related footnote, the court provided the following unsolicited advice to plaintiff's counsel:

> At the hearing on this motion, Plaintiff's counsel asserted that the issues presented in this case were of national importance. Plaintiff's counsel also took great umbrage with Defendants' suggestion that this suit was filed as a consumer protection class action because of the attorney's fees such a suit could yield and stated that "lawyer-driven litigation is what made this country great." [T]the Court hopes that Plaintiff's counsel is seriously committed to ensuring proper care for the Plaintiff and that the three law firms and eight individual attorneys representing her will assist her in pursuing any negligence claim she may have or in bringing claim complaints about the quality of her care to appropriate regulatory authorities, notwithstanding that these actions may not be as lucrative.

Id. at 1033 n.7.

The same court recently denied the plaintiff's motion for reconsideration of its order, rejecting the plaintiff's invitation to have the court delve into the regulatory world, stating:

> A consumer protection class action could be brought every time a nursing home received a deficiency notice from the state indicating a failure to comply with a legal requirement. This would allow litigation to supplant the extensive regulatory structure imposed on nursing homes, and it would insert the courts as overseers of the day-to-day operations of nursing homes, requiring that each interaction between nursing home staff and patients be parsed for possible misstatements.

Bernstein v. Extendicare Health Services, Inc., 2009 WL 1653486 (D. Minn. 2009).

The plaintiff has appealed the court's decision.

The court in *Steele v. Extendicare Health Care Services, Inc.*, 607 F. Supp. 2d 1226 (W.D. Wash. 2009), similarly granted summary dismissal to the defendants, in another class action. In this case, the plaintiffs relied on alleged misstatements in brochures, advertising literature, and admission documents. *See also Corley v. Rosewood Care Center, Inc. of Peoria*, 388 F.3d 990 (7th Cir. 2004) (dismissing plaintiff's purported complaints of fraud, finding no actionable promise or breach of promise by the provider).

A class action similar to those described was recently dismissed by a trial judge in a Wisconsin state court proceeding.

The Fair Housing Act

Senior-housing providers should also understand the potential applicability of housing regulations and standards to facility websites and marketing and promotional material.

The United States Fair Housing Act, 42 U.S.C. 3600, *et seq.* 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. 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," meaning that materials used to promote a community are covered by the act. Covered marketing materials include, print material, television, radio and other electronic media, brochures, pamphlets, annual reports, billboards, pictures of a facility posted in a sales office, specialty marketing devices, and even business cards.

Because Section 3604(c) of the Fair Housing Act bans all housing-related communication that "indicates" discrimination, courts essentially have adopted a strict liability standard regarding advertising. In other words, because the legal analysis depends on what a particular advertisement "indicates" to the ordinary reader, courts usually do not care whether a message was intentionally discriminatory, but whether the advertisement indicates a prohibited "preference" on its face. Accordingly, a court will generally deem language and imagery in advertising that someone can construe as or that tacitly communicates a preference or limitation based on race, color, religion, sex, handicap, or national origin, as violating the act. However, the act's pro-

hibitions regarding familial status do not apply to housing for older persons. 42 U.S.C. §3607(s). Senior-housing providers can indicate a preference for older adults in compliance with the "55 or older" and "62 and older" provision of the act.

In general, the act and related cases, commentaries, and regulations address two particular aspects of advertising content that, if improperly managed, can lead to act violations: problematic language and human models.

Fair Housing Act Guidance on Problematic Language

As mentioned, senior residential communities must exercise care and choose words carefully when developing advertising materials. Guidelines published by the federal Department of Housing and Urban Development (HUD) list numerous words and phrases that someone could interpret as conveying discrimination under 42. U.S.C. §3604(c), including words and phrases designating race, ethnicity, religion, sex, and disability. Fair Housing and Equal Opportunity, Policy and Guidance, *Part 109—Fair Housing Advertising*, http://170.97.167.13/offices/fheo/library/part109.pdf. Advertisements should not contain explicit exclusions, limitations, or otherwise indicate that protected classes are unwelcome or will face different admission criteria than other potential residents.

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

- Adjectives describing the community or preferred resident in racial, ethnic or gender-based terms
- Words indicating preferred race, color, religion, natural origin, sex, disability or familial status, and
- Explicit exclusions indicating discrimination based on disability, for example, "no wheelchairs."

Communities can describe their activities, however, as opposed to describing a prospective or desirable resident. For example, an advertisement describing current residents as "active" may imply that disabled residents are unwelcome, while describing "activities" offered at a community would pass muster, because it avoids giving an impression that an applicant's ability to participate in activities may determine his or her admission.

Communities must also be careful that they do not "create the perception" of religious discrimination. The act provides a rather narrow religious exception, so an examination of perceived religious discrimination by a community must first determine whether the exception applies to that community. If a 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." Memorandum from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity on Guidance Regarding Advertisements Under §804(c) of the Fair Housing Act (Jan. 9, 1995), http://www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf.

Facilities can mitigate potential problems by clearly distinguishing that the community does not discriminate based on religion.

According to HUD, words and phrases to avoid include "Jewish home," and indeed, the words "Protestant," "Christian," "Catholic," or "Jew" in designating a dwelling or its residents. *Id.* Similarly, HUD warns against using symbols or logotypes that imply or suggest a preference for members of a particular religion. Fair Housing and Equal Opportunity, Policy and Guidance, *Part 109—Fair Housing Advertising*, http://170.97.167.13/offices/fheo/library/part109.pdf. HUD also suggests that using religious symbols, such as a cross or a Star of David, without further explanation could communicate a discriminatory preference. Similarly, HUD has opined that directions to the community that refer to a synagogue, congregation, or parish could also indicate a religious preference. Fair Housing and Equal Opportunity, Policy and Guidance, *Part 109—Fair Housing Advertising*.

Therefore, although religiously affiliated groups or ethnic and cultural societies may sponsor retirement communities, marketers should write advertising copy for these residential communities in a way that clearly avoids conveying unlawful discrimination. In addition, displaying the Fair Housing logo in an advertisement with a corresponding statement that a senior residential community welcomes persons of all faiths 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.

Memorandum from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity on Guidance Regarding Advertisements Under §804(c) of the Fair Housing Act (Jan. 9, 1995), http://www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf.

Thus, while communities must exercise caution in using religious terms, senior-housing facilities can mitigate potential problems by clearly distinguishing that the community does not discriminate based on religion. However, HUD has determined that descriptions of communities and services are generally permitted, even descriptions indicating that the facility has a "chapel" on its campus or that "kosher meals" are served daily. *Id.* HUD does not view these descriptions as violating the act because the "do not on their face state a preference for persons likely to make use of these facilities or services." *Id.* (emphasis omitted from original).

Fair Housing Act Guidance on Human Models

HUD advertising guidelines cite the "selective use of human models" as potentially

violating 42. U.S.C. §3604(c). Using human models without care in advertisements can communicate preference for senior residents belonging to one group of persons or another. In determining whether advertising communicates an illegal preference, courts will scrutinize both single ads and entire multi-ad campaigns.

For example, in *Sanders v. General Service Corporation*, a housing complex's pictorial brochures and its newspaper advertising campaign were scrutinized. *Sanders v. General Service Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987). The court upheld an African-American citizen's contention that the community's 68 advertising photographs contained "a vital absence of black models," indicating a racial preference.

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 and sexes. Communities should also ensure that human models used in advertisements include models with disabilities, to avoid allegations that the community is attempting to communicate a preference for nondisabled residents. All models should be of equal social standing. Communities must avoid portraying minorities or women in subservient positions, for example, as nonresident dining room staff, maintenance persons, or service providers.

Other Advertising and Marketing Techniques

In addition to problematic language and human models, HUD guidance addresses some other advertising and marketing techniques that senior residential and assisted-living facilities should evaluate that can lead to Fair Housing Act violations. Advertisers and marketers select advertising media to intentionally reach a specific market. In some instances, this effort to target a specific audience can result in illegal discrimination claims.

HUD guidelines specifically address the possibility that selectively using advertising can lead to discriminatory results that violate the Fair Housing Act. These guidelines provide two relevant examples of how marketing selection can potentially violate the act. One marketing technique that can potentially violate the act is distributing an advertisement within a limited geographic area. If the geographic area is not ethnically or racially diverse, a court can draw the conclusion that the advertiser is indicating a preference for particular types of residents, which violates the act.

Similarly, another marketing technique that can violate the act is advertising in newspapers, newsletters, or magazines with limited circulation, in effect, advertising to attract particular segments of a community. In failing to publicize to the broader community as a whole, courts can draw the conclusion that an advertiser has stated 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 violate the act.

Thus, communities should market to areas with diverse populations. For example, marketing that targets certain zip codes may create problems if a senior-housing or assisted-living facility campaign does not maintain balance, placing similar ads that will reach a population outside those area codes.

In short, advertisers should ensure that the content, as well as the circulation of an advertisement is reasonably broad in scope and sufficiently diverse, to avoid allegations that a senior-housing facility prefers a particular type of resident. Communities engaged in advertising should consider the demographic makeup of the surrounding community and ensure that groups represented in advertising reflect the surrounding population.

Resident Images and Testimonials in Marketing Materials

In designing and implementing marketing programs, senior-housing and assisted-living facilities should determine whether HIPAA and similar state laws apply, if so, how, and obtain permission to print testimonials by and photographs of residents in advertising materials.

HIPAA and Applicable State Laws

Senior-housing and elder-care facilities should review state and federal laws that grant privacy rights to residents. In particular, regulations under the federal Health Insurance Portability and Accountability Act (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 facilities provide health care as defined by HIPAA.

There are 10 HIPAA-covered transactions, which, if conducted electronically, will satisfy the second part of the "covered entity" test. The HIPAA-covered transactions that senior-housing and care facilities most frequently conduct are electronic billing for services, for example, to private health or long-term care insurers or to Medicare or Medicaid, and electronic referrals to providers. It is important for a facility to conduct an analysis to determine if it satisfies both parts of HIPAA's "covered entity" test, and, if so, to adopt policies and procedures to satisfy HIPAA compliance. Many providers of assisted-living services may assume that they are "covered entities" under HIPAA, but the results of a thorough analysis may be surprising. Consult your legal counsel on this issue.

If a 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 (for example, a resident's name) as well as the less obvious, such as a resident's photograph, even if the resident's name is not included with the photograph. Pay particular attention to the photographs and testimonials used in marketing brochures, videos, and websites. HIPAA imposes penalties on a "per disclosure" basis, so monetary fines can add up rapidly, depending on how broadly marketing materials are disseminated.

HIPAA-Compliant Permissions

For an authorization to comply with HIPAA,

it must be revocable by the resident at any time. Obviously, a facility does not have to "un-do" prior disclosures that it made while the authorization was in effect, but the facility must immediately stop any further disclosures once a resident has revoked authorization. Because of the revocability requirement, brochures and other marketing materials can become immediately obsolete as soon as a resident featured in them revokes an authorization. As a practical matter, this means facilities will want to use information that does not identify a resident in marketing materials, such as "stock" photos and testimonials that do not identify the resident who gave or in whose behalf a testimonial was given. For instance, marketing materials could attribute a testimonial to a "resident," a "child of resident," or some similarly neutral references.

Even if HIPAA does not apply, you should obtain releases for photographs and testimonials. Many states protect privacy and publicity rights separate and apart from HIPAA. To make sure that a resident does not misunderstand what you intend to use or how you intend to use it in your advertising, you should get an acknowledgement of release from the resident. Consult legal counsel on the precise language of such a release.

Conclusion

Senior-housing and assisted-living providers must become attuned to the verbiage and descriptions that they use in their ad campaigns and marketing materials, consciously staying away from language or descriptors that courts can later construe as ambiguous, open-ended promises, or phrases promising care that meets or exceeds specific standards, as well as terms that courts can construe as evidence of discriminatory intent, violating the Fair Housing Act. Use of such words have sent providers down a slippery slope, which the creative and newly energized plaintiffs' attorneys have tried to use to their clients' advantage. If senior-housing and assisted-living facility providers design and implement marketing programs that comply with privacy laws, they can also avoid marketing pitfalls that could bring litigation to their doors.