

Be Careful What You Promise

Your advertising and marketing materials might be inviting a lawsuit

BY LINDA WILLIAMS, RN

In any industry, some businesses have a tendency to make unqualified claims concerning their services or products in an attempt to position themselves more favorably in the market. This happens frequently among senior living facility providers, who usually find themselves in an extremely competitive marketplace. Problems often arise when residents and family members expect more than what is actually delivered; providers need to be aware that promises made or implied in marketing materials and oral presentations can be legally binding.

One independent living facility found this out the hard way. Please take the time to review the circumstances surrounding the following case, and make changes as appropriate at your facility.

The Situation

The case involved an elderly woman who resided in her own apartment in an independent living facility that marketed itself as being a caring community with a “good neighbor” policy. This policy consisted of encouraging tenants to put a cord on the outside of their doors when they got up in the morning to signify that they were all right. Each morning a “good neighbor” would check the doors and advise front-desk personnel if any cords were not in place. In response, the front desk was expected to immediately check the apartment to ensure that the tenant was safe inside.

The problem arose one morning when the above-mentioned resident’s cord was not placed on her door. That day, the neighbor noticed the missing cord and immediately reported it to the worker at the front desk. The front-desk worker was busy and neglected to immediately follow up on the situation. In fact, it was several hours later before he checked the woman’s apartment and found her injured and lying on the floor. He summoned rescue help immediately.

The resident was taken to the hospital, where it was determined that she had suffered a massive stroke. While at the hospital, she told her daughter that she had fallen the night before and had been unable to get to the phone to call for help. She had been stuck on the floor for more than 24 hours before being found. While waiting, she vomited several times and

aspirated. As a result, she developed pneumonia, of which she died in the hospital approximately two weeks later.

The Lawsuit

The resident’s daughter believed her mother’s death could have been prevented had the person at the front desk checked out the situation immediately upon notification. The daughter sought the assistance of an attorney, who filed a lawsuit against the facility for breaching its good neighbor policy. Even though this was a voluntary policy, not mandated by any licensing or certifying agency, the daughter and her attorney believed that the facility was derelict in its duties. They alleged that once the facility established this policy, it had an obligation to make sure it was followed. Their settlement request was \$3 million.

The facility’s defense attorney chose not to argue the breach-of-policy issue, but questioned whether the woman’s death from pneumonia could have been prevented. The defense sought the opinion of an expert pathologist, who reviewed the case and was favorable toward the defense. Two months before the trial date, both parties agreed to settle the case for just over \$300,000.

Managing Marketing Risks

Unfortunately, this case study is only one example of an increase in lawsuits against senior living facilities regarding alleged false or misleading advertising. This rise in litigation affects all levels of care—from independent living to assisted living and nursing care. Sometimes the promises at issue are very subtle, well-intended, and seemingly harmless—but review the following examples of marketing promises or representations that can lead to problems:

- Security is one of the most important features of any senior living facility and, subsequently, a major component of most marketing materials. Problems occur with generalized statements, such as, “You will never have to worry about your safety and security at Facility X” or “Facility Y guarantees a safe and secure environment.” While these statements may be well-intended, no facility can guarantee a resident’s

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security. Likewise, facilities must be careful about advertising specific features such as security systems if they cannot ensure 100% service or compliance. The good neighbor program described above is an example of this, as are surveillance cameras if dummy or broken systems are used.

- Quality-of-care claims can leave a facility vulnerable to a lawsuit if they cannot be backed up or supported. Examples of such claims include: “Facility X provides the best care possible,” “superior service and care delivered by our dedicated staff,” and “people are not only cared for, but cared about.” Often, a statement of deficiencies from past survey reports can seem to contradict such statements. Also, facilities need to be cautious about overselling their services, such as promising “24-hour assistance will be provided,” “around-the-clock support designed to meet the individual personal care needs of residents,” and “24-hour supervision.” “Nursing staff on duty 24 hours a day” is a more realistic statement. Even good-quality safety programs cannot ensure 100% staff compliance. An example of this type of advertisement describes the presence of a “zero-lifting program, which has virtually eliminated all physical lifting of residents by staff members.”

- Retention-of-care problems occur more frequently in facilities that offer residential-type care. These types of facilities need to be cautious about using written or verbal advertising that states or implies that residents will be able to live there “even as their health deteriorates.” This type of guarantee might be inconsistent with state licensure laws that limit the type of care and services these facilities can provide. In addition, most residential-type facilities do not have the staff, expertise, equipment, or supplies to manage complex medical conditions. Nor can they enlist enough outside agency service assistance to meet resident needs around the clock. Sometimes the opposite problem occurs, when a facility’s

advertising depicts only active and independent seniors living there. One CCRC was sued because a relatively healthy independent resident objected to being surrounded by nonambulatory and incontinent neighbors.

- A number of senior living facilities have been sued or fined under the Fair Housing Act (FHA) because minorities were not represented in their marketing brochures or advertisements, because several courts have ruled that this practice discourages minority applicants. Using promotional photos of minority staff or of actual residents is not necessarily sufficient if the racial diversity of the entire metropolitan area is not reasonably represented as resident models.

To minimize these liability risk exposures, responsible personnel should familiarize themselves with the facility’s policies and procedures, and then carefully review all advertisements (including brochures, handouts, Web sites, and other promotional material) to ensure that representations are accurate, supportable, and not overstated. By taking these necessary precautions, facilities have the ability to protect themselves from lawsuits based on resident disappointment and disillusion. **NH**

Linda Williams, RN, is a Long-Term Care Risk Manager for the GuideOne Center for Risk Management’s Senior Living Communities Division. She previously served as Director of Nursing in a CCRC and as a nurse consultant for two corporations with numerous long-term care facilities in Iowa. The GuideOne Center for Risk Management is dedicated to helping churches, senior living communities, and schools/colleges safeguard their communities by providing practical and timely training and resources on safety, security, and risk management issues. For more information, contact Linda Williams at (877) 448-4331, ext. 5175, or slc@guidemail.com, or visit www.guideonecenter.com. To comment on this article, please send an e-mail to williams0204@nursinghomesmagazine.com.