

HANDLING SUSPICIOUS BEHAVIOR

By Joel S. Goldman
Hanson Bridgett, LLP

Every time that we think we have seen just about everything that could happen in an assisted living community, something new will pop up, reminding us that reality can indeed be stranger than fiction. In a rather remarkable confluence of events, I received three phone calls from three different providers regarding unusual incidents within a 24 hour period last month.

The first incident arose when a care giver knocked on a male resident's door and entered his apartment in order to assist him. As she entered, she saw him scramble to close a photo album on his bed and he seemed flustered by her entry. She escorted him to the bathroom. While he was in the bathroom, she went back into the bedroom, opened the photo album and saw that it was filled with child pornography. She closed the book, did not say anything to the resident, and reported the incident to her supervisor.

A conference call ensued. There was universal agreement that the police needed to be called and that an incident report would need to be sent to DSS. We had some initial concern about a potential invasion of privacy claim by the resident, but then determined that there is no privacy protection for people who view or possess child pornography. The police were called. They entered the resident's apartment, questioned the resident, and confiscated the photo album as well as his computer. To date, the police have not taken any further action.

We also discussed whether this incident could constitute grounds to evict the resident. We concluded that it did not. RCFE law essentially precludes eviction other than for the specific reasons set forth in Regulation Section 87224. Subsection (a)(2) permits eviction upon "Failure of the resident to comply with state or local law after receiving written notice of the alleged violation." On its face, this regulation appears to mandate a repeat violation by the resident after receiving written notice from the RCFE. So in this case the provider could issue a written warning to the resident that he had violated the law and that if this recurred, he would be evicted.

CALA has been engaged in discussions with DSS regarding the interpretation of Section 87224(a)(2). The Department is in the process of developing a policy regarding this section and thus far has taken the position that it permits termination of a residency agreement based on a single offense, after the licensee receives written notice of the alleged offense, even if there was no prior written notice to the resident, depending on the impact the offense has on other residents. While we appreciate the Department's liberal interpretation,

and while a court might give some weight to the Department's interpretation, there is considerable doubt as to whether a court would allow an eviction based on a violation of law unless the resident had had a prior written warning. Of course, if a resident committed a violent offense, they could be subject to a three day eviction (upon approval from DSS), or could be evicted for violation of house rules, assuming that there was a relevant rule pertaining to resident behavior. Providers may wish to consider adding to their house rules a rule that residents may not engage in any activity that is illegal under Federal or State law or local ordinance. This would expand a provider's ability to evict in situations like the one above.

The second incident involved a resident who began receiving late evening brief visits somewhat regularly from attractive, provocatively attired young women who were always accompanied by a "driver" who waited in the lobby. Both visitors would dutifully sign the visitor log. This pattern was arousing the attention and concern of other residents and staff. Unlike the child pornography incident, however, the provider in this case did not believe that the situation warranted police intervention. Instead, a written warning was delivered to the resident advising him that his conduct was illegal and that if it continued, would constitute grounds for eviction.

This incident raises some broader questions. In this particular case, it was obvious that the resident was engaging the services of prostitutes and this was having a deleterious impact on the community, as it was making other residents and staff uncomfortable. Therefore, it was appropriate for the provider to intervene and insist that the illegal activity stop. On the other hand, it might be an inappropriate intrusion into resident rights for an RCFE to question a resident who simply received periodic short visits from young women. Thus, the specific facts of each situation will likely dictate how to respond.

The third incident involved an 80 year old man who was visiting his mother-in-law in an RCFE. The resident was in the assisting living portion of the community and not in the dementia unit. To enter the dementia unit, one has to punch in a code. The visitor was found in the dementia unit fondling the breasts of a dementia resident. The police were called immediately and they escorted the visitor out of the building. The police held off on immediately arresting the visitor because they needed to first ascertain the mental status of the resident before determining what crime, if any, with which to charge him.

An incident of this type warrants a multi-faceted response. First, it requires the submission of an incident report to DSS and the filing of an SOC 341, suspected elder abuse report, with either the police or the Ombudsman's Office. Second, it suggests that an examination of security procedures, including visitor access to security codes, is needed. Presumably, most providers have in place procedures to prevent dementia residents from figuring out a code that would enable them to elope without triggering a delayed egress device. This incident suggests that providers also need procedures to prevent unauthorized persons from accessing areas that are protected by security codes.

Finally, this incident warrants restricting the culprit's visiting privileges so that he does not pose a threat to other residents. While Regulation Section 87468 grants residents the right to receive visitors, that right is not unlimited. The regulation provides residents with the right to have visitors "provided that the rights of other residents are not infringed upon." In this case, it is the responsibility of the provider to prevent a repeat of an incident that clearly infringed on the rights of other residents. In a situation like this, if the visitor does not agree to a voluntary restriction on visits, it may be necessary to obtain a restraining order.