

## MOLDY GREEN ORANGES

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No doubt some of you are wondering whether I've gone off the deep end writing a "Legal Update" for CALA entitled, "Moldy Green Oranges." (No doubt some of you thought that I went off the deep end years ago.) If you will bear with me, however, I think you will agree that there is a relevant message.

I used to have an addictive habit of making fresh squeezed orange juice every morning. I would buy oranges by the case at Monterey Market, a legendary produce store in North Berkeley. On one particular weekend, I had run out of oranges and was unable to get to Monterey Market. I found myself facing the dismal prospect of either foregoing my morning fresh squeezed o.j. or reverting to some mediocre store bought product.

My wife came to the rescue. While out running errands, she ran across a small, family owned produce store near where we lived at the time. She came home with a 40 pound box of oranges and all seemed well. She had paid \$20 for the case compared to the \$12 I had typically been paying at that time, but the extra money seemed well worth it.

My euphoria, however, was short lived. When I opened the box and began picking oranges, I found moldy oranges. Now when oranges turn moldy, I mean really moldy, they become encased in a powdery grayish green coating. And the powder gets all over everything. As I dug through the box, I must have found at least 20 green, moldy oranges. I got in my car and headed to the store.

I expected that I would get a sincere apology and replacements for the moldy oranges and if they really understood customer service, I might get a free mango or two if I was lucky (or maybe a zucchini if I was less lucky, or even two zucchinis if I was less lucky still). I arrived at the store and spoke to an employee who promptly told me he would get the owner. "Aha," I thought to myself, "this is great, the owner will make this right." Out comes the owner.

"What's the problem," she asked. I told her my story and pulled off the cover and showed her the contents of the box resplendent with green. "You should have checked them, there are always some moldy ones." I responded by saying that I had been buying oranges by the case for years and that while there were occasionally moldy ones, this was unacceptable. She then asked to see my receipt. She looked it over and said, "You only paid \$20, it should have cost \$24."

I said nothing, but my jaw must have dropped as I anticipated what might be coming. She extended her hand apparently

for the additional four dollars. "You expect me to pay you another four dollars," I asked with mounting incredulity.

"A box of oranges costs \$24," she replied. At that point, I handed her the box and asked for my \$20 back. She complied, and I left the store.

I hope that I don't need to point out to any of you what went wrong. Not only did the owner fail to rectify a problem that was clearly her responsibility, she compounded it. She lost the profit she would have made on the sale and more importantly, she lost a potential customer forever and lost countless other customers because of my recounting the story to friends and acquaintances.

So back to assisted living. How do you respond when you hand a resident/customer a "rotten orange?" I have seen many situations that involve lawyers, DSS and the Ombudsman **only** because the residents or family members felt that providers were not listening to their complaints. They only wanted to be heard and told what the provider was doing to fix the problem.

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Where a mistake involves nothing more than an inconvenience, it is generally best to admit your error, apologize, fix the problem and then tell the person the problem is fixed. If, for example, a resident was mischarged for an item on their monthly statement, you might want to offer a free guest meal voucher to compensate the resident for the inconvenience, in addition to apologizing and reversing the charge. Some providers give staff "sorry certificates" to use when needed to provide residents a free guest meal, discount at the community store or some other small token of apology when they make a small mistake such as bringing the laundry up late or missing a scheduled housekeeping day. Many upscale hotels give their associates authority to spend hundreds of dollars to make sure a guest who is dissatisfied feels good about the response to a failed expectation. Numerous studies prove that if you acknowledge a mistake, apologize, fix the problem and give feedback, your customer loyalty increases. It seems so simple but too often staff get defensive or want to blame someone else instead of just apologizing and fixing the problem.

Now for the legal part. Where the mistake is more serious, your response can have much greater ramifications. Admissions of wrongdoing can be used against you in court. That should not, however, stop you from talking with those affected by the incident. You just need to choose the right words. A recent article in the Wall Street Journal demonstrated that when health care providers apologized when something went wrong, overall liability was reduced. This does not mean that every time something bad happens you should follow with an immediate outpouring of mea culpas. We have seen a number of situations in which, at first blush, it looked as though a provider was directly responsible for an injury to or death of a resident, when a more thorough subsequent investigation revealed little or no fault on the part of the provider. When an incident first occurs, it is usually best neither to admit nor deny responsibility. Investigate first, get your facts straight, and then decide (with consultation from your legal counsel) what to say.

Regardless of whether or not you are at fault, it is almost always appropriate to say, "I'm sorry." California Evidence Code Section 1160 states as follows:

"The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action."

Note, however, that the same section specifically states that a "statement of fault" which is part of or in addition to the above IS admissible. Thus, if you state, "All of us here at the community are terribly sorry that your mother was injured," that statement cannot be used as evidence of wrongdoing. But if you state, "We are sorry that we caused your mother's fall," that statement can be used as evidence against you.

In sum, it is important to recognize that how you respond to a problem can minimize or compound it. Sometimes a simple acknowledgement of regret or responsibility can diffuse a difficult situation, while an overly defensive posture often exacerbates a problem.