

special issue

# brief



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## FIVE LESSONS LEARNED

Overlooked Issues to Help Avoid Legal Trouble

*By Joel S. Goldman*



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# FIVE LESSONS LEARNED

## Overlooked Issues to Help Avoid Legal Trouble

By *Joel S. Goldman*

### I. INTRODUCTION

How can over-eager marketing lead to legal problems? What are the “red flags” at the time of admission that spell trouble? What’s the best way to prevent problems before they even occur?

This *Special Issue Brief* summarizes Joel Goldman’s remarks at the 2022 Chairman’s Circle Event in Sarasota, FL.

### II. Lesson #1: Create realistic expectations for residents and family members.

Business executives understand that if you create unrealistic expectations, you will have disappointed customers. In our industry, your disappointed customers can and often will complain to company and building management, the staff, other family members, their friends, and regulators. They can post complaints on social media reaching a wide audience. They can complain to legislators who could enact burdensome regulations.

As an industry, we’re not good at creating realistic expectations. Marketing messages need to be carefully fine-tuned to present an honest appraisal of community life. For example: The salesperson asks the family why they’re thinking about moving their mom to the community. They say she’s been falling. The salesperson then answers by talking about the fall prevention program. The family thinks great. Mom isn’t going to fall any more. But that’s not true. In our model admission agreement, we have language upfront stating that as an assisted living community we are not permitted by regulations to use restraints on residents. Restraints are inconsistent with our philosophy. We encourage residents to participate in physical activities to the extent of their capabilities and as a result, falls and injuries may occur. If the resident or family is not comfortable with this type of environment, it’s best to suggest that they look at a higher level of care. Be honest upfront. It won’t make all lawsuits go away but it can help reduce the number of lawsuits because families and residents will know what to expect.

Similarly, in memory care, we leave the impression that someone will be watching mom all the time. The family wonders how it was possible that someone wandered into her room. But we don't offer one-on-one care and that should be made clear. We also tout the emergency call system leading people to believe that as soon as a resident pushes the call button a caregiver will be there in the room right away.

Be realistic. The marketing staff should have a consistent message. Talk about what the community offers, whether it's an exercise program to build muscle or a pharmacist who reviews medication interactions to help reduce falls. There are ways to put a positive spin on what's being offered with the understanding that even with one-on-one supervision an older person can fall.

### III. **LESSON #2: Watch for red flags during admission.**

If the family or resident has behavioral issues during the admission process—rudeness, demanding conduct, questioning everything—things will not get better after move in. During the marketing process, the family and resident are on their best behavior. Bad behavior at the outset will only deteriorate.

Watch for "recycled" residents. As a law firm, we spend a fair amount of time helping communities transition problem residents. Evictions for nonpayment and behavior issues are a significant part of our practice. Problem residents often show up at another community. Ask why the person is moving. Check references to see if their story makes sense.

Conduct a credit check. It's surprising that our industry doesn't routinely do credit checks. People can scam the system. They may pay for the first month and then not pay the second month because they say their house is about to sell. They can put you off for months. When they finally get a 30-day eviction notice, they may have already gotten away with living at your property for six months without paying. Then they move out and show up at the next community. Our industry is too afraid of losing a customer if we implement a credit check. But we can tell our prospective residents that by running a credit check we can help make sure that everyone is paying their monthly fees and that if someone is not paying, it could impact the entire community. I understand the marketing implications of running a credit check. But like much of the marketing approach, it's a balancing act. There's a way to spin the discussion in a positive direction.

### IV. **LESSON # 3: Get out of the office and on to the floor.**

About 20 years ago, I was conducting a training for a mid-size company and had 18-20 executive directors around the table. I asked: "What percentage of time do you spend in your office vs. out in the community?" I assumed the answer would have been 50/50.

But the percentages were all over the map and there was a simple correlation. The more time the executive director spent in their office, the more problems the building had. Walk the talk. For example, there was an upscale life plan community in California and the executive director had been a general in the Air Force. I was touring the building and while walking down the corridor he stopped to pick up a gum wrapper and said: "I learned when I ran an Air Force base that if you won't do it your team won't either." It's a great life lesson. Get out of your office.

#### **V. LESSON #4. Visit the overnight shift.**

Bad stuff happens on the overnight or nocturnal shift from 11pm to 7am. For example, the day shift showed up at a small memory care building with 32 residents. The day shift could not find any caregivers. Finally, the day shift workers walked into a respite apartment, and the two night shift employees were sound asleep with an empty bottle of vodka on the nightstand. Imagine if a resident during that time had pushed the call button, no one came, and they fell and were injured. From a litigation and licensing perspective, there are very serious ramifications to this sort of behavior.

You have to manage the night shift. A typical assisted living building has at least six managers: executive director, assistant executive director, food service director, activity director, marketing director and maintenance director. Once a quarter, one of the directors should show up in the middle of the night. They can say something like, "Hey I'm the activity director, how are things going? Any suggestions? And I brought you some pizza." If the overnight staff thinks a manager might show up in the middle of the night maybe they'd think twice about doing something they shouldn't.

#### **VI. LESSON #5: Install a two-way communications system.**

Emergency call systems should allow the resident and the caregiver to communicate. One of my earliest memories is being in the hospital for surgery. I had a call button and when I asked for a glass of water, someone would respond and bring it in a few minutes. That was in 1957. Fast forward to elementary school and we had a public address system. The principal could tell the classroom teacher to send me to the office. Here we are in 2023 and the overwhelming majority of assisted living communities do not have two-way communication. We've been spending hundreds of thousands of dollars on inadequate call systems. This becomes a problem when you have situations where a caregiver, who is already helping someone else, gets a page that another resident has pushed the call button. The caregiver has to decide to stay where they are or leave to answer the other call.

Here's a real-life example. Mrs. Smith abuses the call button. Several times a day she's asking for her slippers or help finding her television remote. One day, she pushes the call button during a shift change and the outgoing shift ignores the call. The caregiver on the next shift sees the button was pushed but takes her time to respond. When she walks into the apartment, Mrs. Smith is dead. This resulted in a license revocation action that was ultimately resolved with the community being placed on two years' probation.

Here's another real-life example. A caregiver was assisting a resident on the toilet. The resident wanted privacy, so the caregiver was standing outside the bathroom when her pager notified her that a resident three rooms away had pushed his call button. The caregiver told the resident to stay there while she checked on the other resident. The caregiver visited the other resident and determined that it was not an emergency. The caregiver returned to the first resident's room after just 90 seconds. But while the caregiver was gone, the resident decided to get up and fell and broke her hip. She passed away within a month and the broken hip was listed as a significant contributing factor.

In each case, the caregiver had to make a decision whether to stay with the resident they were helping or leave and respond to the other resident. With two-way communication, technology that has existed since the 1950s, the caregiver could have asked the resident what was wrong and determined whether it was something serious that needed immediate attention. Maybe the resident was just asking for her slippers and could have waited.

Another flaw in the emergency call system is that the reset button isn't necessarily pushed when the caregiver attends to the resident. The caregiver may be busy and not remember to push the reset button until later. It thus appears from the call system that there was an unacceptably slow response time when in fact the call was responded to promptly. This obviously can have a deleterious impact from both a tort liability and licensure perspective.

Providers are starting to look at using Alexa and other voice-activated devices to enable two-way communication. That's where we need to go as an industry. Ultimately, two-way communication will make the caregiver's job easier. They'll be able to finish their work with a resident and not have to rush to someone else in a non-emergency situation.

Two-way communications will require a robust wi-fi system. Retrofitting an older building can be expensive. But it's even more expensive to fend off licensing issues and lawsuits.

## ABOUT THE AUTHOR

Joel S. Goldman represents a wide array of developers, owners, and operators of senior care communities, including, assisted living, continuing care, and congregate senior communities. He focuses on regulatory, licensure, and operational issues, resident issues, and risk management issues.

Joel has been a noted presenter at numerous conferences and seminars throughout the United States for senior care industry associations, legal organizations, and university academic programs. Joel's practical approach to issues and vast experience with senior care communities also make him a popular presenter at in-house training programs for multi-facility providers. Joel is a founding member of the California Assisted Living Association and has served on its Board of Directors since its inception in 1994.



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