

**ADVERTISING FOR SENIOR HOUSING
AND COMPLIANCE WITH THE
FAIR HOUSING ACT
By Robin Dale**

This article appeared in the September/October 2006 issue of The Quality Provider, Oregon Health Care Association's bi-monthly newsletter.

I. THE GROWING DEMAND FOR SENIOR HOUSING

America's senior population has already begun to grow. That increase will accelerate dramatically in 2011 when the generation born between 1946 and 1964 (Baby Boomers) begins to turn 65.

In 2000, the 65 and older population was estimated at 35 million, approximately 12.4 percent of the population.¹ After relatively slow and steady growth of 5.4 million between 2000 and 2010, the population in the 65 plus age group will surge to 69.4 million in 2030.² By then, the senior share of the overall population will expand to over 20 percent.³ The 85 and over population will grow faster than the age 65-84 segment, especially after 2030.⁴ As a result, nearly one-quarter of the elderly are expected to be at least 85 years old in 2050, compared to only one-seventh today.⁵

These figures represent a dramatic and unprecedented aging of the nation's population.⁶ The ratio between young and old will be far higher than at any time in U.S. history.⁷ This growing senior population will continue to raise Fair Housing Act issues well into the future. As the senior population grows and the need for, and availability of, senior housing also grows, providers will need to pay special attention to how they advertise for senior housing on order to comply with the Fair Housing Act.

II. THE FAIR HOUSING ACT

The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968. The law applies to all housing in the United States and is enforced by the U.S. Department of Housing and Urban Development (HUD). The Fair Housing Act outlaws discrimination on the basis of seven criteria in various housing-related practices dealing with every "dwelling" not covered by one of the Act's exemptions.⁸

¹ "Housing America's Seniors," Robert Schafer, Joint Center for Housing Studies of Harvard University 2000.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ "For the Rest of Their Lives: Seniors and the Fair Housing Act," Robert G. Schwemm and Michael Allen, 90 Iowa Law Review (2004), p. 127.

⁷ *Id.*

⁸ *Id.*, p. 143.

Originally, the Act prohibited discrimination in the sale or rental of “dwellings” on the basis of race, color, religion or national origin. Congress later added three additional bases of prohibited discrimination to the Fair Housing Act: “sex” was added in 1974, and “familial status” and “handicap” were added in 1988.

In addition to discrimination in the sale and rental of housing, the Fair Housing Act outlaws discrimination in the financing of housing, provision of brokerage and appraisal services, or in the creation, printing or publication of any notice, statement or advertisement.

III. ADVERTISING AND THE FAIR HOUSING ACT

A. In General.

All advertising and marketing efforts with respect to the sale or rental of housing are subject to the Fair Housing Act. The use of language or imagery in advertising can be construed to create a preference or limitation that is deemed to be unlawfully discriminatory. Care should be taken to ensure that advertising does not violate the Fair Housing Act.

B. Potentially Discriminatory Language Should be Avoided.

Use of certain terms may be considered discriminatory if they convey a preference for a certain type of resident. For example, describing a retirement community as being for “active” residents could imply that disabled applicants are unwelcome. It is preferable to use words that have less of a connotation of physical or mental ability when describing a resident population. For example, communities with an ethnic atmosphere should be very cautious about their advertising and never limit admissions based on the applicant’s race or national origin. Similarly, describing a community as “Catholic” or “Asian” could imply that applicants are excluded or given a preference based upon their religion or race.

HUD has specifically determined that “advertisements should not contain an explicit preference, limitation or discrimination on account of religion.”⁹ According to HUD, words and phrases to avoid include “Jewish Home” and references to “Protestant, Christian, Catholic and Jew” in the description of a dwelling or its residents.¹⁰ Some sources suggest that use of religious symbols, such as a cross or Star of David, without any further explanation, may communicate a discriminatory preference. In addition, HUD has opined that directions to a housing development that make reference to a synagogue, congregation, or parish may also indicate an illegal preference.¹¹ Although a retirement community may very well be sponsored by religiously affiliated groups of ethnic or cultural societies, advertising should be written in such a way that makes it clear that the message is not unlawful discrimination. For example, a project with a religious name can reduce its risk by specifying that persons of all faiths are welcome.

⁹ *Id.*, p. 171.

¹⁰ *Id.*, p. 171.

¹¹ *Id.*, p. 171.

Obviously, senior housing communities are allowed to describe themselves as targeting seniors. This is permitted if the residence qualifies as housing for older persons under the Fair Housing Act, which specifies age 55 and age 62 as the applicable thresholds. However, other potentially discriminatory criteria for choosing residents should be avoided.

C. Human Images Should Reflect the Diversity of the Surrounding Community and the Elder Population as a Whole.

Much of the Fair Housing Act litigation involving claims of discriminatory advertising has dealt with race-based challenges to use of white models in housing ads.¹²

The use of human models was challenged in *Saunders v. General Services Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987). In this case, a housing complex's advertisements in both newspapers and brochures contained no black models in over 68 photographs. The court noted that the lack of black models indicated a "racial preference to the ordinary reader in the Richmond, Virginia area." The court went on to note that "advertisers choose models with whom the targeted consumers will positively identify" and that, therefore, "the natural interpretation" of defendant's brochure was to indicate that their "apartment complexes are for white, and not black, tenants, thus discouraging blacks from seeking housing there."

Using the lessons from the *Saunders* case, communities which serve a disabled population should incorporate representations of disabled people into their marketing materials. This will help to avoid a discrimination claim.

D. Precautionary Steps.¹³

Steps to take to avoid a claim of advertising discrimination are:

- (a) avoid language or photographs that imply a preference for a specific type of resident;
- (b) avoid symbols that imply a religious preference;
- (c) include an Equal Housing Opportunity slogan, logo and statement in all advertising copy;
- (d) make sure human models reflect the diversity of the surrounding community and the kinds of disabilities encountered in the senior population.

¹²*Id.*, p. 173.

¹³ "Fair Housing Language: A Guide for Senior Housing," Paul Gordon, American Senior Housing Association 2004.

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