

By Joel Goldman

# LEGAL issues

VOLUNTEERS are an important part of building an Assisted Living community. They connect the Assisted Living community with the community-at-large. They act as a link between residents and other community groups such as schools, civic groups, or hobby clubs.

## ASSOCIATED WITH VOLUNTEERS

Their involvement can even bring an added warmth and richness to daily life. But it is important to consider legal implications when inviting volunteers into an Assisted Living community.

Clients frequently ask whether or not volunteers need to be fingerprinted and undergo background checks. From a legal and regulatory perspective, the answer will vary depending on the specific facts and circumstances. It is important to note that this is a situation in which it is critical to look at the RCFE law; the regulations do not cover the subject matter adequately.

Health and Safety Code Section 1569.17(b)(2) lists persons who are exempted from fingerprint/background check requirements. Subsection (b)(2)(B) contains an exception for volunteers who meet all of the following criteria:

- 1) The volunteer is only at the facility during normal waking hours.
- 2) The volunteer is directly supervised by the licensee or a facility employee with a criminal record clearance or exception.
- 3) The volunteer spends no more than 16 hours per week at the facility.
- 4) The volunteer does not provide clients with assistance with dressing, grooming, bathing or personal hygiene.
- 5) The volunteer is not left alone with clients in care.

The requirements set forth in the first four exceptions are clear, and it is easy to meet these requirements. Volunteers are not normally in the community during the night time. They are usually supervised by staff. They typically do not spend more than 16 hours per week in the RCFE, and they typically do not assist with activities of daily living.

The difficulty is meeting the requirements of the fifth exception. From a practical standpoint, it is almost impossible for all but a very small RCFE to insure that a volunteer is never left alone with clients. When the volunteer enters or leaves the community, are they going to be escorted, or will they have an opportunity to interact with residents without staff present? What about when the volunteer stops to chat with a resident? Will a staff member be at their side? The practical reality is that volunteers will at times be left alone with one or more residents.



For this reason, it is recommended that providers err on the side of caution and, when in doubt, fingerprint a volunteer. If a volunteer were to engage in inappropriate conduct in your community and you had not run a background check,

there could be regulatory consequences from DSS and potential liability if a lawsuit ensues.

Of course, this does not mean that you need to run a criminal background check on every person who ever enters your community on a volunteer basis. For example, if someone comes to your community one time to entertain your residents, it is simply not practical to fingerprint them. However, if someone is coming to your community on a regular basis, it is prudent to fingerprint them even if arguably not required by Section 1569.17(b)(2).

A number of clients have expressed concerns about insulting a valued volunteer—particularly if they are a family member of a resident—by asking them to undergo a background check. The key to preventing such possible insults is to present the background check as a positive. After all, the reason for the law is to protect the health and safety of residents. It is important, however, for you to stress to anyone undergoing a background check the importance of being truthful on the forms. The intentional failure to list any conviction, no matter how old or seemingly inconsequential, will result in a conclusive presumption that a person is not fit to be allowed to volunteer in an RCFE. ■

*Joel Goldman is a partner at Hanson Bridgett, founding board member of CALA and nationally known expert on Assisted Living.*

## OFF-DUTY STAFF

Another issue that arises frequently in RCFEs is whether staff must be paid if they attend a social event. If a community has a holiday celebration, off-duty staff do not need to be paid if they choose to attend voluntarily. However, attendance must truly be voluntary. If there is an “unspoken” expectation that staff show up to these events, you may be responsible for paying employees who show up during their non-working hours. It is recommended that written notice be provided prior to the event that lets staff know that they are invited to attend, but that attendance is purely voluntary and that there is no expectation that they attend.

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