I. INTRODUCTION

Continuing care retirement communities (CCRCs) present unique challenges for the application of fair housing, disability and other discrimination laws. Because CCRCs combine elements of age-restricted housing, activities programs, health services and often health expense coverages similar to that provided by long-term care insurance carriers, they face a wide variety of discrimination issues in their day-to-day operations. To the variety of programs add the fact that many CCRC residents may be considered disabled and all are elderly, and many facilities are sponsored by religious, ethnic or fraternal organizations, and the scenario becomes complicated at best.

This guidebook reviews how the major federal laws governing discrimination on the basis of age, disability, familial status, religion and race, color or national origin are likely to be applied to typical circumstances faced by CCRCs. Those laws are, respectively, the Age Discrimination Act of 1975, the Americans with Disabilities Act (ADA), the Fair Housing Amendments Act of 1989, and the Fair Housing Act of 1968 (FHA). This guidebook does not examine the architectural requirements of any of the disability discrimination laws or any employment discrimination rules. State anti-discrimination laws also are not discussed and should be reviewed independently by the reader.

The Fair Housing Act, including the 1989 amendments, applies to the sale or rental of dwellings with four or more units. The ADA applies to public accommodations (e.g., a nursing facility), but not housing. Federal publications have stated that CCRCs are subject to a "hybrid" analysis under both the ADA and FHA. Since the requirements pertaining to disability under both acts apply essentially the same sort of analysis, it makes little difference which act is technically applicable when determining how to deal with a CCRC's operational policy or situation.

Federal anti-discrimination laws are purposely drafted in a very broad manner, with few specific exemptions or examples in the laws themselves. Most of the guidance as to the applications of
such laws comes from the courts, and for more recent legislation, such as the Americans with Disabilities Act, the applicability of these laws to an esoteric field such as CCRC operations may not be clarified for many years. Also, case law interpreting these statutes is necessarily dependent upon the facts of the particular case, and different courts may render conflicting decisions in the face of seemingly similar circumstances. The U.S. Department of Housing and Urban Development (HUD) has jurisdiction over enforcement of the Fair Housing Act, which covers the subjects of race, color, national origin, religion, familial status and disability discrimination — whether or not a project was built with HUD funds — and therefore its interpretations and rulings are the most significant of any federal agency.

II. ADVERTISING

A. Human Images

Perhaps more than any other form of retirement housing or long term care facility, CCRCs are most vulnerable to claims of discrimination on the basis of race, color or national origin. Although it may be due to economic and social factors outside the control of the CCRC operator, and not due to any intentional discrimination, the fact is that the resident population of CCRCs often does not reflect the racial or ethnic composition of the areas in which they are located.

A long line of federal cases brought under the Fair Housing Act holds that a plaintiff need not show actual intent to discriminate in order to sustain a valid suit for unlawful discrimination. For example, if advertising has the effect, intentionally or unintentionally, of communicating a preference or limitation that has a discriminatory impact upon a prospective applicant, the advertisement is likely to be in violation of the law.

Over the past several years, fair housing organizations nationwide have made a concerted effort to identify CCRCs and others of the more upscale retirement communities whose advertising might be viewed as indicating a discriminatory preference for or against certain prospective residents based on race, color or national origin. Typically targeted are ad campaigns involving multiple ad placements where there are depictions of residents or prospective residents who are, or appear to be, exclusively or predominantly Caucasian. Usually such challenges are most effectively brought in metropolitan areas with a significant non-Caucasian population. Once identified, such situations almost invariably result in a monetary settlement paid by the retirement community. Whenever there is a significant disparity between the racial composition of residents depicted in advertising and the racial composition of the area in which the facility is located, plaintiffs usually can make a convincing case that the fair housing laws have been violated. In 1997, one Michigan retirement community settled such a challenge for a payment of $569,000.

Sometimes, retirement community administrators will defend the practice of using all-Caucasian models in their advertising by pointing out that the people depicted in the advertising are the facility's actual residents, as opposed to hired models. While this argument may be superficially appealing, it obviously has the following weaknesses: (1) the effect upon the reader of seeing a depiction of all-Caucasian residents is the same whether they are actual residents or only models, and (2) the fact that the facility has only Caucasian residents to put in
their advertising may show that the facility's advertising policies have been effective in
discouraging non-Caucasian people from applying for occupancy, whether or not this was the
intent. A further aggravating factor is when all or virtually all of the residents depicted in
advertising are Caucasian and non-Caucasians are predominately depicted as waiters,
housekeepers or other service personnel.

B. Affinity Group Sponsored Communities
Many CCRCs are sponsored by affinity groups such as churches, fraternal orders, and even
national-origin-based groups. While there are exceptions from the Fair Housing Act's
provisions for religious and fraternal groups, they are narrowly circumscribed and cannot be
depended upon if the retirement community is considered to be a "commercial" activity, rather
than one that is purely religious or fitting within the bona fide activities of a private club. For
example, a convent or monastery would most likely fit within the exemption, whereas a typical
religiously-sponsored retirement community, open to the general public, is less likely to qualify.
Therefore, CCRCs sponsored by affinity groups that are based on religion, national origin,
race, gender and the like must be cautious about their advertising. Affinity groups that do not
revolve around one or more of the classifications protected by the Fair Housing Act, such as
retired military officer organizations or retired teachers' organizations, need not be concerned
about restricting admission to their members.

The basic rule for retirement communities that are sponsored by affinity groups involving
religion, national origin or other protected classifications, is that they should make it clear to the
public that while there is affinity group sponsorship, admission to the community is not based
upon the applicant's religion, national origin, or other protected status. Accomplishing such a
result requires a good deal of finesse in the drafting of advertising copy. For example,
advertising copy may refer to the observance of holidays, worship services, food preparation or
menu selections, and social or recreational activities that are customary for the affinity group,
without suggesting that applicants must be members of the group.

In recent years, some HUD officials have challenged the use by retirement communities of
religious symbols in their advertising copy, such as telephone directory listings. Although there
is no clear legal authority on this point, they have pressured some religiously-based retirement
communities to remove religious symbols, such as crosses, or to add a disclaimer such as "All
faiths welcome" to the advertisement.

C. Disability Issues
Retirement community advertising often repeats the adjectives "active, independent," when
describing the community or the type of people one may expect to find there, as if it were a
magical incantation. While CCRCs are probably more justified than other types of retirement
communities in screening applicants for their ability to meet health criteria, such language may
be viewed by some as communicating an overly broad prejudice against people with physical
handicaps. For example, there are some disabilities that may hamper a resident's ability to be
"active" but that may not necessarily result in an inability to live in a residential setting, or that
would pose the risk of an unacceptably high level or duration of long-term care needs.
Although it is permitted to inquire into a prospective resident's ability to live independently, in some circumstances and subject to some conditions (see Section III.A. below), it is generally better in advertising to describe the features of the retirement community and its services, rather than the functional status of the resident the community is trying to attract. Therefore, the emphasis should be upon details of the activities programs and the facilities available for such activities, rather than on the "active" resident. In some cases, CCRCs have been accused of misrepresenting the extent to which people with disabilities are admitted, or allowed to remain, in the residential portion of the facility. Brochures and other marketing materials should try to paint a realistic picture of the atmosphere that residents will experience if they live there, and managers should enforce level of care determinations, taking into consideration the factors set forth in Section V below. For reasons set forth in the section on human images, CCRCs should also consider depicting disabled persons in their photo advertising.

D. General Precautions
In addition to avoiding arguably discriminatory conduct of the kinds described in the preceding sections, CCRCs may take some affirmative steps to protect themselves in advance should a claim of discrimination be made in the future.

Although it is not a requirement of federal law, HUD strongly encourages use of the fair housing opportunity logo and slogan in all advertising copy. CCRCs may also state in their residence agreements and brochures and other advertising copy that the community does not discriminate on the basis of race, color, national origin, religion, disability or other prohibited status. Although CCRCs may legitimately make distinctions based upon factors such as disability, usually "discrimination" implies unlawful conduct, or the CCRC may opt to state that it does not "unlawfully discriminate." Facilities may also take affirmative steps to place advertisements in minority-oriented news media, groups working with disabled persons, or organizations outside of a sponsoring affinity group. They may also be careful to depict persons of varying backgrounds and abilities in any photographic advertisements.

In general, a sensitivity to these issues needs to be developed among marketing staff, admissions committees and related personnel. When in doubt, advertising materials should be reviewed by legal counsel.

III. ADMISSIONS
A. Disability-Related Admissions Criteria
1. Preadmission Health Screening.
Virtually all CCRCs screen applicants for residence prior to their admission to determine their health status. This is done primarily to determine the appropriate level of care for the resident or to determine if the applicant qualifies for health coverage benefits offered by the facility.

It is important to know that the Fair Housing Act requires questions about disability to be asked of all applicants equally; it is impermissible to ask health or functional status questions only of those who appear to be disabled. However, there is an exception to this requirement when determining if an applicant is qualified for a unit specially designed to accommodate people with a particular disability.
The kinds of questions that can be asked will vary depending upon the programs and services being offered by the community. For example, a so-called Type A facility -- which offers a comprehensive long-term care insurance benefit that keeps monthly fees at a stable level whether the resident is in a residential apartment, assisted living or nursing -- can likely ask the kinds of extensive and detailed questions that health insurers might ask in an insurance application. The ADA specifically permits distinctions based on health when underwriting criteria are used to determine eligibility for health coverage benefits. In contrast, Type B and C facilities that offer discounted health services, or only fee-for-service care, may have fewer financial reasons for asking such questions.

It is important to remember that the questions must be relevant to essential elements of the long-term care program offered by the facility. Avoid general questions about health care issues that are not relevant to the CCRC's risk of covering costs of care or that are unrelated to concerns about the applicant's impact upon staffing levels or the capacity of facilities. For example, questions about childhood illnesses, births or allergies, which often appear on standard medical examination forms, probably have no relevance to the legitimate pre-admission interests of a CCRC. On the other hand, certain questions that have no bearing on the admission decision (such as allergies) may be important to ask on a post-admission assessment questionnaire.

All residential facilities are permitted to ask questions that might disclose whether an applicant can meet the "requirements of tenancy." Such questions clearly can include whether a resident would be able to maintain the unit in a sanitary condition, pay applicable fees, and live peaceably in a group setting. While early case law under the Fair Housing Amendments Act indicated that it may be impermissible to ask if an applicant is capable of "independent living," on the ground that such a question is overly broad, HUD has since indicated that such a question is permitted when the housing provider takes into consideration whether the applicant can meet the requirements of tenancy with the assistance of a third party such as a relative, private aide or outside social services agency. See Sections III.A.3 and V.C. regarding private duty aides. Therefore, CCRCs should be able to ask if applicants can meet their Activities of Daily Living (ADL) needs, either themselves or with the assistance of another. They may also wish to inquire how the applicant intends to cover any cost associated with third-party caregivers, have the applicant commit to abide by the facility's rules governing such personnel, and ask whether the applicant requests any change in the CCRC's policies, procedures or facilities in order to reasonably accommodate the person's disability. See Section III.A.2. below.

2. Exceptions as Reasonable Accommodation

Even if an applicant fails to qualify for admission based upon criteria that are reasonably related to essential elements of the CCRC's program, the community is required by law to consider whether it can make a "reasonable accommodation" in its program or rules in order to afford the disabled applicant equal access to the CCRC's facilities and services. For example, even if a prospective resident fails the health screen for a Type A facility's medical expense benefit, the CCRC should consider whether the resident can be admitted if he or she agrees to pay for care on a fee-for-service basis. While making such an exception in every case would undermine the very foundation of a Type A CCRC program, it is not unusual to find that similar
exceptions to health-based admissions criteria already have been made for other reasons, such as to sell a less desirable unit. When determining how many such exceptions can be made without jeopardizing the health benefit program, it may be useful to seek outside underwriting advice and document the results.

3. Private Duty Aides.
Reasonable accommodation of the disabled usually also requires that a housing provider permit a resident to bring in a private duty aide, if the aide's presence is necessary to afford the disabled person equal access to the housing and associated services. Such an accommodation is likely to be required notwithstanding the fact that the aide's presence may violate guest policies, or minimum age restrictions that are otherwise applied equally to the disabled and non-disabled alike. However, because a CCRC is itself in the business of providing care, it may be able to legitimately insist that all residents use the CCRC's staff to receive such assistance, or if outside aides are permitted, that they conform to criteria and rules of conduct established by the facility. See Section V.D. below for a more detailed discussion.

B. Age-Related Admissions Criteria

1. Familial Status Discrimination
The Fair Housing Amendments Act prohibits discrimination against families with children in the sale or rental of a dwelling with four or more units, but makes an exception for "housing for older persons." In order to qualify for the exception, the housing provider must have a policy of requiring that at least 80% of the units be occupied by at least one person age 55 or over. Formerly, projects electing this method of qualifying as housing for older persons also were required to show that they provided "significant facilities and services" designed to meet the needs of the elderly, but after HUD developed extensive rules that threatened senior housing properties with minimal services, Congress repealed the significant facilities and services rule in 1995. An alternate method of attaining the exemption is to require that all occupants be 62 years of age or older. As a practical matter, this option is not workable because it would take only one underage occupant, including a spouse, to disqualify the entire property. Although there is no definitive regulatory or case law on the subject, it is generally accepted that a housing provider may set a minimum admission age that is higher than the 55-year threshold. Thus, it is common, and probably not a violation, for CCRCs to set the minimum entry age at 65, which coincides with eligibility for Medicare. Also, the IRS has recently taken the position that the tax exemption for facilities such as CCRCs is based upon the assumption that people 65 and older will be served — not 55-year-olds.

2. Age and Federal Assistance
Facilities that receive federal financial assistance -- including those involving direct loans and mortgage insurance processed through HUD and those that receive Medicare or Medicaid reimbursement -- the Age Discrimination Act of 1975 prohibits discrimination on the basis of age, unless it is excused by one of the specific exemptions set forth in the law.

One exception pertains to age distinctions established under the authority of any law that provides benefits or establishes criteria for participation on the basis of age or in age-related
terms. For example, Medicare eligibility is usually based on age. In addition, a state licensing law pertaining to residential care facilities for the elderly may establish minimum age criteria for the admission of residents.

A second exemption exists where age is a factor necessary to the normal operation of a program or the achievement of a statutory objective. To qualify for the exemption, the age-related policy must (1) use age as a measure or approximation of some other characteristic (such as life expectancy); (2) it must be necessary to measure these characteristics in order for the normal operation of the program to continue; (3) age must be a reasonable way to measure that other characteristic; and (4) it must be impractical to measure the other characteristic directly on an individual basis.

According to the federal government, using age as a way to measure a person's ability to live independently is inappropriate and does not fit within the exemption because age is not a reasonable way to measure independence and independence can be measured practically in other ways. On the other hand, a good argument can be made that because a CCRC has limited staffing, facilities and funding, it is necessary for a CCRC to approximate life expectancies in order to operate its program in a normal fashion, and that age is an appropriate way to measure life expectancy. Following this rationale, it is possible for a CCRC to justify a threshold minimum age for admission, or even a maximum age for admission, on the ground that being able to reasonably predict resident lengths of stay in the community is necessary for purposes of budgeting and otherwise allocating resources.

It should be noted that while the federal government has not been aggressive in enforcing the Age Discrimination Act against CCRCs making admissions decisions at the independent living or assisted living levels of care, it has determined that admission age requirements for nursing facilities violate the Act. In several instances, federal officials have required that the skilled nursing facility portions of CCRCs eliminate age-based admissions criteria, particularly as they are applied to prospective residents coming from the general public outside the CCRC. In some of these cases, CCRCs have argued that geriatric nursing care is a distinct specialty, much like pediatric hospital care, and that such age criteria are therefore appropriate. The matter has never been resolved definitively by any federal court. As a practical matter, CCRCs do not need to set minimum age criteria for nursing admissions from independent or assisted living, and probably have no compelling reason to set an age restriction for outside admittees.

C. Financial Criteria

1. Residential and Assisted Living Admissions

There are no federal laws prohibiting CCRCs from determining whether applicants are financially capable of paying private-pay charges at the facility. The courts have determined that providers of housing may impose minimum income limitations upon applicants, even where those criteria might have an adverse impact upon a protected class of people such as a racial minority. Similarly, applicants for private-pay assisted living likely can be asked about their ability to pay. Assisted living facilities accepting Medicaid reimbursement are subject to the Medicaid restrictions discussed in the next section.
2. Nursing Admissions

CCRCs that provide nursing services and are enrolled in the Medicaid program may not condition a resident's admission or continued stay upon a requirement that the resident or someone on his or her behalf supplement the government benefit. In addition, nursing facilities participating in either the Medicaid or Medicare programs may not enter into "private pay agreements" with a resident's relatives in an attempt to assure that the resident will not take advantage of government benefits for which he or she is, or later becomes, eligible. These rules can be very complicated and involve severe sanctions, including criminal prosecution. CCRCs should contact experienced legal counsel when developing policies in this area. Moreover, some state laws may require that nursing facilities not inquire into an applicant's financial status and require private-pay and government-assisted applicants to be admitted on a first-come, first-served basis.

3. Fees Disguised as Charitable Contributions

Tax exempt CCRCs may have a practice of soliciting charitable contributions from prospective residents or their families at or around the time of admission. Several federal court opinions have held that if the making of a contribution (whether by the resident or a family member) is a condition of admission to the facility, it is fraudulent for the facility or the donor to characterize the transaction as a charitable contribution that is eligible for tax-deduction. Instead, any payment that is made as a condition of admission or continued stay in the facility should be characterized as a non-deductible fee. Accordingly, it is prudent for CCRCs to make the admission decision, and inform the resident and the resident's family of the decision, before obtaining a binding commitment for a charitable contribution. For Medicaid-certified facilities, such a solicitation may also constitute a statutory violation (see Section III.C.2. above).

IV. RESIDENT USE OF FACILITIES AND SERVICES

A. Dining Rooms and Assembly Areas

Dining rooms are probably the areas within a CCRC where residents most frequently come into contact with each other. Often, CCRCs have separate dining rooms for each of the residential, assisted, and nursing levels of care. Because level of care distinctions are almost certain to be based upon varying kinds and degrees of disabilities of the residents, a claim of discrimination may be threatened if a resident is unable to eat in the dining room of his or her choice. In one federal case, the court upheld a facility's policy of requiring some residents to eat in the "dependent" dining room. The plaintiff, who wanted to eat in the main dining room, needed assistance with eating. The court, ruling against the plaintiff, determined that her presence in the main dining room would have been disruptive and interfered with other residents' peaceful enjoyment of their meals. In addition to the potential disruption factor, CCRCs may rely upon the differing fire safety, staffing and equipment standards existing among the three levels of care and argue that people in need of such care should remain in the appropriately licensed dining room for their own safety.

Another point of controversy around which a discrimination claim can be made concerns the presence of wheelchairs, walkers or motorized carts in the dining room or in other common areas throughout the facility. Discrimination laws generally require that residents with disabilities have equal access to a CCRC's facilities and services. In one state court case, a
retirement community's policy of requiring a resident to transfer from a wheelchair to a dining room chair was found to violate the state's fair housing law. Although management contended that the policy was based on fire safety considerations, the court determined that the requirement was designed to maintain a "disability-free" atmosphere. In another state court case, a resident who was injured while being transferred from a wheelchair to a dining room chair received a $500,000 award after a jury trial.

Generally speaking, a "no wheelchairs in the dining room" policy is likely to be found to be a violation of disability discrimination laws. Certain other practices that are truly designed to promote safety, such as removing canes from beneath dining room tables when they pose a trip hazard to dining room staff, are more likely to be justifiable.

The increasing presence of motorized carts in retirement communities creates a number of concerns ranging from excessive carpet wear to personal injury. In one case brought by the U.S. Department of Justice against a retirement community, the court found that it was not a violation of the Fair Housing Amendments Act to place certain restrictions upon the use of motorized carts at times when the common areas were so crowded that the carts might pose a safety hazard. The retirement community was found to have made reasonable accommodations to cart users to allow them access to facilities such as the dining room, by using alternate entrances, designating specific elevators for cart users, requiring cart users to enter and exit an assembly area before or after ambulatory residents, and by using staff to assist cart users to transfer to a wheelchair in certain circumstances where they were capable of doing so. CCRCs with motorized carts should develop policies for their use, addressing such issues as evidence of medical need for the cart, evidence of sufficient skills to operate it safely, proof of insurance, damage deposits, and "rules of the road" such as not driving the cart faster than pedestrians in the immediate area are moving.

B. Parking and Transportation

Courts have consistently held that residential housing providers must reasonably accommodate disabled persons by furnishing preferred parking spaces for their use. In a retirement community, where a large proportion of the population might have difficulty with ambulation, there may not be enough close-in spaces to effectively assist disabled drivers. Other solutions might have to be employed, such as valet parking or shuttle services, particularly in campus-type communities where there are large distances between residential and service areas.

Because CCRCs routinely provide transportation services to their residents, they should also be cognizant of when wheelchair lifts are required by law. According to U.S. Department of Transportation regulations, private entities that operate a "demand responsive" (as opposed to "fixed route") transportation system must make vehicles ordered after August 25, 1990 with a capacity over 16 readily accessible to people with disabilities, including those in wheelchairs. Although the Americans with Disabilities Act permits a "separate but equal" approach to transportation, such as by using a small wheelchair-accessible van to supplement a large inaccessible bus, the disabled person must be permitted to use the program that is not separate (the inaccessible bus). As a practical matter, due to the high incidence of ambulation
difficulties encountered in retirement communities, transportation equipment should be made accessible to people in wheelchairs whenever it is readily achievable.

V. TRANSFERS BETWEEN LEVELS OF CARE
A. Why Transfers Generally Raise Concerns
Proposed transfers of CCRC residents from one level of care to another, such as from residential to assisted living or assisted living to nursing, often raise concerns among residents, and their families, who may be neither physically nor emotionally prepared to make the move. The situation is complicated by the fact that, increasingly, home- and community-based services are available to help residents meet their care needs in the lower acuity setting where they already reside. In addition, the concept of "aging in place" is held out as an ideal to be encouraged of all who work with the elderly. Because such moves are almost always based upon a decline in the resident's physical, mental, or functional status, the transfer decision may be characterized by a resistant resident or family as a violation of the disability discrimination laws.

CCRCs should be particularly cautious when formulating the language of their care agreements, specifying that the CCRC is responsible to provide only "routine" care and specifically excluding certain levels of service, such as private duty care. Language stating that the CCRC will provide services "to the limits of its licensure," or stating that a resident "will be permitted to remain in his or her residential unit as long as possible" should be avoided. CCRC contracts should make it clear that a resident may be transferred to an appropriate facility, on or off of the CCRC campus, whenever management deems it to be in the best interest of the resident or other residents at the facility, or when it is appropriate in order to make the best use of the CCRC's staffing and facilities.

The examples below are grouped according to distinct problems typically encountered in transfers from each of the three levels of care. Note, however, that some problems, such as disruption, can occur at any level. It is therefore important to review all the examples.

B. Transfers From Assisted Living
Transfers from assisted living to a higher level of care are usually accompanied by the most clear-cut justifications. Generally, CCRCs should look first to their state licensing regulations to determine if a level of care transfer is mandatory. Most typically, state regulations will prescribe when a resident in assisted living is no longer permitted to remain there and must be transferred to a nursing facility or other higher-acuity location. Triggers for such a mandatory move are often the resident's need for 24-hour care, the resident's becoming bedridden on an on-going basis, or the need for certain procedures, such as intravenous therapy, that may be disallowed in an assisted living facility.

However, even if an applicable regulation clearly prohibits the admission of a particular applicant, the disability discrimination laws may be used to challenge the legitimacy of the regulation itself. Who employs this tactic will depend on whether the facility wants to transfer the resident against his or her wishes, or keep the resident against the regulatory agency's wishes. In one federal fair housing case, a local fire ordinance prohibited the admission to a
group home for the elderly of wheelchair-bound Alzheimer's patients who were mentally and physically incapable of responding to a fire emergency. The ordinance was deemed to violate the Fair Housing Act because the court found it to be overly broad and because of facts presented at trial by the facility's owner showing that the facility could safely accommodate the applicants. Absent such a challenge, however, CCRCs should be able to use licensing regulations to support most assisted living transfer decisions.

C. Transfers From Nursing

It may be far less clear when a transfer out of skilled nursing is required than when a resident must leave an assisted living facility. Federal and state regulations normally contain little guidance about what the upper limits of acuity are for a nursing facility resident, unless the resident requires surgery, emergency care or some other acute hospital-based procedure. As residents' health status deteriorates due to chronic and essentially untreatable conditions associated with old age, it often becomes difficult to identify when a nursing facility can justifiably determine that placement in a higher acuity or more specialized setting is appropriate.

For example, CCRCs are often faced with a nursing facility resident who, because of dementia, is experiencing progressively more severe episodes of combativeness and agitation and may be deemed inappropriate for the CCRC's nursing facility. In such a case, the CCRC may consider transferring the resident to a specialized dementia unit or psychiatric facility. In at least one federal case, however, a skilled nursing facility was required to accept a combative Alzheimer's patient where there was evidence that the facility could handle the resident's occasional outbursts without fundamentally altering the nature of its business, and it was shown that a nursing facility was an appropriate setting for a person with such a disorder. In that case, the court essentially determined that the plaintiff had no meaningful options other than a nursing facility and that it was disability discrimination to deny admission. However, it should be noted that the ADA specifically permits disability-based discrimination where the person presents a "direct threat" to others. While a care facility also should be able to base decisions upon a person's becoming a danger to self, there is no definitive ruling supporting such a position.

As with assisted living, nursing facility transfer decisions are complicated by the availability of private duty care. Whether or not aides are available, nursing facilities will always be expected to make reasonable accommodations to a disabled person such as by making some alteration in the kind or level of service delivery, provided that such accommodations do not fundamentally alter the nature of the CCRC's business. Nevertheless, residents who continually require a significantly higher level of attention than that routinely provided by the CCRC can reasonably be asked to furnish supplemental private duty care at their own expense. Facilities may also legitimately impose reasonable quality and conduct restrictions on the aides.

As a practical matter, when making transfer decisions, CCRCs should balance factors such as the degree of disruptiveness or danger to self or others, the capacity of staff and facilities, licensing considerations, cost, the availability and effectiveness of private duty assistance and of behavioral or pharmaceutical interventions, and other care and management considerations.
D. Transfers From Residential Apartments

Because the residential living component of most CCRCs is unlicensed, there is far less guidance than with assisted living or nursing facilities as to when a resident may or must be transferred due to increasing care needs. Moreover, residents often think of these units as their "private homes" where those who can afford it may legally receive unlimited long term care. Residents erroneously conclude that they may receive any and all levels of care that they might otherwise receive in a licensed facility, using residential care or home health aides, whether furnished by the CCRC or funded by the resident's own income. Of course, a managed multi-family residential environment is far different than a single family home, and a CCRC offering a full continuum of care is another thing entirely.

To be sure, case law indicates that owners of stand-alone multi-family residential housing may be required by the ADA or Fair Housing Act to permit disabled residents to bring private companions or care aides into their residences and even to waive age requirements or guest fees for such attendants if it is necessary to reasonably accommodate the disabled person. Theoretically, a resident of unlicensed housing could receive 24-hour nursing care there if it is being provided by appropriately licensed, third-party, home health nurses.

However, a CCRC differs markedly from stand-alone multi-family residential housing because its very purpose is to provide a continuum of care ranging from household assistance to assistance with activities of daily living and nursing care. Accordingly, the CCRC provider may credibly maintain that it is fundamental to the business of operating a CCRC that the provider have management control over the time, place and manner in which all care and services will be delivered to its residents.

Furthermore, Type A and Type B CCRCs, which operate in some respects like health insurers, have even greater reasons to want to control the delivery of healthcare, and especially preventive care, because they are financially at risk to pay for the consequences of inadequate care that may be delivered by a private duty attendant in the resident's apartment. For these reasons, a CCRC may insist that all care on the premises be delivered by the facility's staff in the appropriately licensed setting, or if any private duty aides are permitted to deliver care in the residential apartments, that they must adhere to strict rules of conduct, pass criminal record and competency screens, maintain insurance, routinely report to the CCRC's staff regarding what services are being delivered and inform the CCRC of any noted changes in the resident's condition.

Another justification for requiring people with care needs to move from residential housing into an appropriately licensed care facility portion of a CCRC is that licensed care facilities often must conform to more stringent construction, fire safety and sanitation codes, and maintain specified levels of staffing, training and equipment. These heightened standards are designed to protect people needing care, and a CCRC arguably may have some liability for failing to move its continuing care resident into a setting where the appropriate protections and safeguards are in place.

Occasionally, residential transfers may be necessitated by a behavioral or personality problem
that causes disruption or safety concerns. While conditions such as alcoholism are not valid grounds for dismissal, inappropriate conduct, such as drunkenness, can be. There is no protection in the disability discrimination laws for current users of illegal drugs.

VI. CONCLUSION

Compliance with anti-discrimination laws presents every CCRC with many challenges — and probably some unfinished work — in the development and implementation of its policies and procedures that affect residents. The subject should also be addressed in a facility's compliance plan, admission agreements and application forms. A conscientious effort to conform these documents and policies to the law should involve representatives of administration, marketing, and care staff, as well as the medical director and legal counsel. In the event of any discrimination claim, legal counsel should be contacted immediately in order to avoid waiving any right to defend against the allegations, to bring any investigation within the attorney-client privilege, and to plan and implement an appropriate response.

By addressing discrimination issues in advance of any claim, any CCRC should be able to decrease significantly its exposure to potential liability.