



# The Resident CONNECTION

3rd Quarter 2020



## President's Message

As we emerge from this summer of 2020, sadly we have not reached the hoped for decline in COVID-19 positive cases or deaths. If there is a bright side, it is that in general, Florida's CCRC populations have fared better than many stand-alone nursing homes.

CCRC providers have stayed in touch with the CDC and other health experts, maintained safe practices and have kept us as safe as possible. It has taken patience and wisdom on the part of both the administrations and the residents. In a number of communities services have been reduced, and occupancy has fallen off.

The coming months will challenge all of us to maintain the recommended behavior: mask wearing, social distancing and handwashing. Has wearing a mask become a fashion statement in your community? As I leave my apartment, I make sure I have my shoes on and my mask.

During the Spring and Summer of 2020 FLICRA has been communicating with the Governor's Office and key regulatory agencies.

Based on FLICRA's state board decision in May of 2020 related to "state blanket immunity," our purpose is to resist pressure from organizations with vested interests to pass legislation that would provide blanket immunity from lawsuits brought by residents and their families. There is additional information in this issue on current state law related to "filing of nursing home lawsuits."

Nursing homes have suffered a large percentage of positive cases of COVID-19, as well as deaths. Our position on not offering blanket immunity is based on the knowledge that Florida already has in place strong burdens of proof that will protect providers from frivolous lawsuits while maintaining opportunities to seek redress for those who have suffered gross negligence.

As we plan ahead for our Annual Conference & Chapter Delegates Meeting, the board has decided to hold the meeting virtually. That means you will need access to a computer or other digital device. We hope many of you will plan to attend.

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There will be an opportunity to ask questions and to participate in the discussion. A preliminary agenda and registration form for the conference is included on Page 7. There will be more information on the conference and how you can participate circulated to chapters in September.

Our Executive Director Bennett Napier and his team are working on developing a new video that will describe FLiCRA, its purpose and accomplishments. We hope it will be available by the November meeting. It is intended to be a support for your chapters to introduce new residents in your communities to FLiCRA and to encourage their membership.

Wishing you all continuing good health,

***Diane Dalsimer, FLiCRA State Board President***

## Best Practice Guide to Solving Issues Between Residents and Management

The following information is provided as a best practice step-by-step process to facilitate communication.

Continuing care retirement communities (CCRC's) are home to over 25,000 older Floridians. The advantages of entering into a CCRC contract are many, including an active lifestyle with the assurance of knowing that nursing care and other long-term care services will be available if needed.

Although continuing care contract holders are typically satisfied with the services they receive, there are times when problems arise that are not easily resolved. When this happens, contract holders have several options available to them. Options are listed below in recommended order.

**Take Your Complaint to Management** - The first place to start is with the chief executive officer or executive director of the CCRC. Resident satisfaction is important and often used as an indicator of staff performance. Management understands that if residents are unhappy, it can affect the general morale and environment of the community. It can also affect marketing.

With rare exceptions, management will make every effort to respond to complaints. Often times, concerns can stem from poor communication or a misunderstanding that a one-time meeting can solve.

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# Liability Waivers and Nursing Home Lawsuit Process in Florida

As COVID-19 continues to affect daily living at all long-term care facilities including continuing care retirement communities, a number of providers have either considered or already distributed “waivers of liability” for current residents, vendors and visitors to sign. The goal of such waivers is to reduce the potential number of claims that can or will be submitted against a long-term care provider.

As of the printing of this issue, FLiCRA is aware of at least three COVID-19 related lawsuits that have been filed against CCRC’s, not all are death related with some being related to visitation restrictions.

Providers that have put forth “waivers of liability” documents are communicating that residents by nature of living in a CCRC are voluntarily assuming some risk and that they have been informed of and agree to abide by the screening and isolation protocols as established by the community and/or that are being implemented by the community given state or federal regulations or guidelines.

It is important to note that while waivers of liability can insulate businesses from liability for simple negligence, generally courts have ruled that they do not prevent lawsuits based on acts of gross negligence or based on intentional acts.

To help residents understand how nursing home lawsuits are filed in Florida, the information below gives a step-by-step process for a “claim” to meet muster, if you will.

Florida lawyers must complete a statutory pre-suit investigative and notice process before a lawsuit can be filed for injuries or death resulting from nursing home neglect.

Florida Statute 400.0233 sets forth the requirements that must be met before a lawsuit can be filed against a nursing home.

First, the statute requires that the injured victim’s lawyer conduct an investigation regarding the claim. This, of course, starts with obtaining the resident’s

records. This is where the unfair delay begins. In almost all nursing home claims, the resident at issue no longer lives at the nursing home in question. Sadly, this is often because the resident died due to neglect. By statute, nursing homes are allowed 30 “working days” in which to provide the records of a former resident. Given weekends, this provides nursing home operators roughly 40 days just to make a copy of the records.

Next, the attorney must review the records to gain an understanding of the: resident’s normal baseline conditions; the resident’s symptoms or changes in conditions; the nursing home staff’s response to those symptoms; the effort taken by the nursing home to prevent an accident, injury or infection; and the involvement of any unrelated medical care providers. This is no small task as the typical residency involves hundreds of pages of records.

Next, the attorney must determine whether serious injury or death was caused by failures on the part of the nursing home operator.

If the attorney is convinced that the nursing home was negligent, and that such negligence caused serious harm or death, the next step required by the statute is to have the matter reviewed by a licensed physician or registered nurse.

This is an expensive proposition for the attorney as a reviewing doctor or, more commonly, RN is going to charge hourly expert witness fees to review the entire nursing home chart in addition to records relating to any subsequent care received at a hospital.

If the reviewing registered nurse or physician comes to the conclusion that the nursing home departed from the nursing standard of care, then the attorney must draft a pre-suit notice to every “prospective defendant.”

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## Liability Waivers – Background, Rights, and Considerations

As shared in the article on page 3 of this issue, some providers of Florida CCRC's have submitted "liability waivers" for residents to sign related to COVID-19.

The following are some observations regarding liability waivers.

The decision to sue a CCRC may be made by a spouse of a resident (where a couple resides in the CCRC), or a grieving family member (who may live in Florida or out of state). In either case, someone has lost a loved one and may want someone to blame, and thus the risk of COVID-19 litigation is very real.

Residents and all other persons know that COVID-19 is all around us and that we could catch it. So by voluntarily coming into contact with any other human, there is already some voluntary assumption of the risk of catching COVID-19.

Because of assumption of risk and problems with causation - pinpointing exactly where or from whom a person caught COVID-19 and establishing that but for the negligence of the CCRC they would not have caught it - suing a facility that is taking reasonable precautions would be a difficult case to win.

However, even if the case against a CCRC was not successful it will most likely be very costly for a CCRC to defend. This realization is likely why CCRCs are seeking to have residents sign COVID-19 waivers.

Even before COVID-19, liability waivers were quite common in user agreements in a variety of venues such as gyms, renting a canoe or kayak, ordering an Uber or going skiing.

When you sign a waiver you are agreeing not to sue for simple or ordinary negligence. You may still bring a case if you are injured as a result of gross negligence.

**Ordinary negligence** - Ordinary negligence refers to unsafe conditions that can arise even if a property

owner or service provider is attempting to maintain a safe environment. This could be broken equipment, poor advice, or other unsafe conditions, and it could be unintentional.

**Gross negligence** - Gross negligence refers to willful disregard for customer or participant safety. With gross negligence, a service provider is aware of a hazard but does not take action to mitigate the risk and protect those at the event or property.

CCRC operators already have a vested financial interest in keeping their communities as COVID-19-free as possible since no one would want to move into a community where there was a high incidence of resident COVID-19 cases. Because those interests align with resident safety, it is unlikely that signing a waiver would necessarily result in lax corona precautions. Even with a signed waiver CCRCs are still liable for any gross negligence.

### Here are some considerations:

- Defending a COVID-19 related suit is costly and any suits that are avoided helps to protect residents from passed on cost increases due to increased insurance expense and litigation defense expenses.
- Residents who sign a waiver can still sue if there is gross negligence.
- Giving up right to sue if simple negligence at the facility is believed to have caused a case of COVID-19.

It is FLiCRA's understanding that no CCRC providers will terminate a residency agreement with a resident who refuses to sign a waiver if one is presented. However, it is likely that the providers will restrict access to certain services to residents who have not signed such a waiver. These restrictions to areas such as the dining room, use of the fitness center, ability to ride shuttles to the grocery store, etc., would likely remain in place until there is an all clear from state or federal guidelines or regulations relative to social distancing.

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At this time, FLiCRA has not taken a formal position on whether or not a resident should sign such waivers if presented. Even if a resident signs such a waiver, residents would still be able to sue if there is gross negligence.

It should be noted that the costs of defending lawsuits would ultimately be passed down to the residents even if the CCRC is found not to have been at fault.

Determining whether or not signing a COVID-19 waiver is in a resident's best interest requires weighing the likelihood for costly COVID-19 suits to trigger an increase in resident fees, on one hand, and the value of preserving an heirs' ability to sue the CCRC for negligence if they suspect the CCRC's negligence was the reason why the resident caught COVID-19, on the other.

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## **Governor Ron DeSantis Announces Task Force to Explore the Safe and Limited Re-Opening of Long-Term Care Facilities**

Governor Ron DeSantis announced the formation of Florida's Task Force on the Safe and Limited Re-Opening of Long-Term Care Facilities. Members of the task force will work together to develop guidelines on how to safely allow family members to visit their loved ones in Florida's long-term care facilities where visitation has been prohibited since March due to the COVID-19 pandemic.

Members of the Task Force on the Safe and Limited Re-Opening of Long-Term Care Facilities are below:

**Mary Daniel, Caregiver** - Mary Daniel is married to her husband Steve who has early onset Alzheimer's disease and resides in a memory care unit of a nursing home. When visitation to long-term care facilities was suspended due to COVID-19, Mary reached out to Rosecastle staff and asked if she could volunteer or get a job at the care center just for the opportunity to see her husband of 24 years in person again. She was hired as a dishwasher and has been working with other families to come up with creative solutions to lessen the burden of isolation during the current pandemic.

**Mary Mayhew, Secretary, Agency for Health Care Administration** - Mary Mayhew is Secretary of the Florida Agency for Health Care Administration. In this role, Mary leads a \$29.4 billion health care enterprise, representing close to 31% of Florida's total state budget, and is responsible for health policy and planning for the State of Florida.

**Richard Prudom, Secretary, Florida Department of Elder Affairs** - Richard Prudom currently serves as Secretary for the Florida Department of Elder Affairs, the State Unit on Aging, whose mission is to help Florida's 5.5 million elders remain healthy, safe, and independent.

**Dr. Scott Rivkees, State Surgeon General, Florida Department of Health** - Dr. Rivkees currently serves as Florida's Surgeon General. As Surgeon General, Dr. Rivkees also serves as state health officer for the Florida Department of Health.

**Gail Matillo, President and CEO, Florida Senior Living Association** - As the Association's President/CEO, Gail Matillo is responsible for directing the association and identifying policy objectives that support Florida Senior Living Association's mission, vision and growth.

**Emmett Reed, Executive Director, Florida Health Care Association** - Emmett Reed currently serves as the Executive Director for the Florida Health Care Association (FHCA), the state's first and largest advocacy organization for long-term care providers and the residents under their care.

**Michelle Branham, Vice President of Public Policy, Alzheimer's Association** - Michelle Branham is vice president of public policy for the Alzheimer's Association. She currently serves as co-chair of the State Health Improvement Plan (SHIP) Priority 9 and the Trust for America's Health Advisory Council.

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# Best Practice Guide to Solving Issues Between Residents and Management Cont.

*Continued from Page 2*

Keep in mind that management's responsibility is to ensure the financial health of the community and the satisfaction of contract holders as a group. There are times when the good of the whole must take precedence over the desire of an individual or small group of residents.

**Use the Resident's Council as a Resource** - If management is not responsive or a desired resolution is not achieved, the next step is to bring your issue to the resident's council. The people you elect to represent you on the resident's council may be willing to intervene on your behalf, especially if the complaint affects other contract holders. If nothing else, the resident's council can be an effective sounding board. The resident's council by law is the formal body to represent resident interests in a community.

**Contact the Appropriate Association** - LeadingAge Florida (providers association) and FLiCRA (residents' association) do not have legal authority to solve a complaint. However, each association when appropriate can intervene in a complaint resolution process. They can sometimes provide helpful information or insight about the laws or rules governing CCRCs. They may also be able to refer you to a resident group or a chief executive officer from another CCRC that had a similar problem that was resolved to the satisfaction of affected parties.

**File a Complaint with the Department of Financial Services, Division of Consumer Services** - Florida law provides a complaint process for residents for all disputes other than challenges involving increases in monthly maintenance fees. You can contact this office at (850) 413-5818 or (877) 693-5236.

**Request an OIR Inspection** - The Office of Insurance Regulation (OIR) has the responsibility to oversee CCRCs. Pursuant to Section 651.111, Florida Statutes, any interested party may request

an inspection of the records and related financial affairs of a CCRC by submitting a signed request that describes the alleged violation of law or rule. Unless OIR determines that the complaint is without merit, OIR must make an inspection of the community within 30 days. OIR must notify the complainant of the inspection outcome and the course of action that will be taken. It's important to note that the OIR can only intercede when there is a violation of statute; it does not have authority to mediate disputes relative to a resident contract.

Office of Insurance Regulation  
Life & Health Financial Oversight  
Phone: (850) 413-3153  
Email: [CCRCTeam@flor.com](mailto:CCRCTeam@flor.com)

Department of Financial Services  
Division of Consumer Services  
Toll free: (877) 693-5236 (in-state only)  
Direct: (850) 413-3089  
Web: [www.myfloridacfo.com](http://www.myfloridacfo.com)

**Request Mediation or Arbitration** - Chapter 651.123, Florida Statutes, provides an alternative dispute process with two options. A resident or provider can seek non-binding mediation and/or binding arbitration when mediation fails to resolve the dispute. Disputes over increases in monthly maintenance fees are not subject to mediation or arbitration. Rules 690-193.062 and 193.063, Florida Administrative Code, explain how the process works and the fees involved. A copy of this rule is available from FLiCRA.

**Long-Term Care Insurance Guide for Florida (including a section on Continuing Care Retirement Communities)** - This is another great resource published by the State of Florida which is helpful to both current and prospective residents of CCRCs.

The link to the public guide is:  
[www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/LTCGuide.pdf](http://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/LTCGuide.pdf)

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# FLiCRA Annual Conference & Chapter Delegates Meeting

## Thursday, November 12, 2020

*By Zoom Webinar - Video and Audio Options. Zoom link to be provided closer to the event date.*

### AGENDA

**9:00 a.m. – 9:05 a.m.**

- Moment of Silence
- Pledge of Allegiance
- Call to Order and Introductions

**9:05 a.m. – 10:15 a.m.**

- President's Report
  - Board Evaluation Process
  - Grassroots Action Project
  - 2020 Membership Video
  - Approval of 2019 Meeting Minutes
  - Treasurer's Year-to-Date Report
  - **ITEMS FOR DELEGATE ACTION:**
    - 2021 Operating Budget Proposal
    - Board Nominations Report
    - Presentation by Candidates
- Electronic link for Delegate Voting will be provided for each action item.***

**10:15 a.m. – 10:35 a.m.**

- Participants take a meeting break
- Ballots will be tallied from online link. The newly elected board will convene by phone to elect officers.***

**10:35 a.m. – 11:25 a.m.**

- Regional Reports

**11:25 a.m. – 12:15 p.m.**

- Recognize Outgoing Directors
- Installation of 2020-2021 State Board
- 2021 Legislative Session Update
- Open Forum from Attendees (Live Question and Answer)

**12:15 p.m.**

- Adjournment

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**There are no fees required to participate in the virtual conference, but we do request that you pre-register. Confirmations will be sent to attendees with additional information prior to the conference.**

***Please print legibly and complete all information requested (if applicable). Please make copies of this form for additional registrants.***

Name \_\_\_\_\_

Chapter \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Phone \_\_\_\_\_

Email \_\_\_\_\_



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## **Liability Waivers and Nursing Home Lawsuit Process in Florida Cont.**

### ***Continued from Page 3***

After the prospective defendants have been identified, the attorney must serve to each a pre-suit notice by certified mail that identifies: the resident's rights that have been violated; the negligence alleged to have caused the injury; and a description of the injuries at issue.

Unlike the medical malpractice pre-suit statutory scheme, Florida's nursing home pre-suit statute does not provide that a claim or defense may be stricken if a party fails to participate.

After receiving the certified pre-suit notice, the prospective defendants have 75-days to review the claim. At the end of the 75-day period, the prospective defendant or its insurer is supposed to provide a written response either rejecting the claim or making a settlement offer.

After the expiration of the 75-day period, the parties are supposed to meet to mediate the case in an effort to discuss the issues of liability and damages. After the mediation, if it does not result in a settlement of the matter, only then may a lawsuit be filed.

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