

# SHORTS



## ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

### No Room at the Inn? Does N.C. Have All the Health Care Services and Facilities It Needs?

by Ken Burgess



Each year, the governor, assisted by the State Health Coordinating Council (SHCC) and members of the N.C. Department of Health and Human Services' Health Planning Section, produces a State Medical Facilities Plan (SMFP) that identifies all health care facilities and services subject to CON that are "needed" in the state. The SMFP covers nursing facilities, assisted living communities, hospices, home health agencies, inpatient psychiatric services and most other health care services including hospital beds, operating rooms and technology (lithotriptors, gamma knives, linear accelerators, etc.).

You know the process – the SMFP identifies a need (like new nursing home beds), it sets a date for all interested applicants to apply, everyone files their CON applications, someone wins and someone loses (except where all applications are denied, which happens fairly frequently of late), and the losers usually appeal the results.

For providers looking to expand, and attorneys like those of us at Poyner Spruill who handle CON matters, the SMFP is the road map to what will or might happen in the next two to three years in terms of facility/service development and potential CON appeals. Most years, the SMFP is chock full of good stuff.

But the 2010 SMFP is noticeably thin in terms of identifying additional "needed" health care facilities and services, leading some of us to pose the question I chose as this article's title – is North Carolina essentially saturated with needed health care services and facilities? To be fair, there are some new things identified as needed in the 2010 SMFP but on the whole, the plan has precious little to offer providers looking to expand their services or get into new lines of service.

Some of the needed services the 2010 SMFP does include, pertinent to long term care, include:

- 60 SNF beds for Johnston County;
- 10 SNF beds for Camden County;
- 20 SNF beds for Perquimans County;
- 340 adult care home (assisted living) beds for Mecklenburg County – this is the BIG bonanza in the 2010 SMFP and should create some interesting applications, decisions and probably appeals;
- 40 adult care home beds each for Dare and Gates counties;
- 30 adult care home beds for Hyde and Jones counties (maybe enough to justify some new development versus expansions of existing facilities);
- adult care home bed allotments of 20 for Camden, 20 for Tyrell and 10 for Washington counties - just enough to allow expansions of existing facilities or small freestanding units as part of multilevel campuses such as independent living;
- only one Medicare-certified home health agency is shown as needed, but it's in Wake County, so that one will be hotly contested for certain; and

*(continued on page 3)*



Poyner Spruill<sup>LLP</sup>

ATTORNEYS AT LAW



# FOR NURSING HOMES



## The Duty to Investigate in Nursing Facilities



by Ken Burgess & Jessica Lewis

We'll make you a bet - we bet if each of you reading this article goes to your facility policy and procedure manual, you'll find a policy on investigating "incidents" in your facility. We also bet that your policy is broader than it needs to be. The nursing facility industry has become so oriented toward "investigating" everything that providers often inadvertently shoot themselves in the foot.

Federal law requires ONLY that you investigate allegations (or suspicions) of abuse, neglect, misappropriation of resident property, and injuries of unknown origin. But what we find in most of our clients' policy manuals is a policy requiring investigations of every unintended outcome, including injuries in which we know exactly what happened. For example, a CNA violates a facility policy on resident van transports, and a fall and injury result. Barring some extreme facts, like that the same CNA has done this numerous times before, it's not abuse, it's not neglect, it's not misappropriation of property, and it's not an injury of unknown origin. Since you know exactly what happened, you are NOT REQUIRED to investigate it. Nonetheless, we often see policies requiring investigations for any "incident" on the campus, defined by the facility as any accident, injury or unintended consequence, regardless of the facts surrounding it.

Here's the problem - the federal administrative law judges who decide nursing facility survey appeals have, over the years, developed a body of case law outlining what a complete and adequate investigation of abuse, neglect, misappropriation, or injuries of unknown origin should look like. So, when you put all unintended outcomes (i.e., "incidents") into the same policy with those four categories, you inadvertently graft onto yourself the same expected investigatory elements for all "incidents" that the regulators expect to see for abuse, neglect and misappropriation of property.

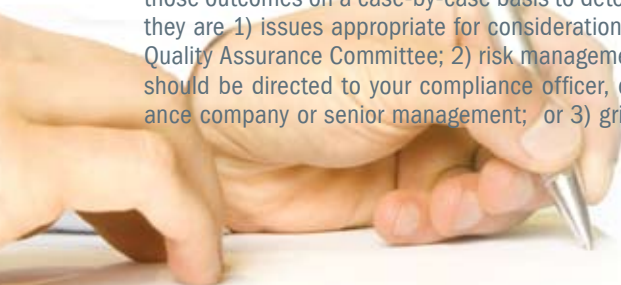
Now, before somebody screams at us, we're not saying you shouldn't look into unintended outcomes that don't rise to the level of abuse, neglect and misappropriation. What we are saying is you should segregate those four types of outcomes into a separate policy in terms of your duty to investigate and report. For everything else, your policy should probably be to evaluate those outcomes on a case-by-case basis to determine whether they are 1) issues appropriate for consideration by the facility Quality Assurance Committee; 2) risk management issues that should be directed to your compliance officer, counsel, insurance company or senior management; or 3) grievance issues

that need resolution with residents, families and/or staff. For example, in the outcome we cited above, you will probably want to know why the CNA used an improper van transfer technique. Was he improperly trained or supervised? Was he just in a hurry? But in our view, that decision should be made on a case-by-case basis, and absent evidence it rose to the level of abuse, neglect or misappropriation, it should be evaluated and assessed as either a QA issue, risk management issue or grievance issue, as applicable.

So, what should you do? Consider creating a policy on REQUIRED investigations limited to those the regulations mandate (abuse, neglect, misappropriation of property and injuries of unknown origin). Either leave the rest to a case-by-case professional decision by your management/staff (consider having the same senior staff make those decisions for the sake of consistency) or separate those other potential unintended outcomes in another policy that delegates them to senior management for evaluation as grievances, risk management and/or QA issues.

The Departmental Appeals Board cases on this point do stretch to find an obligation to investigate. But all the cases we've seen so far where a facility is criticized for failing to do so arose in the context of abuse, neglect, misappropriation, or injuries of unknown origin - EXCEPT where the facility took on an obligation to investigate in a broader array of cases through its own policies and procedures.

*Ken Burgess may be reached at 919.783.2917 or [kburgess@poynerspruill.com](mailto:kburgess@poynerspruill.com). Jessica Lewis may be reached at 919.783.2941 or [jlewis@poynerspruill.com](mailto:jlewis@poynerspruill.com).*



**Poyner Spruill** <sup>LLP</sup>

ATTORNEYS AT LAW



## No Room *(continued from page 1)*

- A smattering of inpatient hospice beds (between three and seven) for Alexander, Buncombe, Macon, Randolph, Sampson, and Craven Counties.

So, back to my original question – is there no real room at the inn for new health care development? We'll have to wait and see. In fairness, the SHCC is looking at the methodologies used to project need for several services, so these estimates of need could change dramatically in future years' SMFPs, or maybe not at all. Either way, we all – providers, regulators and, of course, the lawyers – will be watching eagerly to see who applies, who wins, who loses, who appeals, and how our state health planners respond to the changing shape of North Carolina's health care needs.

### Ken's Quote of the Month

"Ah, but a man's reach should exceed his grasp, or what's a heaven for? The aim, if reached or not, makes great the life."

*Robert Browning*

## Ken won't tell you, but I will...



**By Laura Hudson, President, Ken Burgess Fan Club, and Marketing Director of Poyner Spruill LLP**

Those of you who know Ken know that he'll brag about his friends, his clients, his co-workers, his organizations, and especially his nieces and nephews. However, he frequently forgets to let everyone know of his accolades and achievements, and I'd like to correct that! While 2009 was not a banner year for most industries, Ken didn't let that slow him down in the slightest. Some high points of the past year:

- Ken co-authored an article on Nursing Facility-Hospice Contracts Under Medicare CoPs that was one of the *National Law Review's* most read articles for 2009.
- He was recognized as one of the Best Lawyers in America by Woodward & White, publishers of this esteemed list, for his work in health care law.
- He was president of the North Carolina Society of Health-care Attorneys, and will now serve as immediate past president and chair of the society's Innovations Committee and co-chair of the Law School Grants Committee.
- He was appointed board chair for the North Carolina Health-care Facilities Association FutureCare Foundation through 2011.
- He was appointed to a two-year term on the N.C. Bar Association's Health Law Council.

And in keeping with his overachiever status, Ken already has some great things planned for 2010!

- He has been asked to become an affiliate faculty member of ECU's School of Medicine in the Masters in Public Health Program on Long Term Care Administration.
- He will serve a second term as a legal consultant for the North Carolina Medical Society Ethical and Judicial Affairs Committee.
- He will serve a second two-year appointment to the National Legal Committee of the American Health Care Association.

And finally, he's going to keep publishing this newsletter! Congratulations, and thank you, Ken, for all you do.



## HR Corner

## A Proposed New Year's Resolution

For 2010, a good New Year's resolution from an employment law perspective would be to review your existing personnel policies, paying particular attention to your electronic usage policy.

Employers may assume that anything sent or viewed by their employees on a work-owned or work-issued computer or cell phone can be reviewed by the employer. However, courts across the country are placing limits on what employers can lawfully access, even on an employer-owned computer. And the critical piece in analyzing these cases is usually the employer's electronic usage policy - or lack thereof.

There is a definite upward trend in litigation over this issue, because many companies are routinely accessing employee hard drives and obtaining information that is harmful to the employee. Such information often results in disciplinary action against an employee or is used against a former employee who has sued the employer. When deciding whether the employer had the right to access and/or use employee information on work computers, software systems or cell phones, courts focus on the employer's electronic usage policy. The critical issue is whether the employee had a reasonable basis for believing that information sent on the employer's computer or cell phone—even if sent from an employee's private, password-protected email account (like gmail.com or hotmail.com)—would be subject to review by the employer. However, even the strongest language in an electronic usage policy may not be sufficient if a supervisor or manager tells employees that in actual practice the company will not review their electronic communications.

These difficult issues will be clarified next year, because the Supreme Court has just agreed to hear a case on this subject. The case before the Supreme Court involves an electronic usage policy that prohibited personal use of the employer's computer and limited the number of text messages that could be sent per month over company-issued pagers. In practice, the supervisor told employees

by *Bryn Wilson*



that the employer wouldn't review their messages as long as employees who exceeded the permitted text message amount reimbursed the overage charges. When one employee repeatedly exceeded the permissible texting amounts, the supervisor obtained copies of the messages from the cellular provider and reviewed them to see if they were work-related. The employer discovered many of the text messages were sexual in nature and had been sent to fellow employees. The employee was fired, and he in turn sued his employer for invasion of privacy. One of the questions the Supreme Court will consider is whether the employee had a legitimate expectation of privacy in the content of his text messages.

The Supreme Court's decision will provide more information about best practices for electronic usage policies. Until that time, we recommend adopting a very explicit and strict policy in which it is clear to employees that anything transmitted over their work computers or cell phones is subject to being accessed by the employer, and that no supervisor or manager has the authority or ability to vary the electronic usage policy.

*For more information on employment law issues, please contact Bryn Wilson at 919.783.1117 or [bwilson@poynerspruill.com](mailto:bwilson@poynerspruill.com).*

**POYNER SPRUILL IS GOING GREEN** — In an effort to be more environmentally conscious, we also issue *Shorts* by email. To sign up for an email subscription of *Shorts*, please send an email request to [alerts@poyners.com](mailto:alerts@poyners.com) with *Shorts* in the subject line. Save a tree!

**P.S.**

POYNER SPRUILL publishes this newsletter to provide general information about significant legal developments. Because the facts in each situation may vary, the legal precedents noted herein may not be applicable to individual circumstances. © Poyner Spruill LLP 2010. All Rights Reserved.

RALEIGH

CHARLOTTE

ROCKY MOUNT

SOUTHERN PINES

WWW.POYNERSPRUILL.COM

301 Fayetteville St., Suite 1900, Raleigh, NC 27601 / P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075