

# SHORTS ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP



## The Falling Tree

In the midst of a fierce, Southern summer storm, I saw the old, gnarled oak tree. All around it, the other trees—the younger ones—had given up their leaves and limbs, bowed to the irresistible power of the wind, and now lay broken and scattered on the ground.

And there, still, stood the old oak. It watched the others die. It cried, it creaked, it bent to the ground, groaning in the wind. Then, slowly, it struggled upright again, proudly and fiercely, unwilling to yield. It fought. It held its form until it could hold no more. Again, it strained against the mighty wind, bending low and sweeping the ground, caressing its fallen comrades. And then, once more, it groaned and rose as if to say, “I will not go until I say it’s time to go.”

Finally, when it could fight no more, it fell. And when it went, it did not screech and scream like the saplings and the pines and the willows. It descended slowly, gracefully, deliberately, as if to say, “Now, I am ready.” And as it fell, it remembered when it was a sapling, the first autumn and the proud glory of its burnished leaves, and then the winter snows it endured. It recalled the spring, when it burst to life again, and the countless years it had repeated this cycle of birth and loss and re-birth. As the old oak embraced its glorious, graceful, slow fall to death, it remembered growing older and how it got harder each year to stand tall against the wind.

And when, finally, it surrendered, it fell not with a snap, like the saplings. Not with a whine, like the pine trees. Not with a groan like the others. Instead, in its slow descent to death, it sang. A symphony of passing—the quiet whisper of its leaves,

by Ken Burgess



the sweeping rustle of its branches, the subtle tearing of its aged roots—the majestic music of a proud death. And when at last it fell completely, it was with a kiss to the skies and a quiet, slow, graceful whisper, on its own terms, not those of the earth, or of the wind, or of man.

When its song was done, there was quiet, only quiet. And there, where it once reigned proudly and invincible, only a gaping hole, a wound in the earth, remained. A passing traveler might look sadly at the great beast, now beaten, rotting on the land. But somewhere in the deep recesses of that magical fallen trunk, I think the old tree smiled, knowing it was not yet done.

For soon the winter snows would come and melt, and the sun would warm, and in that great hole in the earth that once held the mighty oak, a tiny, fragile sapling would spring forth, a child of the great tree, and so begin its journey of spring, and fall, and summer, and winter, and someday its own lovely, sad, graceful song of death. And I watched all of this from my car window, sitting beside a country road on a stormy July afternoon, and marveled at what I had just learned.

*(continued on page 4)*

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## Long Term Care Contracts: Ten Rules To Avoid Catastrophe

By Jim O'Brien

*Editor's Note: Poyner Spruill's health care team works closely with our Business Organization attorneys to assist health care providers in every phase of their business operations, including contract preparation and review; corporate document and updating preparation; sales and acquisitions; and financing. This article addresses a key problem we often encounter when providers make missteps in negotiating, executing or implementing services and supplies contracts. Next month, watch for our article on the importance of periodic corporate audits.*

Contracts are part of life for every business owner and every long term care provider. Most of our nursing facility and assisted living clients have dozens of contracts in effect at any given moment. And often we find they are signed without much thought or much review. If you are serious about your business, you will need to take a serious approach to understanding, negotiating and performing the contracts that are presented to you. Here's a list of 10 things you should consider when someone hands you a contract.

**1. ESTABLISH EXPECTATIONS.** A contract should establish the parties' expectations for the relationship. This is just as important as the payment terms or your ability to get out of the contract. If you sign a contract that doesn't reflect your expectations, the relationship is destined for failure. For example, if you're negotiating a "services" agreement (therapy, supplies, pharmacy) and you expect the total cost to include a fixed, per-unit price, but the seller expects to charge \$2.00 more per unit based on

certain variable conditions (brand versus generic drugs, for example), you have a problem. If the parties' expectations are not aligned, you may be better off finding another supplier.

- 2. KEEP IT SIMPLE AND CLEAR.** Contracts in any industry can be very complex. Sometimes the complexity is necessary, but not always. If possible, try to use contracts that say what you mean in a simple, concise and clear manner, but be sure not to oversimplify. If both parties understand what the contract means, you've hit the mark.
- 3. EVERYTHING IS NEGOTIABLE.** Everything is negotiable—even terms that the other party tells you aren't negotiable. You're not likely to get everything you want, and if you push on things that are extremely important to the other party, you may lose the deal, but you will quickly learn where there's flexibility. Part of the art of negotiating is identifying the things that are important to you and the other party, and finding a middle ground. If an important point becomes non-negotiable—a "deal killer"—then you may have to walk away from the deal.
- 4. BE WILLING TO WALK AWAY.** This is very important and, sometimes, it may be your only leverage in negotiating a contract. Leverage—the principle of using a small advantage or even merely a perceived advantage to gain a benefit—is critical in contract negotiations. Sometimes the only leverage you will have is the ability to walk away from a deal. If you indicate your willingness to walk away, the other party may be more willing to negotiate terms



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in your favor. Remember, in health care, there are usually many options for the services or supplies you need, and it's competitive out there.

5. **IF YOU DON'T UNDERSTAND SOMETHING, ASK.** Contracts are legal documents, often drafted by lawyers, and they usually include confusing language or concepts. So, don't be afraid to ask a question if you don't understand what something means (remember, there are no stupid questions). If you sign a contract, it's binding whether you understand it or not. Understand what each provision means before you sign it.
6. **USE A QUALIFIED LAWYER IF YOU CAN.** While lawyers can be expensive, they can also save you money and frustration in the long run (and the short run). A lawyer can help you understand the contract and negotiate terms in your favor. A qualified lawyer will know your industry and which terms should be negotiated. Avoid using a friend or relative who is a lawyer, but doesn't specialize in contracts or your industry—you may end up paying for it down the road.
7. **PUT ALL DEAL TERMS IN WRITING.** It's surprising how many times you may hear "just trust me" when you're negotiating a contract. That's a negotiating tactic—an appeal to your emotions—often used by people who don't have a legitimate negotiating position. All your important deal points should be in the contract and not left to "trust." These include (a) the reason for entering the contract, (b) what you agree to do and what the other party agrees to do, (c) when these things are supposed to happen, (d) what the financial terms of the deal are (e.g., how and when you get paid), (e) how you get out of the deal if something goes wrong, and (f) how long the deal lasts. Business deals are like a marriage—it all sounds good on the front end, but to keep it happy, put everything in writing.
8. **DON'T MAKE ASSUMPTIONS.** Don't assume anything when drafting or negotiating a contract. Spell out all the key assumptions in the contract. For example, if you're negotiating an agreement with a marketing firm and you really want a particular person in the firm to work on your account, don't assume that the firm will assign that person to do your work. If it's important to you, specify in the contract whom you want to service your account.

9. **PAY ATTENTION TO "BOILERPLATE."** Boilerplate refers to the standardized, formal language in a contract that is often located at the end of the contract. Boilerplate provisions affect your legal rights and are binding when you sign the contract even if you don't read them. Be sure you read and understand these provisions, and negotiate them if you don't like what they say. Examples of boilerplate provisions are (a) requiring the loser in a lawsuit to pay the other party's legal fees, (b) requiring a lawsuit to occur in a selected state (which may be far from where you are), (c) prohibiting transfer or assignment of the agreement, (d) specifying which state's law controls the interpretation of the agreement, and (e) requiring arbitration.
10. **UNDERSTAND YOUR BUSINESS.** Translating your business deal into a contract requires a good knowledge of the customs and nuances of your business. If you don't already have an intimate knowledge of how your business works and how deals are structured, talk to others who have done similar deals. If you don't know what's customary in your industry, you may not end up with the best contract. Once you have the deal you want, remember to monitor how the actual deal works in operation and whether it's consistent with the contract. Every company should have a key person or team who monitors the actual implementation of contracts, especially multiyear contracts in which, over time, the actual practice may begin to vary from the contract terms.

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## The Fallen Tree (continued from page 1)

This story came to me one day after some of my lawyer pals were asking me about working for nursing homes and “old folks.” They kept asking me why I liked this area of the law so much. It bothered me that I couldn’t explain, in human terms, why I’ve spent 27 years doing what I do. While I was driving home that day, the wind kicked up. I pulled off the road in my car and watched one of those late July, butt-kickin’ wind storms. I watched the trees fall, and the leaves and road trash fly, and I saw this really old, huge oak tree. And I watched it and watched it, knowing it would fall. And then I saw this story unfold. It was a good day.

Now, when I am asked that question, I talk about the old tree I saw fall in a windstorm. And when I go to clients’ nursing homes, I always stop and look, really look, at the old folks who live there. And I think of them as strong, graceful old oak trees. I don’t really see their withered hands, their thinning hair, and their confused minds. Instead I see their leaves, and their springs, their summers and winters. And I hope that they, and I, and you, will fall in our time like the mighty oak—proud, singing, quiet, and graceful, and that we will leave just one young sapling in our wake to tell this story to someone else.

*Ken Burgess advises clients on a wide range of legal planning issues arising in the SNF setting, assisted living setting and other aspects of long term care. He may be reached at 919.783.2917 or [kburgess@poynerspruill.com](mailto:kburgess@poynerspruill.com).*

## Ken’s Quote of the Month

The old folks say, “Any moment can change your life for better or worse. The trick is simply in the seeing.”

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