

SHORTS



ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

Health Care Reform Planning Comes to North Carolina

What will health care reform mean for me and my company? That's the ten thousand-dollar question everyone is asking. And it's probably no surprise that an entire cottage industry of "experts" has arisen quickly, all claiming they have the answer. I get daily email notices of another health care reform summit, conclave, webinar, or book explaining the new reform law. In reality, no one knows yet the full extent or impact of health care reform in North Carolina or anywhere else in the nation. So much of this massive law has yet to be defined in regulations, federal and state agency policies and other government interpretations.

But North Carolina's state government has begun planning for reform. Recently, I was invited to participate in a new Fraud and Abuse Task Force organized by the Institute of Medicine (IOM) in Chapel Hill and the North Carolina Department of Health and Human Services, and I quickly agreed. The purpose of the task force, in part, is to identify gaps in enforcement of fraud and abuse provisions in the health care reform legislation, to identify new or revised statutes the state will need to adopt, and generally to ensure our state enforcement mechanisms "fit" within the many fraud and abuse provisions of the new reform law. The task force has no real decision-making power. Instead, we will make recommendations to state government agencies and, either directly or through those agencies, to the General Assembly.

I agreed to serve on the task force as a representative of the long term care industry for one primary reason -- we need to be at the table as our state government looks at fraud and abuse enforcement involving public funding for health care. The IOM is highly influential with state government agencies and the General Assembly, and its prior work has often resulted in new or revised legislation and/or agency policy. I was greatly encouraged when the president of the IOM opened our first session with a strong message: "This isn't about dinging health care providers." One of the primary charges to our task force, in addition to identifying potential gaps in enforcement mechanisms, is to educate providers of all types about financial integrity, fraud and abuse programs, and reporting obligations, of which there are many in the reform law.

by Ken Burgess



Our group includes representatives from the Criminal Investigations Division of the Department of Insurance; the Division of Medical Assistance (including both Clinical Operations and Program Integrity); the Division of Health Service Regulation; consumer groups such as AARP and Easter Seals; the attorney general's office; private insurers; and other trade and licensing organizations, including the North Carolina Medical Society, the Board of Pharmacy, and the Hospital Association, among others. The task force will meet monthly, with meetings through December 2010 already scheduled and further meetings in 2011 anticipated.

The Fraud and Abuse Task Force is one of several IOM task forces organized to address health care reform issues at the state level. Other task forces include: Health Benefit and Insurance Oversight; Health Professional Workforce; Medicaid and Elder Services; New Models of Care; Prevention; Quality; and Safety Net.

When the "universal coverage" provisions of health reform are fully implemented by 2014, state officials predict that an additional 500,000 to 800,000 North Carolinians will be eligible for Medicaid (anyone under 133 percent of the federal poverty level); many more will be eligible for health insurance premium subsidies, employers and individuals will have new insurance coverage requirements; and at some point, North Carolina, like all other states, will have a new Health Benefits Exchange to manage

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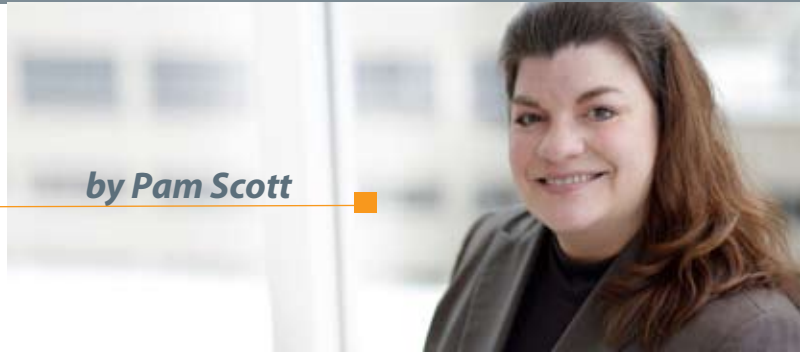
CON Section, May I?

Thinking of converting semiprivate to private rooms, or renovating an existing facility to make it more home-like and family-friendly? Considering relocating existing skilled nursing beds to an adjacent county? Planning to convert existing CCRC beds for nursing care or relocate CCNC nursing beds to a sister community in a neighboring county? Some of these projects would require a certificate of need (CON) under North Carolina's CON law, while others would not. Either way, a provider will almost always want to ask, "CON Section, may I?"

Substantial renovations, expansions or replacements of existing skilled nursing facilities and adult-care home facilities (even those in excess of \$2 million) that do not result in a change in bed capacity and that involve (1) converting semiprivate resident rooms to private rooms, (2) implementing innovative and more home-like dining and living spaces, such as cafes and kitchenettes, and/or (3) renovating other common areas to improve residents' quality of life, are specifically excluded from CON review, provided all of the conditions included in the statutory exemption are met. Even for such projects that do not require CON review, the prudent action plan begins with confirming a project's exempt or no-review status from the get-go by first consulting with your CON attorney and then checking in with the CON Section. Indeed, written notice to the CON Section is required for a nursing facility or adult care home renovation project that falls within the above-mentioned exemption in order to demonstrate that the proposed project qualifies for the exemption.

Tight lending markets, decreased reimbursement, and other factors are causing some providers to change course on projects for which they have CONs in hand but have not yet completed - which they can do provided the project continues to materially comply with the approved application and the conditions of the issued CON. Just as with new undertakings, a pro-

by Pam Scott

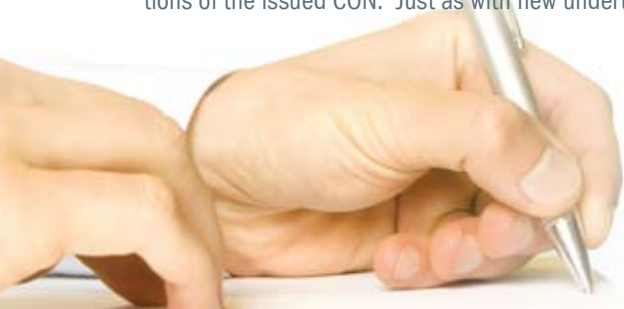


vider planning changes to an ongoing CON project will usually want to make sure the CON Section agrees that the revised project will continue to be consistent with the application and the CON.

An early consult with legal counsel and the CON Section regarding a project's exempt or no-review status can help you anticipate potential questions and legal challenges from the CON Section or a competitor, and shape the details of your project accordingly. Familiarity with the agency's current hot-button issues and recent developments from appellate court opinions applying the CON law are often key to developing a successful proposal. For larger undertakings or projects expected to be opposed by a competitor, you may also want to informally explore the details of the proposed project with the CON Section before seeking an official written determination. Clearly presenting a no-review, exemption, or material compliance question to the CON Section in a way that addresses possible legal as well as factual questions can make all the difference in terms of getting a timely, affirmative decision from the agency and undercutting or sidestepping potential legal challenges to the project. Better to deal with a question or potential legal obstacle before your project gets rolling and major expenses are incurred than to be pulled up short in the midst of development, which can result in costly delays and lost opportunities.

Our CON team has a combined 76 years of experience in helping many different types of providers, including long term care companies, navigate a wide variety of capital projects through the CON law, ranging from material compliance, exemption, or no-review requests to complex CON applications in hotly contested competitive reviews.

Pam Scott may be reached at 919.783.2954 or psscott@poynerspruill.com.



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these new insurance requirements and opportunities. Medicaid, and thus Medicaid fraud and abuse enforcement tools, will be a major part of these changes.

Our participation on the task force will help ensure the North Carolina long term care industry understands the implications of these changes for fraud and abuse enforcement, prevention, and reporting. One of my first requests was for a “cheat sheet” or matrix of existing state government Medicaid-based recoupment and enforcement tools and programs, which the Department of Justice graciously agreed to provide and circulate, so everyone on the task force and in our industry understands the growing array of Medicaid enforcement/recoupment programs already in existence.

We'll keep you posted on the work and recommendations of the task force as our work moves forward. I appreciate the opportunity to represent the North Carolina long term care industry on this task force.

Ken Burgess may be reached at 919.783.2917 or kburgess@poynerspruill.com.

p.s.

Poyner Spruill ^{LLP}
ATTORNEYS AT LAW

Ken's Quote of the Month

“Take it easy – but take it.”

Woody Guthrie

Other Health Care Reform Notes on Long Term Care

A few other notes on health care reform that affect long term care:

- The American Health Care Association (AHCA) recently submitted comments to the Centers for Medicare and Medicaid Services (CMS) on its proposed civil money penalty (CMP) regulation, which implements several key parts of the Patient Protection and Affordable Care Act. CMS's proposed rule addressed statutory “opportunities” for a reduction in CMPs in certain cases, an “independent” informal dispute resolution process for providers, and CMS's ability to collect and “escrow” CMPs before providers have completed their appeals of survey deficiencies. AHCA identified numerous flaws in the proposed regulations of such severity that it asked CMS to retract the proposed rule and start over. Our firm submitted extensive comments on behalf of the North Carolina Healthcare Facilities Association, which made their way into AHCA's final comments to CMS. We'll keep you posted on the progress of the rule.
- Under the reform law, providers eventually will have to implement “ethics and compliance programs.” This is our old friend the corporate compliance program. When fully implemented, this part of the reform law will make compliance programs mandatory. Until now, they have been technically voluntary but highly recommended by the Office of Inspector General of the U.S. Department of Health and Human Services. Poyner Spruill developed a yearlong series of webinars, teaching materials, and model policies -- including a template “auditing and monitoring” tool -- for the AHCA. The series can be found at www.ahcancal.org. With mandatory compliance programs on the way, now is a good time to make sure yours is up to date, fully implemented, and regularly monitored for effectiveness.
- Ken Burgess will be presenting a half-day teaching session on “Implications of Health Care Reform for Long Term Care Providers” for the South Carolina Healthcare Association in late September 2010. We plan to repeat the session for North Carolina long term care providers in early 2011. Stay tuned for more details.



From the Marketing Department

Ken Burgess was recently named to the 2011 *Best Lawyers in America* list for Health Care. This is the third year in a row Ken has been named to this prestigious national listing of lawyers. The *Best Lawyers* designation is based upon an exhaustive annual peer-review survey. The new edition is based on a national survey involving more than 3.1 million detailed evaluations of lawyers by other lawyers. Other members of the PS health law team included in the 2011 *Best Lawyers* edition include:



Christopher P. Brewer



William R. Shenton



Thomas R. West

Ken also recently agreed to serve on the live auction committee for the American Heart Association's 2011 Heart Ball. "You know me: I like to go BIG with these sorts of things," Ken said. "So, I've cooked up a trip to Paris for two with lodging in my friend's private apartment in the Fifth District of Paris near all

the coolest museums and restaurants. Anyone with a private airplane or a couple of first-class tickets to Paris, please give me a call."

Finally, Ken is serving as steering committee chairman of the North Carolina Bar Association's Health Law Council end-of-life care public education campaign. The project involves developing a 20-minute DVD explaining the importance of end of life planning and options under North Carolina law, including the state's revised advance directives documents and tools. "We've trained providers for over three years now on these revised laws and documents, but the public is still largely uninformed about these planning tools," Ken said. "Our goal is to create a DVD, with pre- and post-viewing training materials, that can be shown at local churches, civic meetings, and by facilities which also identifies other resources for folks wanting individualized help in exploring end-of-life planning documents. Eventually, we hope to hold one or more statewide televised programs explaining these concepts and providing hands-on assistance to callers with advance directives documents." The project is being funded by a grant from the North Carolina Bar Association Endowment, along with private contributions from a number of N.C. provider organizations. Stay tuned for more on this exciting project!

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 to *Shorts*, please send an email request to alerts@poyners.com with *Shorts* in the subject line. Save a tree!

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