

SHORTS

ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

Make Me a Channel of Your Peace

by Ken Burgess

Over the nearly six years that we've published *Shorts*, the newsletter has changed, probably because I, as primary writer, have changed. In 2006 when we launched *Shorts*, it was admittedly a "marketing" piece, designed to inform our readers about new happenings in the law, health care operations, clinical developments and all things "long term care." And admittedly, it was also designed to keep the Poyner Spruill Health Law Team front and center in the minds of our clients and potential clients. It worked. In 2006, we began with 300 readers. Today, our readership is somewhere in excess of 1,300, and I can barely keep up with the requests to "add me to your mailing list." That's a blessing.

Somewhere along the way, to my great surprise, we also got noticed by folks outside North Carolina. Our marketing director, without telling me, submitted *Shorts On Long Term Care* to the Legal Marketing Association's international newsletter competition. In late 2009, she called me from Las Vegas to say that *Shorts* had just been named First Place Winner for law firm newsletters – not just among long term care or health care newsletters, but ALL newsletters written by law firms in the U.S. (and several other countries) on any legal topic. Boom, bang, boom. That was a special day!

Somewhere along the way, *Shorts* changed from a legal newsletter to a publication that talked not about just law and long term care, but also about my musings on life. My first dalliance in "soft" stories was "Midnight's Requiem," written in 2009 to express my grief about the death of my little black cat, Midnight. The story generated nearly 300 email responses. Next, I wrote "The Falling Tree," which celebrated the aging process and generated another couple of hundred emails from across North Carolina, the U.S. and even England. A friend was so moved by that story that he created a painting depicting The Falling Tree that now hangs on my dining room wall. I wrote about my trips to Nicaragua and our work with the impoverished elders. I celebrated the life of Debbie Mathis of the Lutheran Services for Aging organization and, most recently, mourned the passing of my friend, Riley Clapp.



What has amazed me is that our "soft" stories touch readers the most and, ironically, bring us the most legal business. I guess that just goes to show that folks want their lawyers to have brains and hearts. Life is strange indeed.

So I'm now on deadline for the next issue (and if we skip an issue, I get frantic calls asking if we've stopped publishing *Shorts*), and I've decided in celebration of the year's end that I'll take a break from law, and long term care, and write about my upcoming Christmas.

This has been, honestly, one of the most challenging years of my life, and for most of 2012, I've just wanted it to be over. My precious mother turned 75, and I've witnessed her slowing down. I turned 55 in July. One of my biggest clients was sold, and off went the business to a fancy D.C. law firm. My niece lost her job. I've been tired and a little depressed. Two of my best friends from my days working in Washington, D.C., at the American Health Care Association died of cancer. My stepfather, Frank, was diagnosed in October with a rare form of cancer that will require major surgery and a long recovery. That news and the days of being with Frank, Mom, and Frank's daughters at the Duke Cancer Center took me back, deeply and painfully, to Dad's death in 2002 at Christmas.

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CMS Signals Renewed Focus on Advance Directives and Residents' Rights to Determine End-of-Life Care

By Ken Burgess

By the time you read this article, if you are a skilled nursing facility (SNF), you will already be subject to new surveyor guidance from the Centers for Medicare and Medicaid Services (CMS) on advance directives and residents' rights to determine care at the end of life. On September 27, 2012, CMS issued revised surveyor guidance in Appendix PP to the state operations manual, further interpreting F Tag 155, which is based on 42 Code of Federal Regulations section 483.10(b)(4). The revised guidelines became effective on November 30, 2012.

The regulation itself has not changed, nor has the Federal Patient Self-Determination Act on which the regulation and the surveyor guidance are based. However, in this revised guidance in Appendix PP, CMS reaffirms its commitment to resident choice in end-of-life care and its direction to surveyors to assess providers' compliance with that right in annual recertification and complaint surveys.

CMS describes four key expectations of SNFs in the revised guidance:

1. To establish and maintain policies and procedures governing the right of choice in end-of-life health care decision-making;
2. To inform and educate residents, or their legal surrogate, about end-of-life choices and the facility's policies regarding how residents exercise these rights;
3. To help residents exercise these rights by creating advance directives (living wills, health care powers of attorney or other advance directives recognized by state law); and
4. To incorporate residents' choices into treatment, care and services, specifically including initial, ongoing and revised care planning as a resident's health care status changes over time.

CMS also spells out the elements that must be addressed in each SNF's policies and procedures on end-of-life care. They include:

1. Determining at admission if the resident has an advance care directive and, if not, whether he or she wishes to create one. Note, a facility may not require an advance directive or condition care on the presence or absence of one. We occasionally encounter providers who *require* a Do Not Resuscitate Order at admission. **This is illegal.**

2. Providing residents an explanation of state law governing advance directives AND a summary of the facility's policies and procedures in advance directives.
3. Determining at admission and periodically thereafter if the resident has the decision-making capacity to make end-of-life choices. In North Carolina, this is defined by statute as the ability to make and communicate end-of-life health care choices. If the resident lacks this capacity, then the facility must have a system for identifying the person or persons who, under state law, can act for the resident. North Carolina has a "family decision tree" statute that answers this question, which we published as a chart in the July 2010 issue of *Shorts*. If you need a copy, please contact us. We recommend posting this chart in a conspicuous place where all staff has access to it.
4. Defining and clarifying a resident's medical condition and explaining that condition to the resident or legal surrogate as appropriate (i.e., making sure the resident understands when he or she is approaching an end-of-life situation and the choices for care that are available).
5. Incorporating a resident's choices into his or her care plan and ensuring that those care plan directions are reflected in all physicians' orders, medical records and staff instructions.
6. Reassessing the resident's choices when there is a significant change of physical or mental condition to ensure that choices previously expressed are still valid in light of the resident's condition.
7. Establishing mechanisms for documenting a resident's end-of-life health care choices AND communicating them to all physicians, nurse practitioners, physician's assistants and facility staff.
8. Identifying and dealing with situations where facility staff and/or treating health care professionals (doctors, NPs or PAs) feel, for whatever reason, that they cannot accommodate a resident's expressed end-of-life choices.

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CMS defines the normal survey sample for end-of-life issues as: 1) residents who have an advance directive or a condition where end of life planning is appropriate; 2) residents with medical orders related to life-sustaining care (i.e., care without which the residents would expire in a relatively short period of time); and 3) residents who have refused medical or surgical care.

The CMS guidance to surveyors also contains examples of deficiency categories applicable to violations of these expectations (i.e., immediate jeopardy, actual harm, etc.). For example, CMS states that immediate jeopardy exists where a resident with a DNR order in his or her medical record was resuscitated, or where a resident was hospitalized contrary to wishes expressed in a valid living will or health care power of attorney, or where a resident received treatment based on the consent of an individual who was not the appropriate surrogate under state law (again, please reference North Carolina's statute that addresses this issue and our chart that provides a "decision tree" for understanding who the appropriate decision-maker is for a resident).

CMS gives as an example of actual harm that is not immediate jeopardy (the "G, H and I" level citations) a facility failure to identify medical orders that detailed a resident's wishes to forgo lab work, IV antibiotic treatment and IV hydration for her seventh episode of aspiration pneumonia, or a facility refusal to allow a resident to attend his son's wedding, insisting that the resident remain in the facility for chest X-rays and blood work. A level 2 harm outcome (no actual harm with a potential for more than minimal harm) would occur, for example, when a facility failed to inform a resident of her right to make an advance directive, but no negative outcome occurred (i.e., no end-of-life decision was made or required, but it could have been). CMS also states that the failure to comply with these requirements can never be a level 1 harm situation (no more than minimal harm) because by definition a resident has been denied rights established under federal law, court decisions and CMS requirements.

Now, the good news. For North Carolina providers, if you have purchased and implemented the North Carolina Healthcare Facilities Association sample policies and procedures on advance directives, you should be in great shape. These sample policies were initially drafted for the association in the 1990s when North Carolina's first advance directive laws were passed, and were updated for the association by Poyner Spruill in 2008 after advance directives laws were revised. We have trained on these sample policies for several years all over the state - if you train staff on them and follow them, you should be fully compliant with CMS's revised surveyor guidance.

However, with CMS signaling a renewed focus on this issue, now is a great time to ensure your policies are up to date; your staff actually knows and utilizes them; and your physicians, NPs and PAs also understand them. CMS directs surveyors in the revised guidance to take a number of steps to measure compliance, including talking to residents and/or their surrogates; talking with physicians, NPs and PAs; and talking with staff to ensure that:

1. Residents are informed of their right to make advance directives and are offered assistance in that process when requested;
2. Residents are offered the chance to make or revise existing advance directives as their condition changes;
3. ALL staff and ALL facility records reflect the presence of resident advance directives, especially including care plans; and
4. ALL staff are aware of resident end-of-life choices, and care is consistent with those expressed choices.

Ken Burgess advises clients on a wide variety of legal planning issues arising in the skilled nursing facility setting, assisted living setting and other aspects of long term care. He may be reached at 919.783.2917 or kburgess@poynerspruill.com.

Ken's Quote of the Month

"You have enemies? Good.

That means you've stood up for something,
sometime in your life.

~ Winston Churchill

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Then I learned that my best friend's daughter was pregnant, after losing a child last year and that if this "Little Man" lived, he would be my godson, but he was trying to come way too early. His chance at living was measured by how many days he could stay in the womb. Again, I found myself just wishing for 2012 to be over and for 2013 to arrive, with a new beginning.

So when I sat down to write this article, I put on a CD called "The Gift," by Susan Boyle. As I wrote, and deleted, and wrote some more, I heard her sing "The First Noel," then "Let Me Be a Channel of Your Peace" and "O Holy Night." I found myself singing along with Susan, and my spirits soared. And I thought about my gifts.

I realized that whatever higher power we believe in – whether it's God, Mohammed, a Prophet or some other spiritual power – faith is easy when times are good. Our faith is tested and strengthened and our character measured when times are hard. There's an old gospel song that came to mind as I wrote this that says:

"Lord, please help us learn the secret, even little flowers know, if it never, never rains, then we'll never, never grow."

In that moment, I realized that 2012 wasn't the worst year of my life, it was the best. Because, along the way, I learned some precious lessons: my stepfather, Frank, had done his best to be a father to me, not a stepfather; his illness bonded me with his three amazing daughters and gave me new friends and sisters for life; a dear friend loved me enough to ask if I'd be the godfather of her grandson; I'd never again stand beside a grave as I did at my father's and wish I'd done more; my sisters and I, by sheer chance, now lived in the same state for the first time in 14 years and at a time when that really matters for Frank and my mom; the daughter of my departed friend from D.C. met me, by chance, at a lecture this past October in Myrtle Beach at the Autumn Corporation Annual Meeting (we celebrated her mom's life privately); my sisters from my father, Jack (Robin and Joy), and my sisters from my stepfather, Frank (Rhonda, Janice and Pat), are circled like wagons on a Nebraska plain, ready for whatever may come with Frank's illness; and a thousand other wonderful things that have happened to me in this year that I thought of as my worst.

Then to punctuate that message, as I wrote this story, Mom called and asked me to come for Thanksgiving dinner. Frank's daughters were all coming and she wanted me there. It was only November 3, not Thanksgiving. But I knew without being told that we would celebrate Thanksgiving early this year because Frank's surgery was coming up soon. I knew that we would pray for Frank, and for Little Man (my Godson) and for my sisters and friends, those still here and those recently departed. I looked outside the door of my breakfast room, where I write, and saw the most glorious fall day, with crisp air and golden leaves and I thanked God for the worst year of my life, 2012. In that instant, as my dogs romped in the yard, I tasted in my memories the smell of Thanksgiving gravy and Christmas treats ... the noise of family, babies and wrapping paper tearing ... I knew that I have been the most blessed in this, my most challenging year. I turned up the Susan Boyle CD and sang at the top of my lungs to my two puppies and kitty cat:

Let me be a channel of Your peace;
Where there's despair in life
Let me bring hope
Where there is darkness
Only light
And where there's sadness
Ever joy

Make me a channel of Your peace
It is in pardoning that we are pardoned
In giving to all men that we receive
And in dying that we are born
To Eternal Life

Oh, Master, grant that I may never seek
So much to be consoled as to console
To be understood as to understand
To be loved as to love with all my soul

I thank you for reading our newsletter so faithfully and wish for you the peace that comes from knowing your worst days or years are actually your best. Happiest of Holidays from the Poyner Spruill Health Law Team and from me, personally. I think I smell a happy Christmas! *Ken*



"The joys of management."