

Long-Term Care Survey Alert

Legal Strategy: To Win An Appeal, Go To The 'Horse's Mouth'

This strategy can ante up the 'rest of the story.'

The CMS 2567 can say one thing but if surveyors' notes offer a different view, your facility may have a foot in the door for winning an appeal.

When preparing for an appeal, ask for surveyors' actual notes and compare them to the statement of deficiencies (CMS 2567), suggests attorney **Barbara Miltenberger** with **Husch & Eppenberger** in Jefferson City, MO.

" Oftentimes, the notes show that surveyors have taken statements attributed to staff, residents, families and physicians out of context in the statement of deficiencies," Miltenberger says. And the full statements may convey an entirely different meaning than the excerpted parts. For example, in a number of cases, Miltenberger has found surveyors' notes show they interviewed an equal number of people who presented an opposite picture of the one depicted by the CMS 2567.

Facilities can use discovery to obtain surveyors' notes in an appeal case, although most states will probably resist turning the notes over for an informal dispute resolution, adds attorney **John Lessner** with **Ober/Kaler** in Baltimore.

"If the notes show that the surveyors took information out of context or misrepresented the facts on the CMS 2567, the facility can use that information as the impetus for getting the government to settle the case," says Lessner. "Or it will make great fodder for cross examination at the Departmental Appeals Board hearing," he adds.