

## Long-Term Care Survey Alert

### Quality Improvement: BEWARE OF CONFIDENTIALITY LOOPHOLE WHEN WORKING WITH YOUR QIO

Quality improvement organizations can be a big help to nursing facilities looking to shine in the national Nursing Home Quality Initiative. But think twice before "telling all" to these agencies under what you believe to be a protective shield of confidentiality.

The quality initiative is set to roll out in November, and the QIOs have contracted with the **Centers for Medicare & Medicaid Services** to help facilities meet their quality improvement goals.

To accomplish this task, facilities and QIOs must work closely with one another, which means the nursing facility likely will have to reveal lots of information about its practices.

QIOs are supposed to keep facilities' disclosures about their practices, clinicians and residents strictly to themselves, says CMS. Such information isn't even available under the Freedom of Information Act. Yet this promise of confidentiality isn't carte blanche, CMS confirmed in its Sept. 20 webcast on the NHQI (<http://cms.internetstreaming.com>).

"A QIO must, by law, report those rare situations that pose a 'substantial risk' to the public health," reported **Angela Brice-Smith**, deputy director of CMS' Survey and Certification Group during the webcast. But the QIO won't run straight to the authorities with its discovery. Instead, if a QIO uncovers a risky situation in a nursing facility, it will direct the facility to report the problem to state authorities. "The facility will know that the QIO saw it there won't be any surprises the next day," Brice reassures viewers.

What Brice-Smith doesn't say is that the QIO will report the matter to the state survey agency if the facility doesn't follow through. The state survey agency would then handle the QIO's report as a complaint investigation, according to a CMS document titled "The Relationship of QIOs and State Survey Agencies" ([www.cms.hhs.gov/providers/nursinghomes/nhi/ssaqiomergedoc.pdf](http://www.cms.hhs.gov/providers/nursinghomes/nhi/ssaqiomergedoc.pdf)). (For the benefits of getting an option to self-report, see article 3)

Nursing home providers should also keep in mind that "the licensed professionals working for the QIOs are 'mandatory reporters' and, as such, have an independent duty in most states to provide the state survey agency with information about any immediate jeopardy situation known to them," adds **Harvey Tettlebaum**, an attorney in Jefferson City, MO, who represents the Missouri QIO and the **Missouri Health Care Association**.

#### Spell Out the Ground Rules

So how can facilities reap the benefits of working with QIOs without unduly exposing themselves to the risks of disclosures?

For starters, facilities should never assume that any information they disclose to anyone will be kept confidential, advises **Joseph Bianculli**, an attorney in Arlington, VA. "The promise of confidentiality with its ill-defined limits doesn't help once the cat's out of the bag," he says. "And once a survey team is involved, you can't predict the outcome."

Say a facility is working with a QIO on protocols to detect delirium, and the nurse tells someone at the QIO that a physician tends to prescribe the same medications for all cognitively impaired residents. Further analysis then shows this practice may have been a factor in what looks like an undetected case of delirium immediately preceding a resident's death.

The nurse might assume this information is confidential or perhaps someone at the QIO actually told her that was the case.

"But then that same person or someone else at the QIO decides the information had to be reported as a 'substantial risk' to public health, thereby breaching the promise to the nurse reporter," warns Bianculli.

So before you ever disclose anything to the QIO, "specify the ground rules under which the QIO would feel compelled to report information to the state survey agency and what sort of protection the QIO is giving for information that is elicited under the promise of confidentiality," Bianculli emphasizes.

#### CMS Needs to Clarify

The ultimate solution, in Bianculli's view, is for CMS to clarify what level of confidentiality providers can expect for their quality assurance activities with the QIOs. "For example, CMS could give nursing homes specific examples of what QIOs are obligated to report to the state survey agency," he says.

#### Time Will Tell

Other industry experts note that time will tell whether providers feel safe working with QIOs in the way required to truly get to the "root cause" of adverse events or near misses in an effort to improve care processes which requires a nonpunitive environment where staff can explain what happened.

"In speaking with QIO leadership, we have emphasized that building trust and relationships will be a critical first for them in reaching out to facilities," **Ruta Kadonoff**, health policy analyst for the **American Association of Homes & Services for the Aging**, tells **Eli**. Kadonoff maintains, however, that once facilities understand QIOs' role and the confidentiality afforded by statute, they will feel comfortable working with the agencies. "It simply may take some time," Kadonoff predicts.