

## Long-Term Care Survey Alert

### Reader Question: Do Survey Interpretive Guidelines = Regulations?

**Not exactly ... here's the 'rest of the story.'**

**Question:** Are the interpretive guidelines surveyors use the actual regulations? Can surveyors cite a nursing facility for failing to follow the guidelines?

**Answer:** The Departmental Appeals Board has held many times (and the **Centers for Medicare & Medicaid Services** has actually conceded) that the interpretive guidelines are not law or regulations, says attorney **Joseph Bianculli** in Arlington, VA.

"At most, the guidelines provide illustrative examples of how certain fact patterns fit within the law - or the questions and analytical frames with which CMS wants surveyors to assess facilities' compliance," Bianculli adds. "Thus, there should be no such thing as a citation based only on violation of interpretative guidelines, since the guidelines don't set forth substantive standards," Bianculli maintains.

"Even so, a surveyor can cite a deficiency for a violation of a regulation if the facts are exactly what the interpretive guideline describes - particularly if the example is pretty clear cut or a longstanding interpretation," he continues. Yet because the interpretive guidelines are not law, CMS is not necessarily going to win an appeal if a facility challenges a citation made on that basis. In fact, one facility Bianculli represented recently won an appeal of a citation for an inadequate assessment for psychoactive medications.

"The physician who prescribed the medications justified his clinical decision making to the administrative law judge's satisfaction," says Bianculli.

A facility's best tack for avoiding citations is for nurses and all caregivers to be aware of and follow the actual law and the prevailing standard of clinical practice (and challenge medical doctors to do the same), Bianculli adds.