

Long-Term Care Survey Alert

READER QUESTION: Taping Exit Interviews--Before You Dare, Be Aware Of These Considerations

3 legal experts explore the pros, cons, alternatives.

Question: Our facility is debating whether we should tape our exit interviews with surveyors either overtly or secretly so we have a clear record of what surveyors said. If we don't tape, how can we be sure surveyors have their facts straight about a situation and quote staff accurately on the CMS 2567?

Answer: The State Operations Manual (SOM) recognizes that facilities may want to tape an exit interview, observes attorney **Paula Sanders**. The SOM instructs surveyors to alert the facility administrator during the initial meeting that the facility intends to record the exit conference, she notes.

If the facility decides to tape the exit conference, it should make sure to record the entire meeting and give surveyors a copy of the tape (SOM § 2724), says Sanders. "Surveyors have the discretion to allow the facility to videotape the exit conference as well," she says. Again, you'd videotape the entire meeting and give surveyors a copy of the video at the end of the meeting.

Play it safe: "Although the State Operations Manual contemplates the possibility of facilities recording exit conferences, providers should always consult with counsel before deciding whether or not to tape the exit," advises Sanders. "State law often controls whether or not a facility can/should tape an exit interview. In Pennsylvania, for example, facilities are prohibited from taping exit conferences," she says.

"Likewise, providers should be very careful about surreptitious taping," Sanders warns. "In many states, it is illegal to make a tape recording of someone without permission or consent. Depending on the circumstances, such taping may also violate federal law."

Beware of this hidden downside: While taping has its pros and cons, says attorney **Joseph Bianculli**, it can chill the conversation, which can also occur when the facility has its attorney present during the exit conference. When taped, "surveyors will be very circumspect and not say anything useful." And they aren't "bound by what they say anyway," he adds, noting it's "not uncommon" for surveyors to cite additional or more serious citations after office review.

Thus, Bianculli prefers the surveyors feel free to describe their concerns as much as possible during the exit interview--especially if a G level of IJ citation is likely in the offing. "The facility may not get the 2567 for some time, and a fine or worse may be running in the interim," he cautions.

Note-Taking Is a Viable Alternative

Attorney **Chris Puri** views taping an exit interview as a "dicey proposition" and one he's reluctant to advise facilities to do given today's adversarial environment. But he believes assigning a number of staff to take good notes during the exit can often "come close to getting as much information as taping."

The key is active listening, he emphasizes. "If someone doesn't understand something the surveyor says or needs clarification, ask and try to get that missing information."

In fact, Puri advises facilities to ask staff to take notes during the entire survey about what surveyors are doing and looking at. Note-taking also allows staff to document "exactly what questions surveyors asked them--and how they

answered," he adds. That information is "really critical in appeals" since so many statements of deficiencies these days quote staff and/or include statements like "conversation with staff confirmed the findings."

In preparing an appeal, "it's very beneficial if counsel can know exactly what was said and how the surveyor is 'interpreting' those statements in what they wrote on the SOD," says Puri.

Editor's note: **Joseph Bianculli** practices law in Arlington, VA. **Paula Sanders** is partner with **Post & Schell** in Harrisburg, PA. **Chris Puri** is a member of **Bolt Cummings Conners & Berry PLC** in Nashville, TN.