

Long-Term Care Survey Alert

Risk Management: KEEP POCS FROM BECOMING AMMUNITION FOR TRIAL LAWYERS

A plan of correction written with a tone of "mea culpa" may please surveyors, but it's also a plaintiff attorney's dream come true.

"The way a facility writes the POC can leave it open to claims of malpractice or negligence," cautions **Barbara Miltenberger**, an attorney with **Husch & Eppenberger** in Jefferson City, MO.

"The statement of deficiencies has become the key document in many civil suits," agrees **Gene Larrabee**, principal of **Primus Care Inc.** in Valparaiso, IN. "And once the facility admits in its POC it did something wrong, the cat is out of the bag."

Nursing home providers should keep in mind that while the POC is a legal requirement, it does not obligate them to admit wrongdoing, advises **Peter Mellette**, an attorney in the Richmond, VA, office of **Crews & Hancock**.

Mellette typically advises facilities to include a disclaimer in the beginning of the POC that says the plan is a requirement of federal law but not necessarily an acknowledgment of any violation of federal laws and regulations.

A facility's leeway to defend itself in the plan of correction varies from state to state. "In Missouri, the facility can include all its refuting information on the POC, saying the facility disagrees with this tag and here is why," says Miltenberger. "Kansas doesn't allow that practice but the facility can submit a separate letter that includes the refuting information and reference the letter in the POC. " At least that way, a plaintiff's attorney is clued in to the fact there's additional information available."

Even when facilities decide not to contest deficiencies, Miltenberger advises them to include language at the beginning of each F tag, such as: "'The facility does and will continue to respect a resident's dignity [or whatever the F tag is]. However, to address the surveyors' concerns, the facility will take the following steps to assure continued compliance' And then list the steps the facility has or will undertake."

While sidestepping admissions of culpability is a wise idea, facilities should refrain from becoming adversarial in the document. "Don't use the POC to argue about the survey process or that surveyors were wrong or to complain about the surveyors," warns **Annaliese Impink** with the **Law Offices of Bianculli & Impink** in Arlington VA.

"The goal is to get the POC accepted," she says, "not to utterly annoy the survey team, Impink notes. "Instead, providers can use other avenues to address these concerns, such as the appeal or complaint process," she adds.