

## Long-Term Care Survey Alert

### Risk Management: Know the Dos and Don'ts for Dealing With Government Investigators

**The outcome of a non-survey investigation can hinge on how well you manage it.**

These days a survey issue or complaint can quickly morph into a fraud and abuse or even a criminal investigation. Your facility won't be left in the lurch, however, if managers and staff know the rules of engagement and what to do at each step of the process.

Rule No. 1: Cooperate but with due caution. When confronted with a non-survey investigation, the facility has to decide if it wants to require the investigating agency to serve formal demands for information, including subpoenas, or respond to informal requests for documents, etc., says **Jennifer Gimler Brady** with Potter Anderson & Corroon LLP in Wilmington, Del. Facilities generally find it's beneficial to cooperate with requests for information and to make staff available for interviews, she notes -- at least until the facility discovers that the investigation may be taking on a different scope or intensity than initially anticipated. At that point, the facility may decide that all communications should go through its legal counsel, Brady counsels. If there's a possibility of a criminal investigation, it's a good idea for the facility to consult with criminal defense counsel, she suggests.

Rule No. 2: Weigh carefully whether to provide staff legal counsel. Facilities often do provide counsel but don't have to unless a union contract provision requires it, notes **Joseph Bianculli**, an attorney in private practice in Arlington, Va. If the facility does offer legal representation, it should make clear that the arrangement works until the facility becomes aware of evidence that the employee acted improperly -- that is "contrary to facility policies or outside the scope of employment," Bianculli says.

At that point, the nursing facility's and staff person's interests may be in conflict, he points out. Staff may, of course, obtain their own legal representation.

Rule No. 3: Educate staff about their rights. Bianculli advises routinely giving staff general guidance about their rights and obligations in case of an investigation. Then reinforce the information in a specific case, he advises. Address the following two key issues:

- The obligation to cooperate. You ordinarily expect staff members to cooperate with official investigations, although they have the right to refuse to do so and not incriminate themselves, Bianculli says. Even so, "it's perfectly legal" for an employee handbook or union contract, etc., to require discipline or even dismissal if someone refuses to cooperate.
- Rules for communicating. Staff should never speak with anyone, even a surveyor, over the phone due to HIPAA issues, emphasizes Bianculli. "You'd be amazed at how often employees do this ..." If confronted by someone flashing a badge, staff should ask for a business card, he says.

Help staff counter these fears: Staff should know there's nothing wrong with telling investigators who contact them at home, "I'd be happy to talk to you at my workplace," says attorney **Paula Sanders**, with Post & Schell in Harrisburg, Pa. The better approach is for the staff person to set up an interview at the facility, advises Bianculli.

People sometimes believe that telling investigators they'd like their attorney present in an interview sends the wrong message, Sanders observes. Yet given the potential consequences of being involved in an investigation, the government is starting to realize that people in such a situation have a right to have counsel present during an interview -- "and that investigators should not hold it against the person [who exercises that right]."

Rule No. 4: Avoid crossing the line. The facility can educate staff about their rights and what to expect in an interview, says Brady.

But don't ever tell staff members how to answer questions, such as, "If they ask you about whether Mrs. Jones ever eloped before, say no." That constitutes obstructing an investigation and possibly suborning perjury, Brady warns.