

## Long-Term Care Survey Alert

### Survey Appeals: Target Surveyors' Powers Of Observation And Analysis

**Surveyors' decision-making is fair game at appeals.**

**Good news:** Recent **Centers for Medicare & Medicaid Services** training on how surveyors should collect and analyze data might provide a stronger framework for challenging surveyors' findings at appeals.

"While a facility cannot raise purely procedural issues in an appeal (for example, claim the surveyors didn't follow their protocol), it can challenge a surveyors' powers of observation and analysis," says **Joseph Bianculli**, an attorney in Arlington, VA. For example, the facility's attorney can ask surveyors questions during the hearing to tap into how they gathered and processed information. The attorney can ask surveyors if they considered various possibilities, talked to certain people or reviewed various materials, says Bianculli.

The regulations cannot anticipate every conceivable situation, of course. "But administrative law judges don't like for surveyors to create new or unanticipated applications for regulations," Bianculli observes. Facilities should thus be alert to surveyors overreaching in their interpretation of the regulations, he adds.

**Citations at F324 for falls a key example:** Surveyors hand out G-level deficiencies when a resident falls and gets hurt - even when the facility has complied with the actual regulatory requirements, says **Chris Lucas**, an attorney in Mechanicsburg, PA.

"Facilities are supposed to comply with processes to prevent certain outcomes, which include policies/procedures, training and proper assessment and care," Lucas tells **Eli**. "If a resident falls because he is elderly, disabled and mobile, but the facility has appropriately assessed his fall risk using standardized or best-practice standards and care planned to address those risks - including provision of reasonable supervision - then one can argue that the facility has met the regulatory requirements."