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Long-Term Care Survey Alert

Survey Management: Don't Go Out on a Limb: Use This 4-Point Decision Tree for Effective IDR and Appeals

Redefining your idea of a win may pave the way for one.

The idea of challenging F tags and CMPs can be very appealing when you're in the aftermath of an unfair survey. But before you take that legal leap,consider these four key strategies for making the best decision about whether -- and how -- to use informal dispute resolution (IDR) and appeals.

1: Know what's right for IDR and/or appeal. Attorney **Joseph Bianculli** always recommends IDR for any citation a nursing facility considers inappropriate. That is "either the alleged facts and/or surveyor conclusions are wrong, or the cited severity level is too high." While technically speaking, you can't "IDR severity, as a practical matter most states allow it," adds Bianculli, who is in private practice in Arlington, Va.

In addition, Bianculli advises considering an appeal in cases where the remedy (termination or a very high civil monetary penalty) "so demands." In his view, other reasons to consider an appeal route include scenarios where the facility wants todo the following:

• **Avoid the Special Focus Facility** list or "other adverse regulatory actions, including negative [certificate of need] or state consequences," says Bianculli.

• **Position the facility todefend against litigation.** Consider an appeal when the facility fears a civil lawsuit and wants to rid the statement of deficiencies of "unnecessarily lurid language" that could have a negative impact on a jury,he notes.

• **Make a stand** when the "facility really is right and needs to support its staff, and/or make a point to surveyors."

• **Deal with a recurring issue** "where the facility needs clarification of the governing standards."

2: Consider doing an IDR as a prelude to an appeal. You can proceed with IDR and also file a request for a hearing so you're good to go with an appeal if IDR doesn't turn out like you want. "A lot of people think that if you request a hearing with an ALJ, you have to go through with a hearing," says attorney **Neville Bilimoria,** with Duane Morris LLP in Chicago. But "that's never the case." In fact, Bianculli says he ordinarily recommends facilities consider doing an IDR and appeal together.

After all: "If there's no basis for IDR -- or no good reason for doing [an IDR] -- then there's probably no good reason to appeal," Bianculli points out.

Perks: Doing an IDR puts the facility in a better position for a formalALJ hearing, advises Bilimoria. "CMS may take the position that the IDR doesn't matter, but the findings can be used in settlement negotiationsvery effectively or even at an ALJ hearing."

In addition, "the IDR forces the facility to make its case close in time to the survey, and that helps prepare for a hearing that might take place much later," adds Bilimoria.

Downside: The compressed timeframe for doing an IDR, which varies by state, can backfire, cautions attorney **Meg Pekarske,** with Reinhart Boerner Van Deuren in Madison, Wis. "You may not have all the facts like you would when doing full-blown litigation where you have time to think about your theories, interview everyone" and review all of the documentation. "So it cuts both ways."

3: Define your goal for an appeal. Pekarske reminds facilities deciding whether to appeal that they often have less than a 50 percent chance of winning one. "If it's principle driving the facility, that's one thing, and an appeal may [make sense]. But if the goal is to win-- you can't count on winning," says Pekarske.

Bianculli agrees that the ALJ/Departmental Appeals Board (DAB) doesn't exactly have a good track record for setting aside nursing home deficiencies and remedies. Even so, "many appeals (except in the Atlanta Region) still are settled for substantial reduction in civil monetary penalties." And some administrative law judges (ALJs) are known to reduce civil monetary penalties. Thus "what might count as a 'loss' on the books can be a ... win" in a practical sense.

Moreover: "Even if the facility loses, getting bad language out of a statement of deficiencies may be worth far more on the civil side thanthe CMP," adds Bianculli.

Tip: If you don't have enough resources to appeal and get back in compliance, focus on the latter, advises Pekarske. "Given there are parallel tracks when you appeal, I tell people they need to focus on getting in compliance and removing IJ because the facility is suddenly in a world of hurt if it doesn't pass its survey revisit."

4: Don't rule out taking your case to federal court. If you lose at the ALJ level, the next step is the DAB. But the "the DAB itself is ... result-oriented and biased against facilities," warns Bianculli.

The good news: There have been some recent favorable federal court decisions, he says. Thus, if a facility is contemplating a DAB appeal, Bianculli ordinarily advises them to consider taking their appeal all the way through federal court. He has "taken about a dozen cases to court in the past three or four years, and the cost need not be prohibitive ..."

Bilimoria notes his firm has also taken cases to federal court after losing at the DAB level. "The federal judges will say that the ALJ madean error or wasn't fair," he relays. And "that's the kind of ruling that breaks the cycle of unfair ALJ rulings." And "absent legislative interventions," he points out, that "is the only avenue nursing facilities have to challenge these judges' behavior."