

# Long-Term Care Survey Alert

## Survey Management: Don't Let Surveyors Use Your QA Documentation Against You

### 6 ways to prevent F tags based on your quality improvement efforts.

Want to make your QI effort one good deed that does go unpunished?

Take advantage of the federal statutory provision and State Operations Manual guidance that keeps your quality assurance committee's (QAC) documentation far from the prying eyes of surveyors -- at least for the purpose of writing the facility up for deficiencies.

Under the statute, surveyors can ask for QA records to prove the facility has a QAC, if they believe it doesn't have one, but they aren't supposed to use the substance of those records, says **Annaliese Impink**, associate general counsel of **Mariner Healthcare** in Atlanta.

There's a bit more to it, however. So follow these steps to prevent surveyors from trying to use your QA dirty laundry against you.

**1. Find out how your state survey agency interprets a facility's ability to keep its QA documents confidential.** In Ohio, for example, the interpretation of the QA privilege varies from surveyor to surveyor, says **Carol Rolf**, attorney with **Rolf & Goffman** in Cleveland. "But generally the management of the Ohio Department of Health will agree that surveyors aren't supposed to be looking at QA records," she says. "So if the facility challenges surveyors on the issue, generally the health department management will agree and back off."

Iowa interprets the SOM guidance very narrowly, however, notes attorney **Kendall Watkins** with **Davis, Brown, Koehn, Shors & Roberts**, PC in Des Moines. "The state agency says that the only thing surveyors are not entitled to review are the minutes of the QA committee, which we think is too narrow," he cautions.

"Most state survey agencies are reasonably respectful of raw QA data," reports **Joseph Bianculli**, an attorney with **Health Care Lawyers, PLC** in Arlington, VA. "They want to encourage facilities to do more rather than less QA, and citing deficiencies based on QA data does not advance that goal," he says.

**2. Bring all of your QI efforts under the QAC umbrella.** Use a three-pronged approach to accomplish this goal, advises attorney **Jerri Lynn Ward**, president of **Garlo Ward** in Austin, TX.

"Create the QA process, identify facility staff who are going to carry out the process, and make sure incidents are investigated under that committee," Ward told attendees of the **American Association of Homes & Services for the Aging's** recent conference in Baltimore.

Who should be part of the committee? According to the SOM, at a minimum, the director of nursing, a physician designated by the facility and three members of the facility staff. "But there's no limit on the number of people who can be on the committee," according to Ward. "You can have an assistant who helps you stamp the documentation 'QAC' and an investigator who carries out all investigations."

**3. Make sure the QAC or a subcommittee investigates even the little issues and guides improvements in the facility.** That strategy puts the ball in the state survey agency's court to challenge the confidentiality of QA

documents if surveyors become aggressive about trying to get their hands on them, says Ward.

**Caution:** Keep the QAC light on its feet with subcommittees that can stay on top of daily QI issues. For example, say the DON realized that CNAs were transcribing medication orders to the MAR, which is against the state practice act, Ward postulates. "The DON and a charge nurse could meet as a QAC subcommittee to address the problem," Ward advises **Eli**. "Then the subcommittee (the DON and charge nurse) can convey the issue to the full committee either by phone or during a formal meeting."

**4. Don't disseminate your QA documents.** Surveyors may easily get their hands on QA-related documents, such as weight and pressure ulcer logs, if the facility disseminates them freely, cautions **Nancy Augustine, RN, MS**, a consultant with **LTCQ Inc.** in Lexington, MA. Rolf agrees: "Information may not be considered QA information if it's not for the QAC's exclusive use and consideration," she cautions. And once staff hands over documents or shares otherwise confidential QA information with surveyors, the cat can't be put back in the bag. "Surveyors can and will use the information," Rolf warns.

**Good Idea:** "If you make six copies of documents for the QA committee, number them so you can get them back," Bianculli suggests. "Otherwise, the doctor might end up sticking one in a medical record, as an example, where surveyors can readily copy it," he says.

**Prep Your Staff:** You don't want staff to hand over QA documents. But make sure they can explain to surveyors how the QA process works in the facility - and how they communicate with the QA team. "Surveyors will ask under the theory that if staff doesn't know, [then] there is no QA in the facility," cautions **Kathy Hurst, JD**, principal of **Hurst Consulting** in Chino Hills, CA.

**5. Decide how you're going to handle incident reports in a way that prevents undue exposure to survey sanctions and litigation.** A lot of facilities do try to bring incident reports under the QAC's purview to keep them confidential. "Yet some jurisdictions require facilities to do incident reports," Watkins points out. "And some of the information (the date, description of the incident, the resident's disposition and any treatment, etc.) should be in the clinical record," he says.

Even so, your facility does have control over what kind of incident report forms it uses. "Some forms ask for a lot of details and require the person completing it to analyze the cause and prescribe a number of corrective actions," Watkins notes. "The problem with that is that sometimes nurses will engage in wild speculation initially as to the cause of an incident. And once that's in writing, the facility is kind of stuck with it."

**Avoid This Litigation Landmine:** You also have to worry about incident reports making their way into the hands of plaintiff's attorneys. The bad news is that "federally or state mandated incident reports are most likely discoverable in most states," reports Chicago attorney **John Durso**. The better news: "If you structure the incident report correctly, it should not contain information prejudicial to the facility's case."

The more detailed report about the facility's investigation into the matter should fall under a privilege -- "either a client-attorney privilege if the facility consults its attorney in preparing the document or conducting the investigation, or under the QA privilege afforded in civil litigation by some states."

**6. Think through how you will maintain QA documents.** Bianculli generally advises his clients, for example, that they don't have to stash all of their QA records in a file cabinet. "They aren't resident records," Bianculli points out, "so you don't have to keep anything other than the fact that the committee met" -- unless the facility needs to hang onto documentation for risk management or insurance purposes.

The same principle holds for incident reports, Bianculli opines. "If the state doesn't require you to keep them, get rid of them once you've done what you need to do with them. The incident reports have raw, real-time information, much of which may not be true or complete," Bianculli cautions.