

Long-Term Care Survey Alert

Survey-Related Litigation: A Prosecutor Or Plaintiff's Attorney Tries To Introduce Penalty-Free Survey Deficiencies Against Your Facility ... Now What?

Here are the arguments your facility should consider making.

Think penalty-free deficiencies can't come back to haunt you? Think again.

One nursing facility recently found itself prosecuted by the state attorney for criminal fraud and neglect related to an H-level deficiency for isolated incidents of Stage 2 pressure ulcers.

Yet the facility never had a chance to appeal the citation because the state imposed no remedies for the H-level tag. And facilities can appeal only penalties - not the underlying deficiency (see related story, [Survey Appeals: Don't Let Lack of Survey Sanctions Leave You Stranded With A Serious Deficiency Or Double G](#)).

Yet that fact isn't likely to affect the admissibility of the survey findings in the criminal case against the facility, says **Brad Kelly**, an attorney with **Reed Smith** in Washington. Kelly currently is helping the facility defend against the lawsuit.

"The fact that the facility had no opportunity for an appeal hearing would not be grounds for the judge to bar the survey findings in the criminal action if it were a false claims action," Kelly says. And states vary on whether courts will admit survey findings in civil litigation against nursing facilities to show that a breach in OBRA regulations is tantamount to a breach in the standard of care.

In either a criminal or civil case, however, a facility could make the point that a judge or jury should not give much weight to survey citations that carried no sanctions. "You could argue that the state cited the deficiencies but saw fit not to impose any penalty whatsoever, so the state must not have viewed the deficiencies as that important," Kelly says.

In a criminal case, the facility may be able to argue that it has the right to cross-examine the surveyors who wrote the deficiency statement, because the Sixth Amendment of the U.S. Constitution gives criminal defendants the right to confront their accusers in court, Kelly adds.

Legal heads up: "In every lawsuit where survey findings may be an issue, the facility's defense attorney should subpoena and proceed to depose surveyors who cited the deficiencies," Kelly counsels. "That's why it's important for facilities to note who the surveyors are during exit interviews, in case they can't figure that out later based on the statement of deficiencies."