

## Long-Term Care Survey Alert

### What Do You Think?

Check out legal experts' answers to last month's questions.

**Question:** Can facilities use OSCAR data to make a case at appeal that a state has a much higher rate of survey citations that can only be explained by inconsistencies in the survey process?

**Answer:** An appeal is not a forum to challenge the survey process itself, says **John Lessner**, an attorney with **Ober/Kaler** in Baltimore. "In the administrative law judge hearing, the facility challenges the CMP or other enforcement action based on a deficiency, which requires challenging the facts supporting that deficiency," he adds.

Neither is informal dispute resolution a forum to challenge or complain about the survey process based on OSCAR trends, Lessner says.

Attorney **Chris Lucas** agrees that appeals aren't really the forum for challenging inconsistencies in the survey process. "Anytime you use the legal theory of the right to equal treatment under the law, race-based claims have the strictest scrutiny - and gender-based claims intermediate scrutiny," he says. "Everything else is done on what's called a rational basis review where the challenge to the government action is supported if there's any conceivable reason to do so," adds Lucas in Mechanicsburg, PA.

"But facilities can focus on their due process rights - the right to receive notice and to be heard," Lucas adds.

**Question:** What is the best forum or strategy for using OSCAR information showing inconsistencies in survey findings to improve the quality and fairness of surveys?

**Answer:** Providers can team up with state trade associations to talk to their state agencies about survey citation trends that might be significantly out of line with other states, says Lessner.

They should do so, however, in a collaborative manner. "The emphasis should be on achieving accurate surveys and investing resources in a high quality of care," Lessner adds.

Also, if more facilities pursue a legal hearing (which they have the right to do related to a licensing action or CMP), then the truth-finding process will increase the consistency and quality of surveys by holding surveyors accountable for their decision-making, says Lucas.

"If surveyors have to go on the record and defend their interpretation of regulations, they are more likely to stick to the actual regulatory requirements - and the **Centers for Medicare & Medicaid Services** and survey agencies are more likely to implement training and processes to ensure they do," Lucas adds.