



Client Alert



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New Rule Limits Release of Documents and Testimony by Federal Surveyors

During the end of its term, the Bush Administration adopted a new rule, 45 C.F.R. § 2.2, that severely limits state health departments and contractors from participating in private lawsuits involving healthcare providers that participate in federal assistance programs (i.e. Medicare) without approval by the head of the Department of Health and Human Services ("HHS"). Supplemental information regarding the rule explains that it was justified because federal employees and contractors were being forced to participate in private cases which diverted them from their federal survey, certification and enforcement responsibilities. However, exemption from testifying or producing documents will not apply to employees or contractors who conduct only a state survey or complaint investigations.

Even before the HHS rule was issued, CMS issued a directive on January 12, 2007, to all its state survey agency directors informing them not to disclose "surveyor notes, worksheets, internal working papers and other informal survey memoranda" that were generated as a result of the federal program. A copy of the full transmittal can be viewed at www.health.state.mn.us/divs/fpc/profinfo/admininfo07_06.pdf.

The impact of this rule should benefit healthcare providers involved in medical malpractice litigation in that it severely limits plaintiffs' access to survey records and surveyors. While some courts have ruled that such information is irrelevant to the underlying medical tort claims, others have permitted surveyors to testify and have allowed survey documents into evidence. In the past, survey documents were frequently used by plaintiffs in an attempt to prove punitive damages or establish the requisite standard care. From a practical standpoint, under the new rule it will be much more difficult for plaintiffs to obtain survey records and to utilize federal employees or contractors as witnesses in medical malpractice tort litigation.

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