The Defensible Citation
Lesson 1 Objectives

Upon completion of this lesson, you will be able to:

- Describe the four roles a surveyor performs when examining deficiencies.
- Outline the proper steps for writing defensible citations.
On Defending an Argument

“First, then, one should grasp that on whatever subject there is need to speak or reason, it is necessary to have the facts belonging to that subject... for if you had none, you would have nothing from which to draw a conclusion.”- Aristotle

Think about this ancient quote for a moment. How does it relate to your ability to write a defensible citation? Select the Forward button to continue.
Lesson 1 Introduction

As a surveyor, you rely on your education, experience, and training to determine if facilities are in compliance with regulatory requirements. You gather evidence, determine facts, draw conclusions, and state your findings in official documents.

There may be times, however, when those findings are disputed by the facility and end up in the appeals process. To ensure that your deficiencies can hold up in an informal Dispute Resolution (IDR), Independent Informal Dispute Resolution (IIDR), or in court, it is critical that you can defend your citation. While your case does not need to be perfect in order to cite a deficiency, you can meet the burden of proof that the deficiency exists by doing the following:

- Conduct a comprehensive investigation from the start.
- Formulate an accurate determination of the deficiency.
- Clearly write your deficiency citation in a manner that can withstand challenges from judges and attorneys.

In this lesson, you will review these concepts.
The Roles of a Surveyor

Surveyors work under enormous time constraints and pressure. The documents they produce are reviewed by State Survey Agencies (SA), the Centers for Medicare & Medicaid Services (CMS), facilities, their attorneys, and the public. A good surveyor is part investigator, part medical professional, part legal analyst, and part writer.

Select each image below to read how each role impacts your work as a surveyor.

(Pop-up) Investigator

As an investigator, you perform tasks similar to those of law enforcement when gathering information during a survey. You must seek out evidence and collect statements from witnesses to determine whether a violation of the law (Federal regulations) has occurred.

(Pop-up) Medical Professional

As a medical professional, you must rely on your experience, education, and training in medicine and the health care industry to understand what you are seeing and to make evaluations regarding the quality of care being administered.

(Pop-up) Legal Analyst

As a legal analyst, you must evaluate the care being given within a legal framework—the Federal regulations. You must be able to understand and apply the law correctly in order to do your job.

(Pop-up) Writer

As a writer, you must compose a defensible Statement of Deficiencies (Form CMS 2567), which is the foundation for legal actions taken against facilities that are not in substantial compliance with Federal regulations.
The Right to Appeal

Remember that every provider has the right to both informal and formal appeals after receiving a completed Statement of Deficiencies, Form CMS-2567. The purpose of the appeal is to give providers an opportunity to refute cited deficiencies. In such cases, the facility must identify the specific issues they are refuting, the facts and conclusions with which they disagree, and specify their basis for arguing that the findings and conclusions are incorrect.

If a facility challenges your citation and requests an IDR, you may (depending on your state’s process) be required to participate, especially if it is a face-to-face IDR. In the event a formal hearing is held before a Federal Administrative Law Judge (ALJ), you could be called to testify at the proceedings.
Foundational Investigative Skills Module 3, Lesson 1

Three Steps to a Defensible Citation

In a recent poll, 75 percent of respondent surveyors admitted that during an investigation they do not regularly consider what might happen if their citation should end up in court. While it may be true that most cases settle before going to court, you should always be prepared to defend your deficiencies. This process of writing a defensible citation begins before you even type the first words into your computer.

Select each arrow below to reveal the three steps to writing a defensible citation.

Step 1 (Pop-up) Conduct a comprehensive investigation.

Step 2 (Pop-up) Formulate a legally and factually accurate determination of the deficiency.

Step 3 (Pop-up) Clearly write the deficiency.
Step 1: Conduct a Comprehensive Investigation

A defensible citation is one that can stand up in court against the scrutiny of facility attorneys and judges. The first step in producing a defensible citation is to conduct a comprehensive investigation before you even begin writing your statement of deficiencies.

Remember that the purpose of your investigation is to determine whether or not a deficient practice exists, or did exist, and to assess the degree of harm inflicted or potentially inflicted by that practice. In this phase of the process, you will gather evidence through observations, interviews, and record reviews, and determine the facts related to the specific incident or concern.

What can you do to ensure that your investigation is thorough?

Select each box on the right for tips on how to conduct a comprehensive investigation.

(Pop-up) Avoid making assumptions. Search for the facts. Draw conclusions based on your assessment of the credibility of all available information.

Interview all necessary people. Ask appropriate follow-up questions. Try to resolve any conflicting or contradictory stories.

Corroborate hearsay. Make additional observations, conduct follow-up interviews, and review all related records.

Confirm that the information you are given is accurate. Verify sources. Do not overuse anonymous sources.

Analyze and copy all documents that are pertinent to the incident or concern.
Review It Before You Write It

All of the information-gathering activities you perform during the investigative portion of the survey are designed to aid you in determining whether there has been a violation of the regulations. When you review all the evidence, the facts should point clearly in one direction or the other. If you have any doubts as to whether the evidence supports the existence of a deficient practice, then your investigation may not be complete.

The first step in writing a defensible citation is to perform a comprehensive investigation before you start. Make sure you interview all persons who might have knowledge of the incident or concern and ask follow-up questions to clarify their answers when necessary. Analyze your evidence carefully for conflicting or contradictory information and verify that you have sufficiently followed up on all hearsay statements. Only when you have all the facts will you be adequately prepared to draw conclusions about the existence of deficient practices.
A Note About Hearsay

Hearsay can occur during an interview when the person you are interviewing is reporting an event that he or she did not witness firsthand. This illustration depicts the interference, or filters, that exist between the actual event and your interview notes. Perceptions and filters influence the information a witness relays to another individual. In turn, that information is filtered once more as the interviewee relates that information to the surveyor.
Knowledge Check

What are the roles a surveyor performs when examining deficiencies? Select all that apply.

a. Investigator
b. Medical professional
c. Legal analyst
d. Writer

Choose your answer, then select the Submit button. When you are finished, select the Forward button to continue.

Incorrect. A surveyor performs all four of these roles, including that of investigator, medical professional, legal analyst, and writer when examining deficiencies.

Correct. A surveyor performs all four of these roles, including that of investigator, medical professional, legal analyst, and writer when examining deficiencies.

The correct answer is Investigator, Medical professional, Legal analyst, and Writer.
Knowledge Check

The first step to writing a defensible citation is to conduct a comprehensive investigation. Which of the following will help ensure that your investigation is thorough? Select all that apply.

a. Interview all necessary people and ask appropriate follow-up questions.
b. Attempt to corroborate and assess the credibility of all information obtained, and draw conclusions based on that.
c. Interview only those persons who directly witnessed the problem or incident.
d. Search for the facts and draw conclusions only after you have evidence to support them.

Choose your answer, then select the Submit button. When you are finished, select the Forward button to continue.

Incorrect. A defensible citation is one that can hold up in court. To ensure that your citations are defensible, you should interview all persons who might have any knowledge of the issue, ask appropriate follow-up questions, corroborate hearsay, confirm all information you are given, and then search for the facts and draw conclusions only after you have sufficient evidence to support them.

Correct. A defensible citation is one that can hold up in court. To ensure that your citations are defensible, you should interview all persons who might have any knowledge of the issue, ask appropriate follow-up questions, corroborate hearsay, confirm all information you are given, and then search for the facts and draw conclusions only after you have sufficient evidence to support them.

The correct answer is Interview all necessary people and ask appropriate follow-up questions. Attempt to corroborate and assess the credibility of all information obtained, and draw conclusions based on that. Search for the facts and draw conclusions only after you have evidence to support them.
Step 2: Formulate an Accurate Theory of the Deficiency

Each Federal regulation has its own set of legal requirements. A surveyor must meet these requirements by showing sufficient facts. In order to write a defensible citation, you must know the regulations. This includes knowing the differences between regulations and related regulations.

Select Play to view the video.
Guidance for Surveyors

Recall that the appendices of the State Operations Manual (SOM) provide guidance for surveyors on the Regulations by provider type.

For Long Term Care (LTC) facilities, guidance can be found in Appendix PP, which is sorted numerically by F-Tag (the alpha prefix and data tag number associated with each regulation).

Additionally, surveyors may refer to Exhibit 7A, Principles of Documentation, for guidance.
Example: Supporting an F323 Tag

“F323—Accidents §483.25(h). The facility must ensure that (1) the resident environment remains as free of accident hazards as is possible, and (2) each resident receives adequate supervision and assistance devices to prevent accidents.”

In a decision handed down by the Departmental Appeals Board (DAB) in the case of Alden Town Manor Rehabilitation and HCC vs. CMS, 2006 (DAB No. 2054), the judge ruled that in order to prove a deficiency under section (1) of the F323 Tag, certain conditions must be present, while others may not. Select each box below to view the elements necessary to meet each condition.

(Pop-up) **Elements Necessary to Prove a Deficiency**

To establish a violation of §483.25(h)(1), you must show: (1) a dangerous or potentially dangerous condition existed in the facility that was either identified or foreseeable; and (2) the dangerous or potentially dangerous condition was not removed, or (3) appropriate steps to protect residents from that dangerous or potentially dangerous condition were not taken.

(Pop-up) **What is NOT Required to Prove a Deficiency**

(1) An accident or injury does not have to have already occurred to cite an F323 Tag; (2) the dangerous condition does not have to be known or foreseeable by management. If any employee knew or should have known of the dangerous condition, that is sufficient.
Step 3: Clearly Write the Deficiency

After you have completed your investigation and formulated an accurate determination of the deficiency, you must write a compelling deficiency citation that explains your full basis for the findings without overloading it with extraneous information. Select each note to read some tips to help you write a defensible citation.

(Pop-ups)

Cite the correct tags with the correct supporting evidence.

A. Use only essential facts.
B. Do not repeat facts.
C. Match the facts with the law.

Do not cite a plan of correction as the basis for a deficiency.

Do not cite policies and procedures as the sole basis for deficiency. If a facility does not follow its own Policies and Procedures (P&P), that may be part of a deficiency finding, but should not be the only reason a deficiency is found.

If the deficient practice violates multiple regulations, it is acceptable to cross-reference. However, each regulation has its own set of requirements, and you must ensure that you cite sufficient evidence so that each deficiency citation can stand on its own.

Minimize discussions of the survey process in the findings.

Always use patient/staff/resident identifiers.
Instructions for Case Study Example

The following case study contains excerpts from a sample Form CMS-2567, Statement of Deficiencies. In this case, the surveyor cited the facility for failing to meet the requirements of an F367 Tag, as shown here.

As you read the surveyor's report on each of the following three frames, select the yellow highlighted area to reveal guided commentary on writing a defensible citation. Select the highlighted area a second time to hide the commentary. When finished, select the Forward button to continue.

(Pop-up)

**F367**

**§483.35(e) Therapeutic Diets**

Therapeutic diets must be prescribed by the attending physician.

**Intent §483.35(e)**

The intent of this regulation is to assure that the resident receives and consumes foods in the appropriate form and/or the appropriate nutritive content as prescribed by a physician and/or assessed by the interdisciplinary team to support the treatment and plan of care.

**Interpretive Guidelines: §483.35(e)**

“Therapeutic Diet” is defined as a diet ordered by a physician as part of treatment for a disease or clinical condition, or to eliminate or decrease specific nutrients in the diet, (e.g. sodium) or to increase specific nutrients in the diet (e.g. potassium), or to provide food the resident is able to eat (e.g., a mechanically altered diet).
Case Study Example (1 of 3)

**STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION**

**NAME OF FACILITY**

(X4) ID PREFIX TAG  SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC INDENTIFYING INFORMATION)

F367=D

483.35(e) THERAPEUTIC DIET PRESCRIBED BY PHYSICIAN

This REQUIREMENT is NOT MET as evidenced by:

Based on observation, record review, policy review, and staff interview, the facility failed to ensure that one (1) of eleven (11) residents in the sample received the therapeutic diet ordered by the physician from September 10, 2013, through April 26, 2014, (Resident #6).

Findings include:

Review of the facility's policy titled “Dietary Tray Cards,” dated January 15, 2013, revealed “each resident shall have a diet card,” “Resident’s diet will be reflected exactly as ordered by the physician,” and “Diets shall be served as ordered by the physician.”
Record review revealed that Resident #6 was admitted to the facility on September 10, 2013, with diagnoses including dysphagia (difficulty swallowing) due to cerebrovascular disease and aphasia (ability to communicate) due to cerebrovascular disease. Review of the Minimum Data Set (MDS), with an assessment reference date of March 9, 2014, revealed a brief interview for mental status score of 6, which indicated that Resident #6’s cognitive status was severely impaired.

Record review of the physician’s order sheet, including medication and diet orders dated September 10, 2013, signed by the physician, revealed instructions for a No Added Salt (NAS) diet—mechanical soft texture, regular liquids consistency, and no raw vegetables, fruits, fried foods, or cornbread.

Review of the Order Listing Report, dated April 1, 2014, revealed Resident #6’s diet order as No Added Salt (NAS) diet—mechanical soft texture, regular liquids consistency. No raw vegetables, fruits, fried foods, or cornbread.

Review of the Dietary Cart Card, placed on trays of food served to Resident #6 during the survey on May 2, 2014, and May 3, 2014, reflected a diet order for No Added Salt (NAS) diet—mechanical soft texture, regular liquids consistency. No raw vegetables, fruits, fried foods, or cornbread.
Case Study Example (3 of 3)

Observation of the supper meal on May 2, 2014, at 5:00 PM revealed Resident #6 was served a turkey sandwich with lettuce and tomato on the sandwich. The turkey sandwich was cut in quarters.

Observation of the lunch meal on May 3, 2014, at 12:15 PM revealed Resident #6 was served a hamburger with lettuce and tomato, French fries, and fried corn nuggets. The hamburger was cut in quarters.

Interview with the Charge Nurse on Resident #6’s unit (RN-A) on May 3, 2014, at 2:15 PM revealed that she was shown the tray served to Resident #6 at noon on May 3, 2014, saw the raw vegetables, raw fruit, and fried foods being served and was informed of the raw fruit and raw vegetables served to Resident #6 the evening before. The Charge Nurse stated that the diet order was not followed.

Interview with the facility Administrator on May 3, 2014, at 5:00 PM confirmed that Resident #6 had received incorrect meals. The facility did not ensure that Resident #6 received the diet ordered by the physician.
Knowledge Check

Which of the following are important elements to formulating a legally and factually accurate determination of a deficiency? Select all that apply.

a. Know the regulations.

b. Know the differences between regulations and related regulations.

c. Know that each F-Tag has a unique set of specific legal requirements that must be established by showing sufficient facts.

d. Have a degree in biology.

Choose your answer, then select the Submit button. When you are finished, select the Forward button to continue.

Incorrect. As a surveyor, it is critical that you know the Federal regulations, as well as the differences between regulations and related regulations in order to formulate a legally and factually accurate determination of a deficiency. You should also be familiar with each F-Tag and know the specific legal requirements that must be established by showing sufficient facts.

Correct. As a surveyor, it is critical that you know the Federal regulations, as well as the differences between regulations and related regulations in order to formulate a legally and factually accurate determination of a deficiency. You should also be familiar with each F-Tag and know the specific legal requirements that must be established by showing sufficient facts.

The correct answer is Know the regulations. Know the differences between regulations and related regulations. Know that each F-Tag has a unique set of specific legal requirements that must be established by showing sufficient facts.
Knowledge Check

True or False? After you have completed your investigation and formulated an accurate determination of the deficiency, the final step in writing a defensible citation is to write a compelling deficiency citation that explains your full basis for the findings without overlooking it with extraneous information.

a. True
b. False

Choose your answer, then select the Submit button. When you are finished, select the Forward button to continue.

Incorrect. It is not enough to simply state your theory of the deficiency. This statement is true. After you have completed your investigation and formulated an accurate theory of the deficiency, the final step in writing a defensible citation is to write a compelling deficiency citation that explains your full basis for the findings without overlooking it with extraneous information.

Correct. This statement is true. After you have completed your investigation and formulated an accurate theory of the deficiency, the final step in writing a defensible citation is to write a compelling deficiency citation that explains your full basis for the findings without overlooking it with extraneous information.

The correct answer is True.
Lesson 1 Key Points

The key points to remember from this lesson include:

- Your role as a surveyor is part investigator, medical professional, and writer.
  - As an investigator, seek out evidence and collect statements from witnesses.
  - As a medical professional, you must rely on your experience in the health care industry to make evaluations.
  - As a legal analyst, you must evaluate the care being given against Federal regulations.
  - As a writer, you must compose a defensible Form CMS-2567.
- As a surveyor, your job is to gather evidence, determine facts, draw conclusions, and state your findings. For those times when your findings are disputed by the facility, conducting a comprehensive investigation from the start is all the more important. This includes formulating an accurate determination of the deficiency and clearly writing your statement so that it can withstand the challenges of the courtroom.
Lesson 1 Summary

This lesson introduced you to the following:

- Four roles a surveyor performs when examining deficiencies.
- Proper steps for writing defensible citations.
Congratulations!
You have just completed Lesson 1. Select the **Forward** button to continue working in this module.

If you wish to complete this course at a later time, select the **Exit** button at the bottom of your screen to return to the Course Menu Page. You can then log out of the course.