

# Nursing & Assisted Living Facility Professional

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## THE ADELMAN ADVANTAGE by Rebecca Adelman

# THE GOVERNING BODY OF THE NURSING HOME – LEGAL AND REGULATORY GUIDANCE



Regulatory and legal issues regarding F837, the Governing Body, which is included in the Administration regulations for skilled nursing facilities, arise in surveys and in litigation. The issues primarily relate to the responsibilities and composition of the Governing Body and the legal liability for the Body or its individual members. This article will

provide an overview of the regulations and legal authorities as well as initial recommendations for evaluating your organization’s governing body. We encounter claims against the Governing Body in nursing home lawsuits and often times learn that nursing homes are not clear on what the “Governing Body” is and “Who Serves on the Governing Body”?

### Skilled Nursing Administration

42 CFR § 483.70 governs the administration of skilled nursing facilities as a Condition Of Participation in the Medicare program,

and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid. An initial review of the Administrator of the facility is helpful in discussing the Governing Body’s role.

§483.70 Administration states:

*A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.*

The survey Guidance offers the following:

*§483.70 Resources include but are not limited to a facility’s operating budget, staff, supplies, or other services necessary to provide for the needs of residents.*

Procedures for the surveyors are set forth at §483.70:

*Cite this tag if the actions, inactions, or decisions in administering the facility contributed to deficient practice(s). The facility’s*



*Continued on page 2*

administration is not limited to the administrator and may also include the facility's governing body, management company, and/or others identified by the facility as part of the facility administration.

The investigation must demonstrate how the administration knew or should have known of the deficient practice and how the lack of administration involvement contributed to the deficient practice found. When citing this F835, it is not acceptable to simply reiterate the non-compliance from any other associated tags and then refer to this tag. Surveyors must document how the administration knew or should have known of the deficient practice and taken action(s) as appropriate.

In addition to a multitude of other administration requirements, the facility must have a **Governing Body**. The regulation states as follows and I've included prompts and recommendations.

**§483.70(d) Governing body.** *§483.70(d)(1) The facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility; and*

1. Who are the members of your governing body? The governing body should include the administrator, nursing and quality assurance directors, medical director and possibly a corporate representative or company depending on the corporate structure.

2. Who in the organization currently establishes and implements policies regarding the management and operation of the facility? The answer to this question may be "management", or "regional", or "corporate". Specifically identify the company or group of people designated, as the governing body will limit the risk of survey deficiency.

*§483.70(d)(2) The governing body appoints the administrator who is— (i) Licensed by the State, where licensing is required; (ii) Responsible for management of the facility; and (iii) Reports to and is accountable to the governing body.*

1. Does the administrator know that these are his/her responsibilities per the regulations? Review the federal and state regulations on administration on a quarterly basis with the governing body.

2. What and when does the administrator report to the governing body? Establish clear expectations and performance plans for the administrator consistent with the regulations.

*§483.70(d)(3) The governing body is responsible and accountable for the QAPI program, in accordance with §483.75(f). [§483.70(d)(3) Governing body responsibility of QAPI program will be implemented beginning November 28, 2019 (Phase 3).]*

1. Who comprises the QA committee and how is the organization's QAPI program implemented? Identify the QA committee and include a member on the governing body.

2. How does the QA committee communicate the QAPI performance to the governing body? Develop QA protocols compliant with the federal and state regulations governing QAA and QAPI.

Notably, per the State Operations Manual (SOM) the intent of this regulation is set forth below along with the definition. I've included prompts and recommendations.

**INTENT §483.70(d) This regulation is intended to ensure that the facility has an active (engaged and involved) governing body that is responsible for establishing and implementing policies regarding the management of the facility.**

and is defined as:

**DEFINITIONS §483.70(d) "Governing body" refers to individuals such as facility owner(s), Chief Executive Officer(s), or other individuals who are legally responsible to establish and implement policies regarding the management and operations of the facility.**

1. Does the organization have a governing body that is "engaged" and "involved" understanding its responsibilities regarding

operations and management? Measure the involvement and engagement of the governing body and assign it operational and management projects to accomplish. Review and revise as needed facility policies for management and clinical care so they reflect best practices for [\[RA1\]](#) the organization in its locale.

2. Does the facility have management and ancillary service contracts? Review each contract and ascertain the rights and obligations of the parties. Revise as needed to reflect the actual business structure and practices between the parties.

For purposes of survey and certification, the following guidance is provided per the SOM and these points serve as a roadmap for your organization on regulatory compliance and litigation risk mitigation. I've included prompts and recommendations.

#### GUIDANCE §483.70(d)

The facility **must** determine: **A process and frequency by which the administrator reports to the governing body, the method of communication** between the administrator and the governing body including, how the governing body responds back to the administrator and what specific types of problems and information (i.e., survey results, allegations of abuse or neglect, complaints, etc.) are reported or not reported directly to the governing body; How the administrator is held accountable and reports information about the facility's management and operation (i.e., audits, budgets, staffing, supplies, etc.); and; How the administrator and the governing body are involved with the facility wide assessment in §483.70(e) Facility assessment at F838.

1. Does the organization have a written protocol that describes process and the method for communication between the administrator and the board? If not, develop this protocol and reference the federal and state regulations on Governing Body.

2. How does the governing body respond back to the administrator? This issue will become

important if there are issues of understaffing, budgeting, lack of compliance with policies. Establish communication methods through the QA committee to possibly rely on protections available for these communications.

3. Does the governing body policy and corporate structure account for what specific types of problems and information are reported or not reported directly to the governing body? Specify this information and reference the federal and state regulations in the policy.

4. How are expectations for the administrator established and how is the administrator held accountable? Review state regulations on licensed administrator responsibilities and establish performance plans that reflect the federal regulations on accountability. Include how the administrator reports information about the facility's management and operation (i.e., audits, budgets, staffing, supplies, etc.);

5. How are the administrator and the governing body are involved with the facility wide assessment as this will be a focus for surveyors? Establish protocols for the governing body in its policy that includes specifically its involvement with the facility wide assessment and delegate responsibilities as needed.

The following procedures must be followed to comply with the federal regulations (**and statute regulations may have additional requirements**) on governing bodies. State surveyors will request this information and it should be readily available as part of the policy on governing bodies.

PROCEDURES §483.70(d) Request the **names and contact information of the members** of the governing body at the Entrance Conference. If there are concerns, conduct an **interview with the administrator** and if possible with one or more members of the governing body or designated person(s) functioning as the governing body.

#### **State Regulations on Governing Body**

It is critical to note that each state may have separate regulations on a Governing Body for

compliance that may be more strict than the federal guidelines. For example, in Michigan, the governing body of a nursing home shall assume full legal responsibility for the overall conduct and operation of the home. In the absence of an organized governing body, the owner, operator, or person legally responsible for the overall conduct and operation of the home shall carry out the functions of the governing body.

In West Virginia, the governing body shall adopt and enforce rules governing the health care and safety of residents, the protection of their personal and property rights, and the operation of the nursing home. The governing body shall develop a written nursing home plan that will be reviewed annually. In addition to the other requirements described in law and in the rule, the nursing home plan shall include:

*An annual operating budget, including all anticipated income and expenses; and*

*A capital expenditure plan for at least a three year period.*

*The governing body shall assure the development and maintenance of written policies and procedures that govern the services the nursing home provides.*

*The policies and procedures shall include as a minimum all policies and procedures required by this rule.*

*A copy of each written policy and procedure shall be available for inspection on request by the nursing home's staff and residents and by members of the public.*

### **Recap on Regulatory Issues**

State surveyors focus on F837 as operations and management have responsibilities related to a multitude of other regulatory compliance issues such as QAPI, facility assessments, staffing and other clinical regulations. Understanding the federal and state regulations; evaluating your organization's corporate structure; creating a body and policy that supports the management and operation of the facility; educating involved members and staying "active" as a governing body

will mitigate survey concerns, claim risks and increase the delivery of quality care.

### **Legal and Litigation Issues**

In litigation, I have defended not only the operating and licensed skilled facility and management but individuals who serve in a corporate capacity (CEOs, CFOs, Administrators) as well as the facility's Governing Body. While it is not often litigated and there is limited case law on the issues of the Governing Body's liability for negligence or malpractice, there are a few instructive cases with lessons learned.

In a 2012 Arkansas Supreme Court, the personal representative of a deceased nursing home resident's estate brought action against a nursing home and the sole member of home's governing body for ordinary negligence, medical malpractice, and violation of the Residents' Rights Act in connection with resident's care. The Circuit Court entered judgment on a jury verdict awarding estate \$5.1 million in damages that **included a finding that the individual owner had a duty to the resident arising from the federal regulation covering the obligations of governing bodies of nursing homes and from an internal nursing home policy.** The Supreme Court disagreed and, after citing the regulation, stated "... it is clear to this court that this regulation is a rule that nursing homes must follow to qualify for participation in Medicare and Medicaid, and we will not interpret it to create a duty in tort. The funding regulations specifically limit themselves to "serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." 42 C.F.R. § 483.1(b).

**Lessons Learned:** The federal and state regulations do not provide a private right of action or create a duty for a sole member of the governing body but may establish a standard to be considered by the court.

In a 2015 United States District Court case from Oklahoma, the Court also declined to find a duty of a member of the governing body of the nursing home defendant using the same analysis.

The Court found “...the regulation plaintiffs rely upon in support of their assertion that Lusk had a duty to Ms. Mayberry, 42 C.F.R. § 483.75(d), does not impose such a legal duty for purposes of holding Lusk liable for negligence. The regulation at issue falls within Part 483 of Title 42 of the Code of Federal Regulations; the regulations within this part contain the requirements that an institution must meet in order to qualify to participate as a [Skilled Nursing Facility] in the Medicare program, and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid.

42 C.F.R. § 483.1(b). Nowhere in Part 483 is there any mention of a private right of action or any legal consequences other than having federal funding denied to a health care facility that does not satisfy Part 483’s requirements.

Accordingly, the Court finds that plaintiff has not established the existence of a duty on the part of Lusk to protect Ms. Mayberry from injury and Lusk, therefore, is entitled to summary judgment.”

**Lessons Learned:** The federal and state regulations do not provide a private right of action or create a duty for a sole member of the governing body but may establish a standard to be considered by the court.

However a 2004 Florida appeals court suggests that a governing body may be liable to a resident under the regulations. The resident’s estate argued that the concept of piercing the corporate veil does not apply in the case of a tort, and that it presented sufficient evidence of one of the owner’s negligence, by act or omission, for the jury to reasonably conclude that he caused harm to the resident by ignoring complaints to the governing body about under-staffing and other operational concerns.

It argued that the owner had the responsibility of approving the budget for the nursing home. He also functioned as the sole member of the “governing body” of the nursing home, and pursuant to federal regulation, the governing

body is legally responsible for establishing and implementing policies regarding the management and operation of the facility and for appointing the administrator who is responsible for the management of the facility. The owner was thus required by federal mandate to create, approve, and implement the facility’s policies and procedures. Because he ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems the resident suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, argued the Estate. It argued that a reasonable jury could have found that the owner’s elevation of profit over patient care was negligent.

The appeals court concluded that the trial court erred in granting the directed verdict in favor of the owner because there was evidence by which the jury could have found that the owner’s negligence in ignoring the documented problems at the facility contributed to the harm suffered by the resident. This was not a case in which the plaintiffs were required to pierce the corporate veil in order to establish individual liability because the owner’s alleged negligence constituted tortious conduct, which is not shielded from individual liability. A new trial was granted.

**Lessons Learned:** Establishing protocols for the governing body that reflect the federal and state regulations and also set expectations for the governing body as it relates to management and operations may have limited the risk of liability for this owner.

**Legal Recap:** With corporate ownership transparency and more scrutiny on operations and management in skilled nursing, there is increased legal risk for owners, managers and the governing body. Reviewing all applicable contracts and revising as needed; establishing proper protocols and prioritizing corporate compliance are the best proactive means to mitigate litigation risk.

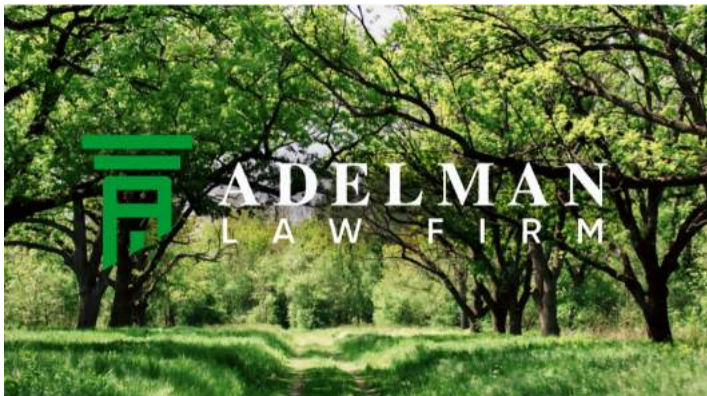
Please reach out to me for further legal guidance; state regulation comparisons, policies and best practices.



Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm and Claims Management, a Women's

Business Enterprise National Council (WBENC) certified Women Business Enterprise (WBE) established in 2001. In 2021. She founded the Adelman-Mettle Care Alliance with Dr. BJ Miller and Sonya Dolan, founders of Mettle Health, a palliative care consulting provider. AMCA provides certification for risk mitigation programs in the senior living industry. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm's practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca's insurance defense practice includes representation of insurance companies and long-term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation.

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# Did You Know?

July was named after the famous Roman general Julius Caesar by the Roman senate; as it was the month he was born in. Julius Caesar was a formidable military general and statesman who was largely responsible for changing the Roman Republic into the Roman Empire. The month was previously called Quintilis (Latin for fifth) as it was the fifth month of the 10-month-long ancient Roman calendar.

Julius Caesar wasn't the only military genius born in July. Alexander the Great was another important historical figure who changed the shape of the world and was born somewhere around July 20, 356 BC. Other famous people born in July include Frida Kahlo, Franz Kafka, Marcel Proust, and Nelson Mandela.



On July 4, 1776, the 13 American colonies declared their independence from the British monarchy. The 4th of July, formally known as Independence Day, has been a federal holiday since 1870 in the United States of America.

On July 4, 1776, Congress officially adopted the Declaration of Independence, but it actually wasn't signed until almost a month later. When the declaration was officially approved on July 4, John Hancock and Charles Thompson (president and secretary of the Continental Congress) signed the draft that day. But the official copy wasn't signed by all 56 signers until August 2, 1776.

# Core Principles of Nonviolent Communication



## Navigating Feelings and Needs Regarding Mask-Wearing During Nursing Home Visitation

### What is Nonviolent Communication?

Nonviolent Communication (NVC), a communication model developed by psychologist Marshall Rosenberg, is a set of skills that supports communication based on empathy. This document focuses on the interplay between two main components of NVC: our universal human needs and our feelings.

### Universal Human Needs

Universal human needs are the same in all people, no matter our age, race, culture, gender identity or any other difference. Main categories of human needs include: Physical wellbeing, Harmony, Pleasure, Autonomy, Connection, Liveliness,

Meaning, and Love and Attention. Within each of those general categories, there are more specific needs. For example, the need for connection includes needs for collaborating, communicating, belonging, giving and receiving, seeing and being seen, hearing and being heard, and understanding and being understood.

### Our Feelings Provide Key Information About Our Needs

Our feelings provide us with vital information about whether our needs are being satisfied or met. Feelings tell us when something within ourselves isn't okay, when it's out of balance, and point us in the direction of things in us that requires attention. Contrary to popular belief, feelings are not good or bad or right or wrong. They simply are. They serve as a guidance system that help us steer toward the fulfillment of our real needs. Not knowing what our feelings and needs are make navigating life difficult and confusing, but as we learn to pay closer attention to our feelings and needs, our way forward becomes clearer and we become

### The Connection Between Feelings and Needs

| Feelings<br>(when needs are fulfilled <i>or</i> unfulfilled)                          | Needs<br>(met <i>or</i> unmet)  |
|---|---|
| <b>Fulfilled</b><br>Thankful<br>Content<br>Cheerful<br>Thrilled<br>Hopeful<br>Excited | Connection<br>Continuity<br>Attention<br>Reassurance<br>Support<br>Tenderness<br>Mourning<br>Affection<br>Understanding |
| <b>Unfulfilled</b><br>Irritated<br>Uncertain<br>Nervous<br>Depressed<br>Tense         |   |

smarter about what is really going on in any given interaction.

**Digging Beneath Strategies to Underlying Needs**

As human beings, we all have the same needs but we differ in how we go about meeting those needs. Those are called strategies. For example, if I feel bored, I may choose a strategy of watching a movie to meet my need for fun. Someone else might choose a strategy of surfing to meet their need for adventure. Both address the feeling of boredom, but they do so in different ways, with different strategies.

Conflict can occur when there are different *strategies* in play. Generally speaking, most of us tend to focus on fixing problems at the level of strategy, without taking time to listen for the feelings and unmet needs that underly the strategy. This is particularly true when the underlying feeling is uncomfortable or distressing. In our urgency to relieve the feeling, we get busy trying to ‘fix’ it with a strategy.

Nonviolent communication invites us to shift our focus from strategy to needs. For example, when a family member says, “I refuse to wear a mask when I visit my mom,” that is a strategy. What might be the need? The staff member could ask, “Do you long for physical connection? For comfort?” Offer a guess as to what the person needs and then allow for silence as the person experiences the guess and composes their response.

How can this delineation between needs and strategies help us reduce or avoid conflict? When you start with a strategy, you are limited to that one choice. When you start with needs you have many choices. Using the example above with the family member who wants to hug their mom, to hug is actually a strategy. The need might be connection, or touch. And, there are many ways to meet needs for connection and touch such as empathy, dialogue, reading to each other, or sitting near a person. Touch is a bit harder during the pandemic, and yet we’ve seen some fantastically creative strategies such as the shower curtain hug.

**Summary**

Nonviolent Communication helps us find a way forward from conflict and difficult feelings by teaching us to shift our focus from the strategies we are using to feel better and meet our needs to the underlying needs themselves. As we practice seeing feelings and strategies as clues to underlying needs, we can be freer and more creative in discovering solutions that work for everyone.

This document was co-created by Paige Hector, LMSW and Melanie Sears RN, MBA, PhD author of *Humanizing Health Care* and *Choose Your Words*.

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| Needs   | Strategies  |
|---|---|
| Connection<br>Continuity<br>Attention<br>Reassurance<br>Support<br>Tenderness<br>To Mourn<br>Affection<br>Understanding | Phone call<br>Window visit<br>Electronic visit (iPad, etc.)<br>Audio recordings<br>Letters<br>Socially distanced visit with PPE<br>Courtyard visit<br>Hugging station (plastic covering)<br>In person visit with PPE, no physical contact<br>In person visit with PPE, physical contact |