Imagine for a moment that you are employed by a nursing home in New York State as either an aide or nurse. During your career, you have not had a complaint directed against you, been the subject of a disciplinary proceeding or been suspended. Although health care, and more specifically skilled nursing facilities, are heavily regulated at the State and Federal level, you have never run afoul of the various standards relating to your profession. Your focus has been and remains providing quality care to your patients. Would it alarm you to know that simply by being employed in a nursing home your personnel records can be disclosed to individuals other than your employer and that such can be utilized in a legal proceeding in which you have not been named as a party? This unfortunate state of affairs is all too real and largely the consequence of a decision entitled Simmons v. Northern Manhattan Nursing Home, Inc.

Before discussing the facts of Simmons and its implications for the long term care profession, employees of nursing homes, including the Administrators, Risk Managers and all members of the nursing staff must understand why personnel records are typically sought by plaintiff's attorneys. It is axiomatic that compiling information on staff members is an essential function for long-term care employers since personnel files aid in compiling and documenting evaluations of staff, provides assistance in measuring performance improvement goals, and serves as an operational tool to ensure that all relevant policies and procedures have been properly maintained and explained to each employee. Plaintiff's attorneys, however, may have other motivations. Specifically, plaintiff's attorneys often seek the disclosure of personnel files to advance claims that members of the nursing staff were not competent to provide the cares assigned. They also seek personnel records to allege that the resident may have suffered cumulative neglect and seek to determine patterns of employee in-servicing, disciplinary actions and protests of assignment. Hence, personnel records are sought to suggest that the facility hired and subsequently maintained poorly trained, unqualified employees or otherwise allowed staff with questionable work performance histories to care for residents.

The statute governing the maintenance of personnel records can be found in Title 10 of the New York Code Rules and Regulations (NYCRR), which is essentially a code of minimum operating standards for long-term care facilities set forth by the Department of Health. Subsection 415.30 requires nursing homes to maintain “general records” and section 415.30(g) mandates that nursing homes keep personnel records for each employee, including the Administrator. The personnel records are to include all available pre-employment information, orientation and full in-service record. But, typically, employers maintain additional information within the personnel records, most notably performance evaluations or documentation concerning isolated work-related events, which may or may not prove substantiated.

Pursuant to NYCRR § 415.30, nursing homes shall maintain information necessary to permit the production of records "immediately upon request". What is not plainly specified in the statute, however, is guidance as to who may have access to such records upon request. When one reviews NYCRR § 415.1, entitled "Basis and Scope" it is clearly delineated that the requirements set forth in the statute focus upon facility operation, performance and outcomes. The statute also expressly states that the code of minimum operating standards was written so that the “regulator” can recognize the infinite diversity of the nursing home population. Accordingly, one can extrapolate from the statutory language that, plaintiff's attorneys, who have no role in the oversight of nursing home operations, performance and outcomes, and are certainly not "regulators", and therefore not the intended beneficiaries of the disclosure scheme set forth in the NYCRR. Certainly, no portion of the statute expressly authorizes personnel records to be used in civil litigation alleging negligence or deprivation of a resident’s rights.

The above, however, need to be contrasted with the statute in New York which governs the scope of disclosure in civil actions, CPLR § 3101(a), which promotes full disclosure of all matter “material and necessary” to the prosecution or defense of an action. Traditionally, Courts have construed the term “material and necessary” as referenced in CPLR § 3101(a) in a liberal fashion so as to promote disclosure of items arguably relevant to the case at hand. Although disclosure under CPLR § 3101 is not unlimited, (the typical exceptions being that the material sought is palpably improper or that the demands themselves are overbroad or vague), supervision is generally left to the discretion of the trial court. Unfortunately, thus far Courts have shown little interest in limiting the scope of disclosure.
as it pertains to nursing home litigation, which seems, in part, related to the lack of core understanding as the scope of practice in a nursing home and also seems at times driven by the same perceptions rooted in the public at large concerning nursing homes from an institutional standpoint. The foregoing was made all too clear in the Simmons v. Northern Manhattan Nursing Home, Inc. decision.

In brief, Simmons involved a wrongful death claim arising from a fall and subsequent care at a nursing home. Plaintiff’s counsel demanded numerous items including quality assurance investigative material and the personnel files of staff that treated the decedent. Defense counsel’s position was, primarily, that the quality assurance privilege generally exempted these items from disclosure. However, the Appellate Division of the First Department, The Court that decided Simmons, disagreed, and in respect to the personnel record issue, reasoned that since the defendant did not deny maintenance of such files, they were subject to disclosure. The troubling aspect of the Simmons decision was that there was no analysis whatsoever as to whether NYCRR permitted disclosure to entities other than the Department of Health, or whether disclosure of personnel records was relevant. Rather, the Court rendered its decision largely on the defendant’s failure to sustain its burden of proof that the items sought were privileged and believed that since records were maintained by the defendant, they should be disclosed. It would appear that in reaching its decision, the Appellate Division of the First Department, did not counterbalance the putative need for disclosure sought by plaintiff with the avowed basis and scope of the NYCRR or the defendants’ interest in keeping its employees’ personnel files private to promote an unfettered evaluation of its employees.

In March of 2009, the Appellate Division of the First Department issued an equally disquieting decision in Clement v. Kateri. There, the claim was founded upon personal injury and negligent hiring and retention allegedly arising out of the care afforded plaintiff during her stay at the defendant nursing home. Although the decision, like Simmons, dealt primarily with the scope of the quality assurance privilege, the Court did weigh in on plaintiff’s demand for personnel information regarding each employee who had contact with plaintiff while she was admitted to the defendant’s facility. The Court determined, without explanation, that these items were “material and necessary” under C.P.L.R. § 3101(a) inasmuch as defendant was compelled by statute and regulation to maintain and continuously collect such information, and expressly cited the Simmons decision. Again, the Court determined that the material was subject to disclosure simply because nursing homes compiled such information. Omitted from the Court’s analysis entirely was whether the NYCRR carved out an express right for plaintiff’s attorneys to obtain personnel records or whether the right to inspect these types of records was exclusive to the Department of Health.

Despite the unfavorable Appellate precedent, in February 2010, the Nassau Supreme Court, in the decision Szulta v. Good Samaritan Hospital Medical Center, determined that the demand for, inter alia, personnel records was not “material and necessary” to plaintiff’s claim for nursing home negligence and barred plaintiff’s attorneys from obtaining said information. The Court determined that despite the fact that defendants maintained such records, the mere fact of their existence did not entitle plaintiff to their production and there was no showing that they were material and necessary. Although this decision was rendered at the trial court level, its logic is instructive and suggests that the judiciary need not automatically be constrained to follow the Simmons decision.

The question that long-term care facilities and defense counsel ultimately face with regard to the disclosure of personnel records is how to manage the mine field left in the wake of the Simmons and Clement decisions. While the law governing disclosure of personnel records has not been addressed by the Court of Appeals, the decisions discussed in this article do provide some suggestions for both long-term care facilities and their defense counsel in addressing such demands.

First, defense counsel and the nursing homes they represent must work cooperatively to understand the contents of personnel records before they are disclosed. For example, defense counsel should be prepared to cogently argue that whether a particular staff member was disciplined for tardiness or, had an isolated performance issue years before the care in question, does not necessarily mean that the employee was unsuitable to render care in any instance. While licensing, credential and disciplinary information is likely discoverable under certain situations, such as “material and necessary” cases involving sexual, emotional or physical abuse, it is suggested that an employee’s mailing address and phone number, list of contacts, next-of-kin, references, and salary information ought not be disclosed automatically in all cases as these items are extremely sensitive on a personal level and would not be related to resident care in most instances. Thus, all such information should ordinarily be redacted under the theory that the information sought is not relevant. Tax records, annuity, pension, accident, health or fringe-benefit information should be similarly protected. In fact, some of the foregoing material is expressly prohibited from disclosure by statute. (See, Title II of the Americans with Disabilities Act of 1990 and The Health Insurance Portability and Availability Act of 1996 (HIPAA), which protects from unauthorized disclosure any health information that is considered “individually identifiable.”).

Furthermore, attempts to identify the specific caregivers should be made as early as practicable in the litigation and, depending upon the nature of the claim at issue, efforts should be made to let these
individuals know that their records may be subject to disclosure in an effort by plaintiff’s counsel to collaterally attack the facility and its staff. Employees, even former employees who may have left on poor terms, whom take pride in their work, are typically more willing and motivated to assist in the defense investigation and support that all cares provided were reasonable under the circumstances presented. When confronting situations involving the disclosure of personnel records of former employees, it must be understood that plaintiff’s typically allege the nursing homes are vicariously liable for the negligent acts of these persons. Accordingly, efforts must be made to contact relevant ex-employees, explain the situation to them and, if possible and appropriate, obtain their assistance.

Moreover, the effort should be geared toward disclosure of personnel records that is limited to those dates which correspond to the dates of the care alleged in the Complaint so as not to allow unfettered access to an employee’s records simply so opposing counsel can “fish” for issues to attack credibility. In other words, disclosure should be limited to those dates of employment that coincide with the dates of care, and any searches outside the scope of the foregoing, should be generally opposed.

Critically, although plaintiffs typically assert a negligent hiring claim in rote fashion in the Complaint, defense counsel must examine whether such a claim is truly viable or whether the allegations more properly fit under the theory of vicarious liability. This distinction is a key one, since under New York Law, employment records have been held to be protected from disclosure when an employee was acting within the scope of their employment at the time of the incident. See, Neiger v City of New York, 2010 NY Slip Op 02934, 72 AD3d 663 (2d Dept 2010); and Gerardi v Nassau/Suffolk Airport Connection, 288 AD2d 181 (2d Dept, 2001). In other words, plaintiffs should be forced to articulate why they specifically need an employee’s records and defense counsel must make every effort to limit disclosure. Similarly, in the first instance, before assuming a request for disclosure of personnel records is proper, the defendant should seriously consider whether there is a valid objection that the demand is not “material and necessary” from the outset, as this is a baseline requirement to compel disclosure.

From a practical standpoint, each time a nursing home is sued, the defense must be mindful that employee records will likely be sought by adverse counsel. This is extremely problematic since many long term care cases involve years of residency and, hence, there will be a multitude of caregivers involved. The financial and human resources expended in compiling all such personnel records for every caregiver involved is self-evident, particularly when one considers that each document must also be inspected carefully by counsel prior to production to consider any pertinent privileges and necessary redactions.

Ultimately, long-term care facilities and defense counsel need to be well-versed in New York concerning the discoverability of personnel records and available defenses or protections. As reflected by Simmons and its progeny, the judicial trend is to compel disclosure of personnel files due to general, liberal discovery mandates despite the countervailing potential harm to employees and the chilling impact such might have on employers who seek to honestly apprise, guide and educate staff. Whether the Courts will ultimately be persuaded by arguments to further limit or preclude such based on the espoused language of NYCRR is uncertain and may remain unsettled for some time as most facilities and defense counsel choose to engage in a compromise as to the extent of disclosure rather than resist entirely the demands. The lesson, however, is that there is an ever-growing need for coordination between defense counsel and the long-term care providers to understand the legal impact of documentation at every level, that protections from disclosure is quite limited, and that there will continue to be efforts by plaintiff’s counsel to seek out any and all writings prepared in the normal course of business even to the extent such materials may seem at first blush to be otherwise protected.

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