A recent case decided by the New York Court of Appeals presents potentially far-reaching implications for nursing facilities and their quality assurance (QA) committees. The court interpreted a provision of the Federal Nursing Home Reform Act (FNHRA) and concluded that certain documents created or used by a facility’s QA committee were privileged under FNHRA and did not have to be turned over in response to a grand jury subpoena in connection with a Medicaid fraud investigation.

**How The Court Ruled**

This case arises from an investigation into a patient care issue by New York state’s Medicaid Fraud Control Unit (MFCU). Three grand jury subpoenas were issued seeking disclosure of documents and reports involving various aspects of facility management and patient care. The nursing facility moved to quash the subpoenas relating to certain categories of the requested documents on the grounds that the documents were generated by a QA committee and were therefore privileged under FNHRA and did not have to be turned over in response to a grand jury subpoena in connection with a Medicaid fraud investigation.

The lower courts ruled that the documents did not qualify for protection. On appeal, New York’s highest state court reversed the lower court’s ruling, concluding, in part, that certain categories of the documents were protected from disclosure under FNHRA. The court reasoned that certain documents—such as incident-accident reports and infection control reports—were created and maintained by the facility to comply with federal and state regulations. Therefore, they did not qualify as QA committee documents and were subject to disclosure. The court indicated that such documents would not qualify as privileged, even if the QA committee were involved in their preparation or handled or reviewed them.

In contrast, however, the court ruled that other documents, such as monthly skin condition and pressure ulcer reports, monthly weight reports, and lists of facility-acquired infections that were generated by the facility solely for quality assurance purposes, did qualify as privileged records under FNHRA because there was no federal or state regulation that required the facility to prepare such documents. This case is significant because nursing facilities may be able to withhold certain sensitive QA-related documents that could otherwise be harmful or damaging from federal and state regulators relying on the court’s reasoning. As a result, it is recommended that facilities with QA committees do the following to gain the full benefit and protection afforded by this privilege:

- Implement written policies and procedures that broadly define the matters and projects that fall under the jurisdiction or purview of the facility’s QA committee.
- Make sure that written policies and procedures explicitly outline the manner in which the QA committee authorizes or requests the preparation, compilation, production, and maintenance of documents pertinent to the facility’s QA program and activities.
- Make sure that policies and procedures contain a comprehensive list of the types of materials to be reviewed or distributed by the QA committee.
- When using outside vendors or consultants for QA-related projects—outcome analysis, trending reports, record reviews, random spot checks—the facility’s QA committee should directly retain the vendor, specify the scope of the services in the engagement letter, and directly receive any reports or data generated by the outside consultants.

**For More Information**

- The author can be reached at (973) 643-5783 or via e-mail at gherschman@sillscummis.com.

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**Legal Advisor**

*When QA Documents Are Privileged*

New York’s highest court rules that some documents created or used by a facility’s QA committee may be withheld in an investigation.

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**GARY W. HERSCHMAN**

Chair of the health and hospital law practice group at Sills Cummis Radin Tischman Epstein & Gross. He is based in Newark, N.J.