

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

DENNIS RODRIGUEZ and ELLEN RODRIGUEZ,

Plaintiff,

-against-

URIEL DAVIS, M.D., MARIA NOYA, M.D.,
FRITZ HYPPOLITE, M.D., EILEEN DOUGHERTY,
R.N., SYOSSET HOSPITAL and NORTH
SHORE-LONG ISLAND JEWISH HEALTH
SYSTEM, INC.,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 477-09

MOTION SUBMISSION
DATE: 7-6-11

MOTION SEQUENCE
NOS. 2 & 3

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Notice of Cross-Motion, Affirmation, and Exhibits	X
Affirmation in Opposition	X

This motion by the plaintiffs for an order pursuant to CPLR § 3124 compelling the defendants Fritz Hyppolite, M.D., Syosset Hospital and North Shore-Long Island Jewish Health System, Inc. ("North-Shore-LIJ")("the defendants") to produce Dr. Hyppolite's personnel file pursuant to their Further Notice for Discovery and Inspection dated January 7, 2011, or, in the alternative, an order requiring the defendants to produce that file for an *in camera* inspection and this cross-motion by defendants Fritz Hyppolite, M.D., Eileen Dougherty, R.N., Syosset Hospital and North Shore-Long Island Jewish Health System, Inc. ("North-Shore-LIJ")("the defendants") for an order pursuant to CPLR §§3101, 3103, New York State Education Law § 6527(3) and New York State

Public Health Law §2805-m granting them a protective order with respect to Dr. Hyppolite's personnel file on the grounds that it is privileged are determined as provided herein.

The plaintiffs in this action seek to recover damages for medical malpractice; negligent hiring, supervision and retention; lack of informed consent; and, loss of consortium. They allege, *inter alia*, that upon Dennis Rodriguez's presentation to Syosset Hospital's emergency room on December 14, 2006, the defendants failed to timely diagnose his ischemic stroke which resulted in their failure to timely administer the clot busting medication tPA with devastating consequences, including plaintiff Dennis Rodriguez's permanent loss of motor and cognitive function. They allege that the defendant Dr. Hyppolite was the first attending doctor to see Dennis Rodriguez in Syosset Hospital's emergency room and, *inter alia*, that he had been negligently hired, retained and/or supervised by Syosset Hospital.

Via their present application, the plaintiffs seek the defendants' production of Dr. Hyppolite's entire personnel file. While the defendants have produced a portion of his personnel file, they have withheld documents which they maintain are privileged because they were produced in connection with their quality assurance program and/or their credentialing privileging and re-certification program. The defendants accordingly oppose production of those records on the grounds that the materials sought are privileged under Education Law § 6527(3) and/or Public Health Law § 2805-m.

"CPLR § 3101(a) provide that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' " Accent Collections, Inc. v Cappelli Enterprises, Inc., 84 AD3d 1283 (2nd Dept.

2011). "The phrase 'material and necessary' is 'to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.' " Kooper v Kooper, 74 AD3d 6, 10 (2nd Dept. 2010), quoting Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 406 (1968). "The Court of Appeals' interpretation of 'material and necessary' in *Allen* has been understood 'to mean nothing more or less than "relevant." ' " Kooper v Kooper, *supra*, at p. 10, quoting Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR § 3101:5.

Privileged matter is immune from discovery. CPLR 3101(b). The burden of establishing that material sought to be discovered is privileged falls upon the party opposing disclosure. Stalker v Abraham, 69 AD3d 1172 (3rd Dept. 2010); Kivlehan v Waltner, 36 AD3d 597, 598 (2nd Dept. 2007); *see also*, Marte v Brooklyn Hosp. Center, 9 AD3d 41, 46 (2nd Dept. 2004); Koump v Smith, 25 NY2d 287, 294 (1969).

Nevertheless, "information which is privileged is not subject to disclosure no matter how strong the showing of need or relevancy" (Lilly v Turecki, 112 AD2d 788, 789 [4th Dept. 1985], citing Cirale v 80 Pine St. corp., 35 NY2d 113, 117 [1974]; Brady v Ottaway Newspapers, Inc., 97 AD2d 451, 452 [2nd Dept. 1993], *aff'd*, 63 NY2d 1031 [1984]; Matter of Love Canal Actions, 92 AD2d 416, 422 [4th Dept. 1983]; *see also*, Smith v Delago, 2 AD3d 1259, 1260 [3rd Dept. 2003]). However, discovery of inadmissible material is permitted if it may lead to the discovery of admissible evidence but the party seeking that discovery has the burden of establishing that (Montalvo v CVS Pharmacy, Inc., 81 AD3d 611, 612 [2nd Dept. 2011]; Southampton Taxpayers Against

Reassessment v Assessor of Village of Southampton, 176 AD2d 795 [2nd Dept. 1991]); Crazytown Furniture, Inc. v Brooklyn Union Gas Co., 150 AD2d 420 [2nd Dept. 1989]; Iavarone v City of New York, 25 Misc3d 1243(A) (Sup. Ct. Richmond Co. 2009).

“Public Health Law § 2805-j requires periodic review of a physician's credentials and competence, and section 2805-k requires detailed information from a physician in connection with granting and renewing professional privileges, all for the purpose of maintaining an active program to prevent malpractice.” Logue v Velez, 92 NY2d 13, 18 (1998), citing Public Health Law §§ 2805-j(1), 2805-k(1).. Information obtained and documents generated as part of a medical malpractice assessment or quality assurance review process to comply with Public Health Law § § 2805-j and 2805-k are confidential and exempt from disclosure under Education Law § 6527(3) and Public Health Law § 2805-m. Logue v Velez, *supra*, at p.17-18; *see also*, Leardi v Lutheran Medical Center, 67 AD3d 651 (3rd Dept. 2009); Powers v Faxton Hosp., 23 AD3d 1105 (4th Dept. 2005). Education Law § 6527(3) “confers confidentiality on three categories of documents: records relating to the performance of medical review and quality assurance functions; records reflecting ‘participation in a medical and dental malpractice prevention program’; and reports required by the New York State Department of Health . . . pursuant to Public Health Law § 2805-l.” Leardi v Lutheran Medical Center, *supra*, citing Education Law § 6527(3); Katherine F. ex rel. Perez v State of New York, 94 NY2d 200, 204 (1999); *see also*, Kivlehan v Waltner, *supra*, at p. 598. The purpose of the confidentiality is to encourage frank and objective discussions relating to credentialing and malpractice prevention. Stalker v Abraham, *supra*, at p. 1173, citing Logue v Velez, *supra*, at p. 17.

"In order to assert the privilege, '[a] hospital is required, at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure.'" Kivlehan v Waltner, *supra*, at p. 598, citing Bush v Dolan, 149 AD2d 799, 800-801 (3rd Dept. 1989); *see also*, Stalker v Abraham, *supra*, at p. 1173. Thus, "[t]he burden is not satisfied by a showing that the report was received by the hospital's quality assurance committee." Lowenthal v New York Downtown Hospital, 106344/09, NYLJ, 120251135874 at 1 (Sup. Ct. New York Co. 2011), citing Clement v Kateri Residence, 60 AD3d 527 (1st Dept. 2009); *see also*, Kivlehan v Waltner, *supra*. Thus, "[m]ulti-motivated reports [are] note exempt." Benacquista v Mount Sinai Hosp., 20 Misc3d 1111(A) (Sup. Ct. New York Co. 2008), citing Vandenburgh v Columbia Memorial Hosp., 91 AD2d 710 (3rd Dept. 1982). Indeed, "[t]here are many ways in which [a defendant] might have acquired knowledge of . . . alleged prior negligence of [a] defendant doctor wholly apart from any review committee meeting. Such information is discoverable by [the] plaintiff as is information as to whether, armed with such knowledge, the hospital took any action to limit staff privileges extended to [a defendant doctor]." Stalker v Abraham, *supra*, at p. 1174 quoting Byork v Carmer, 109 AD2d 1087, 1088 (4th Dept. 1985), citing Megrelishvili v Our Lady of Mercy Medical Center, 291 AD2d 18, 24-26 (1st Dept. 2002), *lv. dismiss.* 99 NY2d 532 (2002); Bryant ex rel. Bryant v Bui, 265 AD2d 848, 849 (1999).

"The burden of proving privilege can only be satisfied by a particularized showing in evidentiary form such as an affidavit from an individual with personal knowledge, that the report was prepared **at the behest of the quality assurance committee for their**

purposes and actually utilized by them for their purposes (emphasis added).”

Lowenthal v New York Downtown Hospital, *supra*; *see also*, Clement v Kateri Residence, *supra*; Simmons v Northern Manhattan Nursing Home, Inc., 52 AD3d 351, 352 (1st Dept. 2008); Raptis-Smith v St. Joseph's Medical Center, 302 AD2d 246 (1st Dept. 2003); Benacquista v Mount Sinai Hosp., *supra*. The key issue is the manner in which the document originated and the purpose of the communication. Lowenthal v New York Downtown Hospital, *supra*, citing Clement v Kateri Residence, *supra*; Simmons v Northern Manhattan Nursing Home, Inc., *supra*; Raptis-Smith v St. Joseph's Medical Center, *supra*.

“In the absence of a properly asserted privilege, any ‘knowledge the hospital may have had regarding [a staff physician’s] alleged incompetence is . . . relevant and subject to disclosure. . . .” Van Caloen v Poglinco, 214 AD2d 555, 557 (2nd Dept. 1995), citing Byork v Carmer, *supra*, at p. 1088; Raschel v Rish, 110 AD2d 1067 (4th Dept. 1985), *app. dism.*, 65 NY2d 923 (1985); Larsson v Mithallal, 72 AD2d 806 (2nd Dept. 1979); *see also*, Stalker v Abraham, *supra*, at p. 1173; Lowenthal v New York Downtown Hospital, *supra*. Where there is any question as to whether documents were generated as part of the peer review process related to medical assessment or quality assurance, personnel files are to be inspected *in camera*. Leardi v Lutheran Med. Ctr., *supra*; Chardavoyne v Cohen, 56 AD3d 508 (2nd Dept. 2008); Meder v Miller, 173 AD2d 392 (1st Dept. 1991).

In support of their application, the plaintiffs have tracked a history of substance abuse by Dr. Hyppolite. They note that on September 11, 2008, he submitted an

Application for and Agreement to Not Practice Medicine pending the outcome of the New York State Department of Health, Office of Professional Medical Conduct's ("OPMC") investigation. They further note that as a result of that investigation, Dr. Hyppolite applied to OPMC to surrender his physician's license on December 26, 2009 because he did not contest the specifications of misconduct which OPMC had charged him with, as follows: that "[d]uring periods from in or about and between 2005 and 2008, [Dr. Hyppolite] failed to render appropriate care and treatment to Patients A, B and C, and discharged the patients inappropriately," in violation of Education Law § 6530(3); that "[d]uring periods from in or about and between 1987 and 2008 [Dr. Hyppolite] was dependent on or a habitual user of controlled substances, including Stadol and other opiates," in violation of Education Law § 6530(8); and, that "[d]uring periods from in or about and between 2006 and 2008, [Dr. Hyppolite] knowingly, and with intent to deceive, wrote prescriptions for Stadol and other controlled substances inappropriately in the names of others . . ." in violation of Education Law § 6530(2).

The plaintiffs further note that a Surrender Order was executed by the Chair of OPMC's Board on January 11, 2010 and that Dr. Hyppolite did in fact surrender his medical license on January 20, 2010 on the grounds that he did not contest the charges of negligence on more than one occasion; being a habitual use of controlled substances; and, fraudulent practice. The plaintiffs additionally note that Dr. Hyppolite testified at his examination-before-trial that he originally surrendered his license in 2008 due to "substance abuse," and that he admitted that he experienced substance abuse with opium-related substances in December, 2006, during which time he treated Dennis Rodriguez.

The plaintiffs allege that Dr. Hyppolite's drug abuse may well have undermined his ability to properly care for patients including Dennis Rodriguez and that his personnel file may contain evidence establishing the defendant Syosset Hospital's knowledge of Dr. Hyppolite's drug abuse problem at or around the time that he cared for Dennis Rodriguez. The plaintiffs accordingly seek production of Dr. Hyppolite's entire personnel file on the ground that it may contain evidence that is material and relevant to their negligent hiring, supervision and retention claim.

In opposition and in support of their application for a protective order, the defendants have submitted a Log enumerating 393 documents, many of which have not been produced on the grounds that they are privileged. They have also submitted the affidavits of Joseph Garber, M.D., Director of Syosset Hospital's Emergency Department and Tracey White, the Coordinator of the Credentialing Office of Syosset Hospital.

Dr. Garber attests that as required by Public Health Law § 2805-j, Syosset Hospital has a program overseen by its Quality Assurance Committee whereby medical malpractice is identified and the incidence thereof prevented, which, pursuant to Public Health Law § 2805-j(d) includes "a procedure for the prompt resolution of grievances by patients or their representative related to accidents, injuries, treatment and other events that might result in claims of medical . . . malpractice." As custodian of the Hospital's Quality Assurance Documents pertaining to Dr. Hyppolite, he opines that none relate to his care of Dennis Rodriguez; the withheld documents consist of other patients' complaints regarding Dr. Hyppolite and documents relating to Syosset Hospital's investigation and response thereto. He attests that all such documents were created in

furtherance of the hospital's attempt to prevent medical malpractice and that but for the requirements of Article 28 of the Public Health Law, they would not exist. He accordingly opines that pursuant to Public Health Law § 2805-m and Education Law § 6527(3), they are privileged.

Tracey White attests that as required by Public Health Law §§2805-j(b), (c) and § 2805-k, Syosset Hospital has procedures in place whereby physicians' credentials, capacity and competence are reviewed before privileges are granted; before they are credentialed to perform various procedures; and, when they seek re-credentialing and reappointment. She explains that in fulfilling this mission, the hospital acquires information as required by law including:

The name of any hospital or facility with or at which the physician, had or has any association, employment, privileges or practice;

In the case where a physician's employment, privilege or practice was discontinued, the reasons for its discontinuation;

Information regarding any pending professional medical misconduct proceedings or any pending medical malpractice actions including the substance of the allegations in such proceedings or actions;

The substance of the findings in such actions or proceedings and any additional information concerning such actions or proceedings as the physician may deem appropriate; and,

Documentation that the physician has completed the course work or training as mandated by the Education Law.

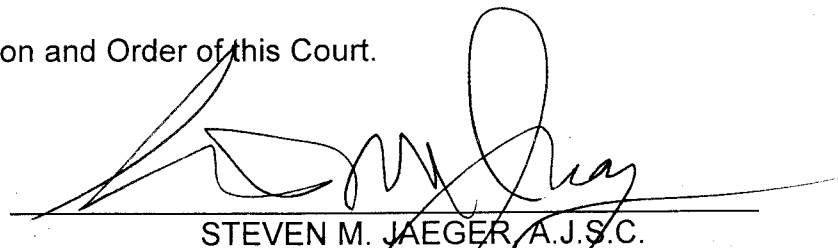
A credentialing file is maintained for all doctors on staff. Ms. White attests that the information contained in Dr. Hyppolite's credentialing file consists solely of

information and documentation required by Public Health Law § § 2805-j(b), (c), § 2805-k, which includes Dr. Hyppolite's initial application and the documentation submitted in support thereof; his applications for reappointment to the medical staff; proof of his education, medical training and continued medical education; references from his peers; correspondence from the hospital to other institutions with which he was previously affiliated to verify his education and training and to ascertain whether there were any malpractice claims or professional disciplinary actions pending against him; the responses to those inquires; OPMC information; and, correspondence and documentation from Syosset Hospital concerning the status of Dr. Hyppolite's privileges. She also attests that but for the requirements of Public Health Law § § 2805-j and § 2805-k, these documents would not have been created or maintained and that they are therefore privileged under Public Health Law § 2805-m.

The defendants have not established to this Court's satisfaction that all of the withheld records are privileged as it is not clear that they all originated or were generated pursuant to the quality assurance review or credentialing or re-credentialing process. An *in camera* inspection is therefore required. The defendants are directed to submit the subject documents to the Court on or before October 7, 2011.

This constitutes the Decision and Order of this Court.

Dated: September 6, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE