

legalbriefs

Nursing Home Liability

Nursing home residents are often highly vulnerable because they suffer from multiple chronic conditions, including physical and cognitive impairments. A nursing home resident is entitled to be treated with respect and dignity and to receive the necessary care to attain or maintain the highest quality of life. The Omnibus Reconciliation Act of 1987 (“OBRA”) was enacted by Congress to provide a comprehensive set of reforms to ensure that protocols are in place in every nursing home facility to protect a resident’s rights.

OBRA, which sets national minimum standards of care, was enacted in response to overwhelming complaints from the families of nursing home residents, as well as in response to state and federal reports which criticized the quality of care at nursing homes. All nursing home facilities which seek Medicare or Medicaid reimbursement must comply with federal *OBRA* regulations (*42 Code of Federal Regulations Part 483*). New York State has created similar regulations (*10 New York Code of Rules and Regulations Part 415*).

The goal of this regulatory framework is to ensure that every person requiring nursing home care receives the appropriate medical, nutritional, rehabilitative and cognitive support. These regulations oblige a nursing home to address a resident’s needs from the moment of admission, developing a comprehensive, accurate, reproducible assessment of each resident’s medical and functional capacity. This care

plan must be in place within 21 days following admission and must describe the services to be provided to attain the resident’s highest physical, mental and psychosocial well-being. New York requires every nursing home operating in the state to have sufficient and competent nursing home staff, to conduct an initial comprehensive and accurate assessment of each resident’s functional capacity, to ensure that residents do not develop pressure sores and, if a resident has pressure sores, provide the necessary treatment and services to promote healing, prevent infection, and prevent new sores from developing. A nursing home must also provide a resident with the necessary services to maintain good nutrition, grooming and personal hygiene; provide adequate supervision and assistive devices to prevent accidents; ensure that residents are free of any significant medication errors, and promote each residents’ quality of life, which includes *continued on page 2*

Inside this issue

Nursing Home Liability
(page 1–2)

Right-Size Your Legal Counsel
(page 2)

The Internet and Your Business
(page 3)

Firm News
(page 4)

Regulatory accountability under OBRA and Public Health Law 2801(d), which holds the nursing home liable for a deprivation of any right created or established by law, regulation or contract, has significantly improved the standards of care.

maintaining dignity and respect of each resident.

Nursing homes should be held accountable for violations of regulations as well as for both negligence and medical errors which cause injury. New York's *Public Health Law 2801(d)* provides an enforcement mechanism by creating the right to sue for damages caused by a nursing home's violation of *OBRA* or other statute or regulation, or the violation of the nursing home-resident contract. To sue successfully under *Public Health Law 2801(d)* you must prove that the nursing home deprived the resident of a right or benefit which caused an injury, meaning

physical harm, emotional harm, death or financial loss. This law sets a minimum amount for compensatory damages and allows the resident to recover punitive damages as well.

The remedies provided by this statute are in addition to, and cumulative with, any other remedy, which means that the aggrieved resident may also bring a medical malpractice or negligence suit along with the statutory violation of a federal or state law. The nursing home can be held accountable in a negligence or malpractice action for failing to assess the resident's needs, failing to prevent a fall, failing to provide adequate nutrition, or failing

to prevent pressure sores with interventions such as proper positioning and frequent turning of a bedridden or wheelchair bound resident. In addition, the failure to provide proper medical services, such as administering the correct medication or appropriate wound care, may be the basis for a medical malpractice claim.

The quality of care in our nursing homes is a matter of public concern and policy. Regulatory accountability under *OBRA* and *Public Health Law 2801(d)*, which holds the nursing home liable for a deprivation of any right created or established by law, regulation or contract, has significantly improved the standards of care. Whether or not a private lawsuit for damages is indicated, families and friends of nursing home residents should be alert for potential abuses by nursing homes and report suspicions of neglect or medical errors to the New York State Department of Health. ■

Written by: Patricia M. Meisenheimer

Right-Size Your Legal Counsel

A recent article in the New York Times discussed the traditional business model for large law firms this way: "Every year, armies of new associates are hired. Many are assigned to so called high-volume projects... multimillion-page document reviews that define scorched-earth litigation; deal-related due diligence; or the drafting of routine documents. This sort of work can often be handled, for a small fraction of the cost, by contract lawyers, or, in some cases, by nonlawyers. But instead of farming this work out, many firms have historically kept it in-house, assigning teams of highly educated but untrained young lawyers to log thousands of hours a year at hourly rates that can be well in excess of \$300."

The article went on to say that as belt-tightening has occurred at all levels of the economy, there has been "a rising

awareness" among corporate in-house counsel that this traditional model is "broken" because client companies wound up paying for training these new associates and for keeping them busy.

Big firms can muster an army for you, and complex disputes sometimes require those resources. But smaller firms can often effectively handle complex litigation, using the resources of knowledgeable senior lawyers, well-supervised associates, and technology that lets even smaller firms grapple effectively with large volumes of documents. Since smaller firms have never operated on the "traditional" business model discussed in the article, they are used to approaching litigation on a more economical level.

Are we the right size for you?

The Internet and Your Business



Employers big and small derive benefits from the use of the internet. Electronic communications permit the free flow of information with ease, potentially increasing productivity, fostering discussion, and disseminating information quickly. They enable employees to work from remote locations. However, the digital age holds pitfalls for employers as well. Two-thirds of all employed adults use the internet and email at work, but one-quarter of time spent online at the office is for personal reasons unrelated to work. Consider these scenarios:

Scenario 1: You are hiring a new employee and have just completed an interview. You decide to “Google” the potential employee’s name and you find a link to a social media website page posted by this person. You click on the link and you recognize his/her picture. You read that this person was out late “partying” with friends over the weekend and expresses hope that he/she does not have to take a drug test anytime soon. You read that a supervisor of this person has been complaining about the quality of work in his/her current job. You also see that this person belongs to a depression peer group and thanks the fellow members for their help. Can you use this information in your decision making process? Are privacy concerns implicated?

Scenario 2: You notice that every time you pass the desk of a new employee, he or she clicks and closes an open window on the computer screen. You make a mental note to log onto the employee’s computer after hours to check their incoming and outgoing email and their Internet search history. Are you invading privacy? If you find something amiss, can you use it to discipline the employee? How may an employer assure that the internet is used as a tool, not as a distraction, and that it will contribute in a positive way to the work environment?

...one-quarter of time spent online at the office is for personal reasons unrelated to work.

For Scenario 1, an employer ought to request permission ahead of time to review material on public websites

about the candidate, including social media, and disclose on your firm’s employment application form that public websites may be reviewed. Remember that while you are free to consider information from any source that is job-related, employment discrimination (such as making hiring choices based on race, religion, protected disabilities, and sexual orientation) remains illegal regardless of the source of the information.

How may an employer assure that the internet is used as a tool, not as a distraction, and that it will contribute in a positive way to the work environment?

Regarding internet use in the office, survey the scope of internet and email use by employees and make policies that address present or potential problems but do not prevent use that promotes your business goals. Equally important, make the policies known after adoption. Have employees acknowledge that they have read and understand the policies, either by having employees sign and return a copy of the policies to a manager, or, create a pop-up screen posting the policies and having employee clicking “yes” prior to using the internet.

To address Scenario 2, policies might explain that employees do not have a privacy interest in their use of email and the internet at work and that you reserve the right to review, audit and disclose digital communications. Prohibiting vulgar, harassing or inappropriate language in connection with office internet use prevents harassment claims. Be sure the policy statement includes notice that discipline may be imposed for violating the policies. Several recent court cases have upheld the employer’s right to enforce internet use policies and to discipline employees for violations of such a policy, including discharge. ■

Written by: Gerard J. McCreight

firm news

The Firm is pleased to announce that **John P. Bracken** is named in the 2009-2010 *Super Lawyers – Corporate Counsel Edition's* top list of attorneys practicing in the area of Business Litigation in New York State. Lawyers are selected for inclusion from a candidate pool nominated, found through research or suggested by clients, then evaluated by *Super Lawyers* based on 12 indicators of peer recognition and professional achievement, and finally reviewed by the candidates' peers within their primary area of practice.

Gerard J. McCreight is being honored by the Huntington Youth Court in May. The Huntington Youth Court is celebrating its 10th anniversary and Gerard has served as a legal trainer and as a member of the Advisory Board since its inception. The Huntington Youth Court serves as a diversionary program for youthful offenders who commit their first, non-violent crime and plead guilty. The members of the Youth Court, drawn from high-schools across Huntington, serve as judge, jury, prosecution and defense counsel for the sentencing phase of a criminal case. The jury may impose a sentence that includes community service, written or verbal apology to the victim, written essays pertaining to the crime, counseling sessions or a jail tour. A positive educational experience is provided for both the defendant and the Youth Court volunteers. Congratulations Gerard!

Marilyn Lord-James continues to play an active role in community affairs. She is a Member of the Longwood C.S.D.'s Legislative Committee, which is comprised of community members, students and representatives from various organizations within the school district, such as the PTA, student government and Board of Education. The Committee promotes school issues to federal, state, county and town officials, and monitors and may initiate legislation in the interest of the district.

She is also a member of the Long Island Metro Business Action, which is an organization created in 1968 by Paul Townsend, editor and founder of Long Island Business News. The organization is committed to providing thoughtful commentary on issues or importance to the general public, and has championed many improvements in infrastructure, as well as providing a forum for individuals and institutions to address the needs and problems facing Long Island.

Dear Reader:

If you would like to receive future editions electronically, please let us know by emailing us at: ahildebrand@bracken-margolin.com

This publication is intended to provide accurate information on the subject matter covered. It is provided with the understanding that *Legal Briefs* is not rendering a legal service, and we assume no liability whatsoever in connection with its use. ©Copyright 2010 Bracken & Margolin, LLP Attorneys at Law

 PRINTED ON RECYCLED PAPER

April, 2010 Volume 26

Bracken & Margolin, LLP Attorneys at Law

ONE SUFFOLK SQUARE SUITE 300 ISLANDIA, NY 11749

Firm Profile

Bracken & Margolin, LLP was founded in 1986, and has been engaged in the general practice of law, with an emphasis on litigation and business practice.

Our litigation practice embraces a wide range of business disputes, personal injury and products liability claims, municipal law and land use cases, labor law issues, civil rights claims and contested estate matters. The firm has periodically been engaged as trial counsel to the profession. The broad scope of our litigation practice gives us a wide and balanced perspective on how to use litigation effectively to pursue a particular objective, including settling a case to advantage, as well as successfully litigating a case to its conclusion.

Our business practice encompasses a wide range of transactions and counseling, with an emphasis on real estate, including leases, acquisitions and mortgages, municipal law, labor relations and employment regulations, corporate counseling, the sale or purchase of assets or stock, the formation of partnerships, corporations and limited liability companies, joint ventures, arbitrations arising within specific industries, tax certiorari and condemnation, health law, probate and administration of estates, wills, trusts and estate planning.

Clients of the firm range from individuals and newly-formed companies to established corporations, partnerships, title companies, investment advisors, employee associations, homeowner associations, municipalities and professionals.

PARTNERS

John P. Bracken
Linda U. Margolin

ASSOCIATES

Marilyn Lord-James
Gerard J. McCreight
Patricia M. Meisenheimer
Kristen Ryan

COUNSEL

Jeffrey D. Powell
William T. Ferris III

OF COUNSEL

Deborah Berger
William J. Graham

SPECIAL COUNSEL

Joshua M. Pruzansky

A Summary of the Firm's Areas of Practice

Litigation

Litigating all matters in state and federal courts, in trial and appellate courts, on behalf of businesses, municipalities, estates and individuals. Our litigation includes criminal and commercial litigation, actions on mortgages, notes and security agreements, employment and civil rights claims, violations of restrictive covenants.

Personal Injury and Products Liability Claims

Representing plaintiffs in personal injury actions or wrongful death claims resulting from accidents, products liability or malpractice.

Professional Discipline and Liability

Representing doctors, lawyers and other professionals in grievance/disciplinary proceedings and actions involving professional liability.

Real Estate

Representing buyers and sellers of residential and commercial real estate, in simple as well as complex transactions; negotiation and drafting leases.

Business Transactions

Negotiating and structuring new business ventures, formation of corporations, LLP's and LLC's, preparing shareholder and partnership agreements, employment agreements, consulting agreements, licensing agreements; buying and selling existing businesses, advice on due diligence and tax-related issues.

Estates, Wills, Trusts, and Elder Law

Probate and administration of estates; estate planning, trusts, drafting of wills, health care proxies, living wills and durable powers of attorney; planning for individuals with substantial estates with a goal toward a significant tax savings.

Criminal Law

Representing defendants charged in both state and federal courts involving charges of business and white collar crimes, DWI, Vehicle and Traffic violations, crimes of violence and street crimes.

Labor and Employment Law

Counselling on human resources and employment-related issues, in both the public and private sectors, counselling and appearances in wrongful termination, discrimination lawsuits, and administrative proceedings.

Land Use and Municipal Law

Representation before town and village boards and courts concerning all phases of zoning and land use regulations.

Professional Relationships

Representing Doctors, Lawyers and other professionals in partnership formations, preparing Partnership Agreements and representation in partnership disputes.