



**MID HUDSON REGIONAL PLANNING
CONSORTIUMS
RELEASE OF MEDICAL
RECORDS**

BARCLAY DAMON LLP

Eric Naegely is a partner and trial attorney in the Health Care Practice Group



- Eric focuses his practice on representing all types of health care providers. He has successfully tried numerous cases to verdict. He also represents health care professionals in matters with the State and Federal government agencies including the New York Department of Health, Office of Medicaid Inspector General, Medicaid Fraud Control Unit and Justice Center.
- Eric also assists health care providers with risk management issues including developing and implementing policies and procedures, conducting internal investigations and dealing with privacy issues.
- He has published many articles and given numerous lectures in the area of healthcare law such as mandated reporting, medical charting, conducting internal investigations and nursing home negligence.

General Overview

(1) Responding to a request for Medical Records/Medical information must be done with an abundance of caution.

- Provider/Patient Privilege
- HIPAA
- State Privacy Laws

(2) However, ignoring a request for records and/or not timely responding can also cause many problems.

General Overview

- **Requests can be from many sources.**
 - Other medical providers.
 - An attorney for the patient.
 - An attorney for a party being sued by a patient.
 - The actual patient.
 - A Court (i.e. family, civil, criminal).
 - An insurance company (or other payor).
 - A government agency.

General Overview

- **Requests can come in many forms.**
 - HIPAA compliant authorization.
 - Written request from the patient.
 - Proper request from patient's representative.
 - Attorney subpoena with authorization.
 - Court ordered subpoena.
 - Civil Court, Family Court, Criminal Court
 - Court order.
 - Civil Court, Family Court, Criminal Court

General Overview

- **Requests can be for various things.**
 - Patient chart
 - Films from diagnostic tests
 - Lab results
 - Requisition forms
 - Billing information
 - Sign in logs
 - Quality Assurance material (do not provide)

General Overview

- **Subject matter of the request can vary.**
 - “General health care” related records
 - Mental health records
 - Substance abuse records
 - Records that include HIV related information
 - Records that involve a minor’s sexual activity

Proper Requests For “General Health Care” Related Records

(1) Directly from the Patient.

- Must be made in writing.
- Must be made to the individual physician or health care facility.
- Must identify the specific provider and the information being sought.
- Must specify if copies are being requested, or is it just a request for access.

Proper Requests For “General Health Care” Related Records

(2) From Patient’s Representative.

- Parents or Guardians
- Attorneys representing patients
- Health Care Proxy (HCP)?
- Power of Attorney (POA)?

Proper Requests For “General Health Care” Related Records

(3) By HIPAA compliant Authorization.

- Is it HIPAA compliant?
- Is it properly prepared/completed?
- Is it signed and dated?
- Is it expired?
- What is the scope of the authorization?
 - Type of records. e.g. “related to left arm”
 - Is it limited as to time frame?

**AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA**

[This form has been approved by the New York State Department of Health]

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form:

In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996

(HIPAA), I understand that:

1. This authorization may include disclosure of information relating to **ALCOHOL and DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
2. If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
3. I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
4. I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
5. Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
6. **THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**
7. Name and address of health provider or entity to release this information:

7. Name and address of health provider or entity to release this information:	
8. Name and address of person(s) or category of person to whom this information will be sent:	
9(a). Specific information to be released: <input type="checkbox"/> Medical Record from (insert date) _____ to (insert date) _____ <input type="checkbox"/> Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers. <input type="checkbox"/> Other: _____ Include: <i>(Indicate by Initialing)</i> _____ Alcohol/Drug Treatment _____ Mental Health Information _____ HIV-Related Information	
Authorization to Discuss Health Information	
(b) <input type="checkbox"/> By initialing here _____ I authorize _____ Initials Name of individual health care provider to discuss my health information with my attorney, or a governmental agency, listed here: _____ <i>(Attorney/Firm Name or Governmental Agency Name)</i>	
10. Reason for release of information: <input type="checkbox"/> At request of individual <input type="checkbox"/> Other: _____	11. Date or event on which this authorization will expire:
12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Signature of patient or representative authorized by law. _____ Date: _____

* **Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.**

Proper Requests For “General Health Care” Related Records

(4) By Subpoena

- Three types of subpoenas
 - (1) *duces tecum* (for documents only)
 - (2) *ad testificandum* (for testimony only)
 - (3) Both (1) and (2)
- Must be personally served on you.
Cannot be simply mailed to you.

Proper Requests For “General Health Care” Related Records

(4) By Subpoena

KEY Question to Ask - Is it a court ordered subpoena or is it simply a subpoena signed by an attorney?

Court ordered subpoenas are actually **signed** by the Judge. CAREFUL : MOST SUBPOENAS WILL INCLUDE THE JUDGE’S NAME BUT NOT ALL WILL BE SIGNED BY THE JUDGE.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CHENANGO

REBECCA L. SHTRAUCH,

Plaintiff,

-against-

MOSHE SHTRAUCH

Defendant.

Index No. 2014X576

RJL No. 2014-0401M

SUBPOENA DUCES TECUM

The People of the State of New York

TO: **Chenango County Public Defender
26 Conkey Ave, 3rd Floor
Norwich, NY 13815**

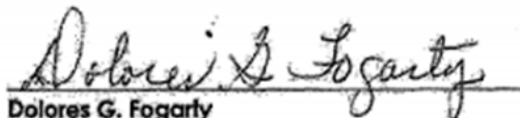
WE COMMAND YOU, That all business and excuses being laid aside, you and each of you appear and attend before Hon. Phillip R. Rumsey, Acting Supreme Court Justice, on the 26th day of May 2015 at 9:30 o'clock in the forenoon, and at any recessed or adjourned date to produce records in this action on the part of the Plaintiff, Rebecca L. Shtrauch, at the Chenango County Supreme Court Chambers, located at 13 Eaton Avenue, Norwich, New York 13815.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

Records to be produced: Copies of any and all applications for assigned counsel for Moshe Shtrauch, date of birth: 4/24/1955, SSN: XXX-XX-6623.

Substantial compliance with this Subpoena may be achieved by submission of the above materials to the office of Dolores G. Fogarty, Esq., Attorney for Plaintiff, by 4:00 pm on May 22, 2015, at 183 Main St, PO Box 727, Unadilla, NY 13849.

WITNESS, Hon. Phillip R Rumsey, Acting Justice of said Court, at Norwich, New York, the 19th day of May 2015.



Dolores G. Fogarty
Attorney for Plaintiff, Rebecca L. Shtrauch
183 Main St, PO Box 727
Unadilla, New York 13849
Tel: (607) 369-3000
Fax: (607) 369-4814

STATE OF NEW YORK
FAMILY COURT COUNTY OF ONONDAGA

BOB SMITH,

Plaintiff,

**JUDICIAL SUBPOENA
DUCES TECUM**

-vs-

MARY SMITH,

Family File No.: 11111

Defendants.

THE PEOPLE OF THE STATE OF NEW YORK

TO: ABC HEALTHCARE
1 Main Street, NY 11223

SO ORDERED:

WE COMMAND YOU, business and excuses being laid aside, you and each of you attend and appear before Onondaga County Family Court Attorney Referee, Mr. Salvatore Pavone, Family Court, at the Onondaga County Courthouse, 401 Montgomery Street, Syracuse, New York, on the 12th day of May, 2017 at 09:30 a.m. in the forenoon of that day, and at any recessed or adjourn dates, and that you bring with you and produce at the time and place aforesaid, pursuant to CPLR 2305 and CPLR 2306, CERTIFIED COPIES of ANY AND ALL RECORDS (Certification Form must be completed and attached to the certified records), now in your custody or control with reference to:

JOHN SMITH.

And it is,

ORDERED, that you deliver copies of all said RECORDS, on or before Friday, May 12, 2017; to:

Mr. Salvatore Pavone
Court Attorney Referee, Family Court

WITNESSETH, Mr. Salvatore Pavone, Court Attorney Referee of the Family Court,
Syracuse, New York, this _____ day of _____, 2017.

THIS SUBPOENA SHALL CONSTITUTE THE ORDER OF THE COURT

Mr. Salvatore Pavone
Court Attorney Referee
Family Court, Onondaga County

BARCLAY DAMON ^{LLP}

Proper Requests For “General Health Care” Related Records

(4) By Subpoena (cont.)

- A subpoena that is only signed by an attorney **MUST** be accompanied by a proper medical authorization signed by the patient or the patient’s representative.
- Some say that an attorney can issue a subpoena for a trial without an authorization. I do not agree.
- Court ordered subpoenas (signed by the judge) should be responded to ASAP.

Proper Requests For “General Health Care” Related Records

(5) By Court Order

- This is essentially the same as the court ordered subpoena but in a different form. Look for the judge’s signature. It can be from family court, civil court, criminal Court, etc.
- Assumption can be made that a court order is enough for the disclosure of “general health care” information. However, it is not always enough for other types of information (mental health, substance abuse, etc.).

Proper Requests For “General Health Care” Related Records

(6) Request by Law Enforcement

- **Warrant?** If yes, then you can comply with the terms of the warrant.
- **No Warrant?** Law Enforcement is still entitled to records, under the following circumstances:
 1. To identify or locate a suspect, fugitive, witness, or missing person; **This has been interpreted very broadly.
 2. When there has been a crime committed on the premises of the covered entity;
 3. In a medical emergency in connection with a crime.
- Notice does NOT have to be given to affected individuals (the patient).

Proper Requests For “General Health Care” Related Records

(7) Request by State or Federal Agency

(1) Must be for a legitimate purpose specific to the Agency.

(2) Must be minimum amount necessary for the Agency’s purpose.

(8) Request by Health Care Professional

(1) Must be for a legitimate purpose specific to the Agency.

(2) Must be minimum amount necessary for the Agency’s purpose (IN SOME CASES).

Proper Requests For “General Health Care” Related Records

Any Questions?
(So Far)

HIV Information

Public Health Law, Article 27-F

– Protects the Confidentiality of Anyone who has:

1. Been TESTED for HIV;
2. Been EXPOSED TO HIV;
3. An HIV infection or HIV/AIDS-related illness;
4. Been treated for an HIV/AIDS-related illness.

HIV Information

Public Health Law, Article 27-F

- Requires that anyone taking a voluntary test first sign a consent.
- Requires that information about a person's HIV status be disclosed ONLY if the person signs a HIV release form, with a few exceptions.
- Applies to individuals and facilities that directly provide health or social services AND to anyone who receives HIV-related information about a person.
- Requires individuals and facilities to keep HIV-related information confidential as required by law.

HIV Information

When is a release form NOT needed?

1. For medical treatment.

- To medical professionals working on the treatment team with the person's existing provider, but only to give necessary care.
- To a person's insurance company if the information is needed to pay for services.
- To medical staff and certain other supervisory professionals who may need access to monitor services if a person is in jail, prison, or on parole.
- To parents or guardians if it is necessary to provide timely care, unless it not in the person's best interests to disclose the information.

HIV Information

When is a release form NOT needed?

2. To monitor disease prevention.

- Health care staff and oversight review organizations or governmental agencies authorized to have access to medical records, in general, may be given HIV-related information when needed to supervise and/or administer a health or social service.
- Known partners of an HIV-positive person MUST be notified that they have been exposed. Notice is given by a physician or public health officer.
- To public health officials, as required by law, to monitor trends and plan prevention programs.

HIV Information

When is a release form NOT needed?

3. Other circumstances:

- Authorized agencies that work with prospective adoptive or foster parents.
- Pursuant to a special court order.
- A subpoena issued by an attorney is NEVER enough.

Mental Health Information

- **HIPAA and NY Mental Hygiene Law**
 - **Basic Rule**: Generally a covered entity may **NOT** use or disclose PHI to other's except:
 - a. As the Privacy Rule Permits (See next slide);
 - b. As authorized by the person (or personal representative) who is the subject of the health information. A HIPAA-compliant authorization must contain the specific information, including that it specifically permits the disclosure of mental health records;
 - c. A covered entity **MUST** provide individuals (or a personal representative) with access to their own PHI **UNLESS THERE IS PERMITTED GROUNDS FOR DENIAL**, and must provide an accounting of the disclosure of their PHI to others;
 - d. HIPAA is the controlling law, unless State law provides great privacy protection;

Mental Health Information

Permitted Uses or Disclosures Without Authorization

- To the Individual who is the subject of the information.
- A covered entity may disclose for its own treatment, payment and other health care operations such as QA and credentialing.
- When individual is incapacitated or in an emergency, but only where disclosure would be in that person's best interest.
- When required by law including a court order (or court ordered subpoena).

Mental Health Information

Permitted Uses or Disclosures Without Authorization

- To state and federal public health authorities to prevent or control disease, injury or disability.
- To other government authorities BUT only to prevent abuse and neglect;
- To Law Enforcement (See next slide)
- To prevent or lesson a serious and imminent PHYSICAL THREAT.
- To certain government programs that provide benefits.

Mental Health Information

Permitted Uses or Disclosures Without Authorization

- **When to disclose to Law Enforcement?**
 - When they have a warrant or court order. However, the information sought must be relevant and limited to the inquiry.
 - To identify or locate a suspect, fugitive, material witness, or missing person. However, this should be limited to only identifying data.
 - For information about a victim of a crime. However, this too should be limited to identifying data.
 - About criminal conduct on your premises.

Mental Health Information

“Minimum Necessary” Rule

- **Must make a reasonable effort to use, request, or disclose to others the minimum amount of PHI to accomplish the purpose of the use or disclosure. Providers should not request or disclose the entire chart unless its warranted to do so.**
- The “minimum necessary” rule does **not** apply to:
 - (a) disclosure to health care providers for treatment;
 - (b) disclosure to an individual or representative who is the subject of the disclosure;
 - (c) if the disclosure is being made pursuant to a proper authorization;
 - (d) if being made to HHS for investigation, compliance, review or enforcement.

Substance Abuse Treatment Records

- Substance Abuse and Mental Health Services Administration's (SAMHSA's) final revised rule became effective March 21, 2017.
- Applies to all SUD programs (a) conducted, licensed or funded by a federal department or agency; **or** (b) that are tax exempt or receive tax deductions; **and** which hold themselves out as providing and actually do provide SUD diagnosis, treatment and referrals.
- **RULE: PATIENT CONSENT IS REQUIRED.** Two types of consent (see next slide).

Substance Abuse Treatment Records

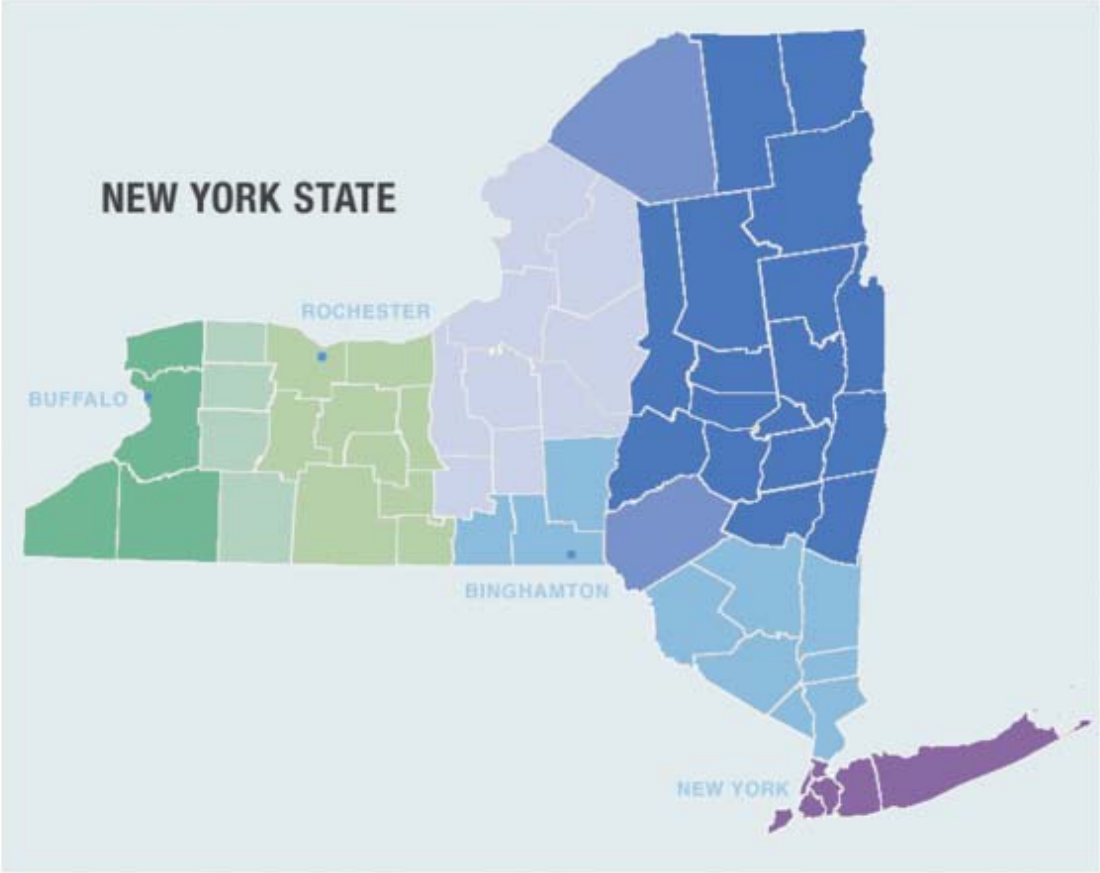
- **PATIENT CONSENT IS REQUIRED.** Two types of consent.
 1. BROAD CONSENT: To be used when disclosing to an entity with which a patient has a treating provider relationship (or is about to have such a relationship). Can be given for classes of providers who may provide future treatment.
 2. SPECIFIC CONSENT: To be used when given to someone outside of the treating provider relationship. The authorization must include:
 - (i) the patient's name;
 - (ii) the program permitted to make the disclosure;
 - (iii) the amount and kind of SUD-related information to be disclosed; and
 - (iv) the specific name or entity to receive the information.

Substance Abuse Treatment Records

- **When is patient consent NOT required?**
 1. For a bona fide medical emergency in which the patient's consent cannot be obtained.
 - However provider must immediately document (i) the name of the recipient; (ii) the name of the disclosing party; (iii) the date and time of the disclosure; and (iv) nature of the emergency.
 2. For approved scientific research
 - There are many elements to this. Contact your attorney first.
 3. For audits (Medicare, Medicaid, etc.).
 4. Court order?

Sharing Data with Regional Health Information Organizations (RHIOs)

- Community-based regional health information exchanges (“HIEs”)
 - Improve health care / control costs
 - Regional Health Information Organizations (“RHIOs”)
 - Also known as: Qualified Entities (“QEs”) certified under 10 NYCRR Sec. 300.4
 - 8 RHIOs in New York State covering different areas
- Participation Agreements (PAs)
 - Required to become a “Participant” in a RHIO/QE
 - BAA with RHIO/QE as Business Associate to its data sources
 - PAs include Qualified Services Organization Agreement (QSOA) as an attachment



County served by:

- HEALTHeLINK
 - HealthConnections
 - HealthlinkNY
- Area served by: HEALTHeLINK & Rochester RHIO
 - Area served by: HealthConnections, Hixny & HealthlinkNY
 - Area served by: Healthix, Bronx RHIO & NY Care Information Gateway
- Rochester RHIO
 - Hixny

RHIOs: Patient Consent

- Sharing of Patient Information (10 NYCRR 300.5)
- New York regulatory authorities' interpretation of existing law has been that providers are not required to obtain patient consent to upload patient information to a RHIO, as long as the RHIO does not make the information accessible to other entities without patient consent (or without patient consent for enumerated exceptions)
- Final Regs allow RHIO Participants to provide patients the option to withhold patient information from the SHIN-NY (but this is not required)
- This option to withhold also covers “minor consent patient information”

Data Sharing Challenges: If you've seen one RHIO... you've seen one RHIO

- Difficulty engaging behavioral health organizations
- 42 CFR Part 2 (Confidentiality of Substance Use Disorder Patient Records): Imposes restrictions upon disclosure and use of these records
- Behavioral health information can be included in RHIO so long as RHIO policies and procedures are in place to comply with federal and state confidentiality laws
- Work with your RHIO to determine whether appropriate procedures are in place for exchange of behavioral health and other sensitive information

Improper Disclosure is a HIPAA violation

- **HIPAA violations**

- From \$100 to \$50,000 per violation.
- The penalties for noncompliance are based on the level of negligence and can range from \$100 to \$50,000 per violation (or per record), with a maximum penalty of \$1.5 million per year for violations of an identical provision.
- Criminal penalties for a willful violation.
- No Private Right of action under HIPAA.
 - Citizen cannot sue civilly for a HIPAA violation.

How much can you charge for a record request?

- NY Public Health Law
 - 75 cents per page for the cost of hard copies.
 - Actual cost for radiologic material such as the cost for copies of films.
 - Actual cost of postage.
- Much less for electronic records per HIPAA Hitech.
 - Actual labor costs to scan records.
 - Actual cost of supplies (paper, toner, etc.)
 - Its not a \$6.50 flat rate.

Retention Requirements

- The general rule is that documents should be retained for **10 years**.
 - This is longer than HIPAA requires.
 - Why 10 years?
- An exception is when dealing with records of a minor. These records should be kept for **10 years or for 3 years after the minor reaches the age of majority, whichever is later**. The age of majority in New York is 18 years of age.

Thank You
Questions?