

NEW YORK

New York statutorily grants patients the right of access to their medical records. A similar statute applies to records held by mental health facilities. The state also has numerous protections against the disclosure of confidential medical information held by various entities and agencies.

I. PATIENT ACCESS

A. Health Care Providers

1. Scope

Individuals have a right to inspect any patient information related to their treatment in the possession of their health care providers. [N.Y. Pub. Health Law § 18(2)(a), (b), (c).¹] “Health care provider” is defined as a health care facility or a health care practitioner. [N.Y. Pub. Health Law § 18(1)(b).] “Health care facility” includes hospitals, home care services, hospices, HMOs, and shared health facilities. [N.Y. Pub. Health Law § 18(1)(c).] “Health care practitioner” includes physicians, physician assistants, chiropractors, physical therapists, dentists, nurses, midwives, podiatrists, optometrists, persons engaged in ophthalmic dispensing (ophthalmic dispensers, opticians, optical technicians, dispensing opticians, and optical dispensers), psychologists, certified social workers, occupational therapists, and speech-language pathologists. [N.Y. Pub. Health Law § 18(1)(d).]

“Patient information” is any information concerning or relating to the examination, health assessment, or treatment of an identifiable subject maintained or possessed by a health care facility or practitioner. [N.Y. Pub. Health Law § 18(1)(e) (defining “patient information”).] Patient information includes information related to a health assessment for insurance and employment purposes. [*Id.*] Patient information does *not* include and therefore exempts from access by the individual or his representative: a practitioner’s personal notes and observations, provided such notes are not disclosed to others. Additionally, the definition of “patient information” excludes records about substance abuse and mental health treatment which are subject to other specified provisions of N.Y. law; information obtained by a practitioner from another practitioner; and data disclosed to the practitioner in confidence by other persons on condition that it would not be redisclosed. [*Id.*]

2. Requirements

In general, health care providers must allow an individual or his qualified representative to inspect his patient information within 10 days of receiving a written request. [N.Y. Pub. Health Law § 18(2)(a), (b), and (c).] A provider may make available

¹There are two sections 18 of the Public Health Laws – one addressing access to patient information and the other registration and notification of boards of directors or trustees of certain voluntary, not-for-profit facilities or corporations.

for inspection either the original or a copy of the patient information. [N.Y. Pub. Health Law § 18(2)(i).] Health care providers are also generally required to furnish a copy of any patient information requested, or the originals of mammograms, within a reasonable time of receiving the request. [N.Y. Pub. Health Law § 18(2)(d).]

Fees. Providers may impose reasonable charges for inspection and copying, not exceeding the cost incurred by the provider. The maximum charge for printed copies is 75¢ per page. There are special rules for mammograms. Access may not be denied solely because of an individual's inability to pay. [N.Y. Pub. Health Law § 18(2)(e).] The provider may also place reasonable limitations on the time, place and frequency of inspections of patient information. [N.Y. Pub. Health Law § 18(2)(f).]

Denial of Access. A patient's general right to inspect and copy is subject to some important exceptions. A provider may deny access if the provider determines that the "requested review of the information can reasonably be expected to cause substantial and identifiable harm to the subject or others which would outweigh the qualified person's right of access to the information," or would have detrimental effects. [N.Y. Pub. Health Law § 18(3)(a), (b), and (d).]

A provider may also deny access under certain circumstances when the request is made by the parent or guardian of an infant or minor. The parent or guardian may not inspect or make copies of the infant's patient information where the provider determines that access by the parent or guardian "would have a detrimental effect on the provider's professional relationship with the infant, or on the care and treatment of the infant, or on the infant's relationship with his parents or guardian." [N.Y. Pub. Health Law § 18(2)(c).] A minor over the age of twelve years may be notified of a request by his parent or guardian (a "qualified person") to review his patient information. If the minor objects to the disclosure, the provider may deny the request. [N.Y. Pub. Health Law § 18(3)(c).]

In reviewing the information to determine whether access should be granted, the provider must consider certain factors specified in the statute, such as the individual's need for continuing treatment, the extent to which knowledge of the information may harm the health or safety of the individual or others, and other factors. [N.Y. Pub. Health Law § 18(3)(d).]

If a request for access is denied, the provider must inform the individual or his representative and specify the basis of the denial. The individual or his representative has the right to obtain, without cost, a review of the denial by the appropriate medical record access review committee. [N.Y. Pub. Health Law § 18(3)(e).] Medical record access review committees are appointed by the health commissioner pursuant to the conditions in the statute. [N.Y. Pub. Health Law § 18(4).] If the individual seeks committee review, the provider must transmit the information, including personal notes and observations, to the committee within 10 days of the individual's request. The committee must review the materials, provide all parties a reasonable opportunity to be heard, and promptly make a written determination. [*Id.*] If the committee decides that access should be granted, the provider must comply. [*Id.*]

Remedies and Penalties

Right to Sue. If the committee denies a patient access to his own records, the individual may seek judicial review of the provider's refusal to grant access. [N.Y. Pub. Health Law § 18(3)(f).] However, the committee's determination as to whether materials sought to be reviewed constitute personal notes and observations is not subject to judicial review. [*Id.*] The individual must seek review within 30 days of receiving notice of the committee's decision. Relief is limited to a judgment requiring the provider to make available the requested information for inspection and copying. [*Id.*]

Right to Amend. An individual or his qualified representative may challenge the accuracy of his information and may require his own brief written statement to be inserted as a permanent part of the patient information and released whenever the information is released. [N.Y. Pub. Health Law § 18(8).] An individual's right to challenge the accuracy of the information applies only to factual statements, not to a provider's observations, inferences, or conclusions. [*Id.*] An individual's right to inspect, copy, or seek correction of patient information cannot be waived. [N.Y. Pub. Health Law § 18(9).]

Whenever federal law or applicable federal regulations affecting the release of patient information are a condition for the receipt of federal aid, and are inconsistent with the provisions of section 18 of the Public Health Laws, the provisions of federal law or federal regulations are controlling. [N.Y. Pub. Health Law § 18(7).]

In addition to the general statute [N.Y. Pub. Health Law § 18] governing an individual's access to his patient information, New York requires hospitals and "examining, consulting, or treating physicians" to disclose copies of all x-rays, medical records, and test records, including laboratory tests, to any other designated physician or hospital upon the written request of the patient or his representative. [N.Y. Pub. Health Law § 17.] Personal notes of the hospital or physician, however, need not be released. [*Id.*] Additionally, records concerning the treatment of a minor patient for venereal disease or the performance of an abortion operation upon a minor may not be released to a parent or guardian. [*Id.*]

The physician or hospital may impose a reasonable charge for providing copies of these records, to be paid by the person requesting the release or deliverance of the records. The maximum charge for paper copies is 75¢ per page, and access to records cannot be denied solely because of inability to pay. [*Id.*]

3. Remedies and Penalties

Right to Sue. In order to bring a civil action against a provider for failure to furnish the subject access to or a copy of patient information, a patient must show that the provider did not act in good faith. [N.Y. Pub. Health Law § 18.]

B. Insurers

New York does not appear to have a general statute governing the right of health insurance consumers to have access to their records held by insurers. See Section IV below for laws addressing specific conditions.

C. State Government

New York law permits individuals access to records about themselves held by state agencies and also gives them the right to request amendments or corrections to their records. [N.Y. Pub. Off. Law § 95.] The time frame for responding to an individual's request for access to his own records and the reasons for denying access and/or corrections are also set forth in the statute. [*Id.*] The agency may impose a fee for copies of records, not exceeding 25¢ per photocopy or the actual cost of reproducing the record. [N.Y. Pub. Off. Law § 87.]

Within five business days of receiving an individual's written request for records pertaining to that individual, the agency must: make the record available to the individual; deny the request in whole or in part and provide reasons for its denial in writing; or furnish a written acknowledgment of its receipt of the individual's request with a statement of an approximate date when the request will be granted or denied, not exceeding 30 days from the date of acknowledgment. [N.Y. Pub. Off. Law § 95.]

The agency is not required to provide access if it does not have the record in its possession or the record cannot be retrieved without using extraordinary search methods. The agency also may deny access to personal information if such information is compiled for law enforcement purposes and if disclosed would interfere with law enforcement investigations or judicial proceedings, deprive a person of a right to a fair trial or impartial adjudication; identify confidential sources or disclose confidential information relating to the investigation; or reveal non-routine criminal investigative techniques or procedures. [N.Y. Pub. Off. Law § 95(5).] Other exceptions to the right of access are specified in the statute. [*Id.*]

Upon written request for correction or amendment of a record or personal information by the subject of the information, the agency must, within 30 business days: make the correction or amendment, or inform the individual of the agency's refusal to correct or amend and the basis for the refusal. [N.Y. Pub. Off. Law § 95.] If a request for correction or amendment is denied, the agency must inform the individual of his right to file with the agency a statement of disagreement with the agency's determination. The agency must attach the statement to the individual's record. [*Id.*]

Any individual whose request for access or request for correction or amendment is denied may, within 30 business days, appeal the denial in writing. Within seven business days of the receipt of an appeal concerning a denial for access or within 30 business days in the case of denial of correction or amendment, the agency must: provide access to or correction or amendment of the record; or explain in writing the factual and statutory reasons for further denial and inform the individual of his right to seek judicial review of the agency's determination. [*Id.*]

Remedies and Penalties

Right to Sue. Any aggrieved data subject ("any natural person about whom personal information has been collected by an agency" [N.Y. Pub. Off. Law § 92]) may seek judicial review and relief. The court may award reasonable attorneys' fees and other reasonably incurred costs. [N.Y. Pub. Off. Law § 97.]

II. RESTRICTIONS ON DISCLOSURE

A. Health Care Providers

New York statutorily imposes an obligation on health care providers to keep patient information confidential and to only disclose it in accordance with the statute. The restrictions on disclosures apply to physicians, physician assistants, chiropractors, physical therapists, dentists, nurses, midwives, podiatrists, optometrists, persons engaged in ophthalmic dispensing (ophthalmic dispensers, opticians, optical technicians, dispensing opticians, and optical dispensers), psychologists, certified social workers, occupational therapists, speech-language pathologists, hospitals, home care services, hospices, HMOs, and shared health facilities. [N.Y. Pub. Health Law § 18(1)(b), (c) and (d).] A health care provider may disclose patient information to someone other than the subject of the information pursuant to a patient authorization or when otherwise authorized by law. [N.Y. Pub. Health Law § 18(6).] When disclosing patient information to someone other than the subject of the information, a health care provider must add to the patient information, either a copy of the subject's written authorization, or the name and address of the third party and a notation of the purpose of the disclosure. [N.Y. Pub. Health Law § 18(6).] The requirement for either the patient's written authorization or the notation does not apply when the disclosure is to: practitioners or other personnel employed by or under contract to the facility or to government agencies making facility inspections or conducting professional conduct investigations. [*Id.*] For disclosures to government agencies making payments on behalf of patients or to insurance companies, the notation is required only at the time of the first disclosure. [*Id.*] Disclosures must be limited to the "information necessary in light of the reason for the disclosure." [*Id.*] The party receiving the information must keep it confidential and is subject to the limitations on disclosure of N.Y. Pub. Health Law § 18.

B. HMOs

HMOs are included in the definition of "health care facility" under N.Y. Pub. Health Law § 18.1(c) and are therefore governed by the disclosure provisions of N.Y. Pub. Health Law § 18 summarized above. In addition, HMOs are subject to N.Y. Pub. Health Law § 4410, which allows disclosure of information obtained in the course of providing professional services only if the patient waives the right of confidentiality or if the disclosure is otherwise required by law. [N.Y. Pub. Health Law § 4410(2).] In making disclosures, HMO providers must comply with the requirements of N.Y. Pub. Health Law § 18(6), which requires patient authorization or the notation of the disclosure in the patient's record. (See section II.A. above.) In addition, upon the request of an enrollee or prospective enrollee, an HMO must provide to the enrollee its procedures for protecting the confidentiality of medical records and other enrollee information. [N.Y. Pub. Health Law § 4408(2).]

Special rules apply to individuals protected because of their HIV status [N.Y. Pub. Health Law § 4410(2), citing N.Y. Pub. Health Law § 2780], and to information and reports about child abuse and maltreatment. [N.Y. Pub. Health Law § 4410(3).] The

commissioner of health has access to patient-specific information, including encounter data, maintained by an HMO, for purposes of quality assurance and oversight [N.Y. Pub. Health Law § 4410(4)(a) and (b)], but redisclosure by the commissioner or his agents is restricted. Health department employees are subject to penalties for unauthorized disclosures. [N.Y. Pub. Health Law § 4401.4(c).]

C. Insurers

1. New York State Insurance Law

Insurers must, upon request of an insured or prospective insured, “provide the procedures for protecting the confidentiality of medical records and other insured information.” [N.Y. Ins. Law § 3217-a(b)(5).]

Insurance companies that are members of medical information exchange centers, or which otherwise transmit medical information in any manner to any similar facility, (such as an electronic data facility used by two or more insurance companies to determine the insurability of applicants), must obtain the applicant’s informed consent to transmit such information. The company must furnish the applicant with a “clear and conspicuous notice” at the time any application for personal insurance is completed. The notice must disclose: a description of the facility, its operations, name, address, and phone number where it may be contacted to request disclosure of any medical information transmitted to it; the circumstances under which the facility may release medical information to other persons; and the applicant’s rights to request the facility to disclose information in its files pertaining to the applicant and to seek correction of any inaccuracies or incompleteness in such information. [N.Y. Ins. Law § 321(a) and (b).] The facility may not transmit medical information to any person unless that person has a written authorization signed by the subject of the information specifically naming the facility and authorizing the person to obtain the medical information from the facility. [N.Y. Ins. Law § 321(c).] Medical information exchange centers and similar facilities are required to code information about HIV test results using a code meeting standards specified in the statute. [N.Y. Ins. Law § 321(d).]

2. New York State Insurance Department Regulations

a. Scope

In addition to statutory restrictions on the disclosure of personal medical information, the New York Insurance Department adopted a privacy regulation (Privacy of Consumer Financial and Health Information) in 2001 to prevent the unauthorized disclosure of New York State consumers’ health information. These rules govern the practices of “licensees,” (*i.e.*, an HMO or persons licensed, authorized or registered or required to be licensed, authorized or registered under New York State Insurance Law) with respect to the disclosure of “nonpublic personal health information” of insurance consumers and customers. [N.Y. Comp. Codes R. & R. tit. 11 § 420.3 (defining “licensee.”)] “Nonpublic personal health information” is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [N.Y. Comp. Codes R. & R. tit. 11 § 420.3 (defining “nonpublic personal health information”).] Insurance “consumers” are individuals who seek to obtain, obtains, or has obtained an insurance product or service from a licensee to be used primarily for personal, family or household

purposes. “Customers” are generally consumers who have a continuing relationship with the licensee. [N.Y. Comp. Codes R. & R. tit. 11 § 420.3 (defining “consumer” and “customer”).]

Licensees are required to comply with the requirements of the state regulation with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [N.Y. Comp. Codes R. & R. tit. 11 § 420.21.]

b. Requirements

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without authorization. [N.Y. Comp. Codes R. & R. tit. 11 § 420.17.] An authorization, however, is not prohibited, restricted or required for disclosures made for the purpose of performing insurance functions by or on behalf of the licensee as specified in the regulation, such as claims administration, underwriting, quality assurance, utilization review, disease management, fraud investigation, and actuarial, scientific, medical or public policy research. [*Id.*]

A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); and notice that the consumer or customer may revoke the authorization at any time and the procedure for revocation. [N.Y. Comp. Codes R. & R. tit. 11 § 420.18.]

c. Remedies and Penalties

Any violation of these rules constitutes an unfair method of competition or an unfair or deceptive act and practice. [N.Y. Comp. Codes R. & R. tit. 11 § 420.23.] The superintendent of insurance may hold hearings to determine whether or not a violation has been committed, and enjoin a person from engaging in such violations. [N.Y. Ins. Law §§ 2405 and 2407.]

D. Health and Hospital Service Corporations

Health service, hospital service and non-profit medical expense indemnity corporations are required, upon the request of a subscriber or prospective subscriber, to provide their procedures for protecting the confidentiality of medical records and other subscriber information. [N.Y. Ins. Law § 4324(b).]

E. On-site Occupational Health Services Facilities

The records of employees treated at on-site occupational health service facilities sponsored by the employer may not be disclosed to the employer without the authorization of the employee-patient or as authorized by law. [New York Lab. Law § 201-e.]

F. State Government

In general, records held by government agencies are available for public inspection.

[N.Y. Pub. Off. Law § 87.] Agencies are prohibited, however, from disclosing any record or personal information when such disclosure is an invasion of personal privacy. [N.Y. Pub. Off. Law §§ 87 and 96.] An invasion of personal privacy includes disclosure of medical histories or items involving the medical records of a patient in a medical facility. [N.Y. Pub. Off. Law § 89.] With some specified exceptions, agencies may not disclose any personal information without written request or written consent from the subject of the information. [N.Y. Pub. Off. Law § 96.]

Each agency that maintains a system of records must maintain only personal information that is relevant and necessary to accomplish the purpose required by statute or executive order, or to implement a program specifically authorized by law. [N.Y. Pub. Off. Law § 94.]

1. Notice Requirements

At the time of initial request for personal information, the agency must provide notice to each data subject that includes:

- the name of the agency and any subdivision requesting the personal information and the names or title of system of records in which the information will be maintained;
- the authority granted by law that authorizes the collection and maintenance of the information;
- the principal purpose(s) for which the information is to be collected; and
- the uses that may be made of the information.

[N.Y. Pub. Off. Law § 94.]

2. Other Requirements

The agency is required to establish administrative, technical and physical safeguards to ensure the security of the records. It must also establish written policies that govern the responsibilities of persons involved in the design, development, operation or maintenance of a system of records, and instruct these persons with respect to such policies and the requirements of New York's personal privacy protection law and the penalties for noncompliance. [N.Y. Pub. Off. Law § 94(1).]

Remedies and Penalties

Right to Sue. Any aggrieved data subject ("any natural person about whom personal information has been collected by an agency" [N.Y. Pub. Off. Law § 92.]) may seek judicial review and relief. The court may award reasonable attorneys' fees and other reasonably incurred costs. [N.Y. Pub. Off. Law § 97.]

G. Utilization Review Agents

Utilization review agents must have written procedures assuring the confidentiality of patient-specific information obtained during the process of utilization review. [N.Y. Ins. Law § 4905(1).] The information may be shared only with the insured or his designee or health care provider, or those authorized by law to receive the information. [*Id.*] Utilization review agents may collect only such information as is necessary to make a determination and may require medical records during prospective or concurrent review only when necessary to verify that the services are medically necessary. [N.Y.

Ins. Law § 4905(7).] Only the necessary or relevant sections of the medical record may be required. [*Id.*] For retrospective review, the utilization review agent may request copies of partial or complete medical records. [*Id.*] Only health care professionals, medical record technologists or administrative personnel who have received appropriate training may obtain health information from health care providers for utilization review. [N.Y. Ins. Law § 4905(8).]

III. PRIVILEGES

New York recognizes a number of health care provider-patient privileges, which generally prohibit a health care provider from disclosing any information acquired while attending a patient in their professional capacity. [N.Y. C.P.L.R. 4504 (physicians, nurses – both registered nurses and licensed practical nurses, dentists, podiatrists, and chiropractors; and medical corporations, professional service corporations, and university faculty practices); N.Y. C.P.L.R. 4507 (psychologist-patient); N.Y. C.P.L.R. 4508 (social worker-client); N.Y. C. P. L. R. 4510 (rape crisis counselor-client).] The patient can waive the privilege but is not deemed to have done so if the patient authorizes disclosure for the purpose of obtaining insurance benefits. [N.Y. C.P.L.R. 4504, 4507, 4508 and 4510.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

New York requires the reporting of birth defects and genetic and allied diseases by physicians, hospitals and other persons present at births to the state health department. The information is confidential and not admissible as evidence in any court action or proceeding. [N.Y. Pub. Health Law § 2733.]

B. Cancer

Every physician, dentist and other health care provider is required to report to the state health department no later than 180 days every case of cancer or other malignant disease coming under his care. [N.Y. Pub. Health Law § 2401.] Information about cancer cases collected by the state health department may not be divulged or made public in a manner that would identify any person to whom the information relates, unless otherwise authorized in the sanitary code of New York. [N.Y. Pub. Health Law § 2402.]

C. Genetic Information and Test Results²

1. General Rules

A genetic test generally cannot be performed on a biological sample taken from an individual without the prior written informed consent of the individual. [N.Y. Civ. R.

²There are two sections 2612 under the New York Insurance Law. One deals with genetic testing written informed consent while the other section 2612 deals with discrimination based on being a victim of domestic violence.

Law § 79-l(2).] This provision does *not* apply to authorized insurers who are in compliance with section 2612 of the insurance law. [N.Y. Civ. R. Law § 79-l(6) and N.Y. Ins. Law § 107(a)(10) (defining “authorized insurer”).] “Genetic test” is defined as “any laboratory test of human DNA, chromosomes, genes, or gene products to diagnose the presence of a genetic variation linked to a predisposition to a genetic disease or disability in the individual or the individual’s offspring.” [N.Y. Civ. R. Law § 79-l(1)(a) (defining “genetic test”).] An informed consent must contain, among other things, the name of the person or categories of persons or organizations to whom the test results may be disclosed. [N.Y. Civ. R. Law § 79-l(2)(b).] Genetic testing may be performed on specimens from deceased persons if informed consent is provided by the next of kin. [N.Y. Civ. R. Law § 79-l(11).]

There are a few exceptions to this general rule. Genetic tests can be performed without the individual’s prior written consent pursuant to a court order and as required by N.Y. public health law or Article 49-B of New York’s Executive Law regarding the establishment of a state computerized DNA identification index of individuals convicted for certain felonies. [N.Y. Civ. R. Law § 79-l(2), (4), and (7).]

All records, findings and results of an individual’s genetic test are deemed confidential and may not be disclosed without the individual’s written informed consent. [N.Y. Civ. R. Law § 79-l(3)(a).] Disclosures of genetic test results to persons or organizations not named on the informed consent require the individual’s further informed consent. [N.Y. Civ. R. Law § 79-l(2)(d).] However, disclosures without consent are permitted if required by court order, N.Y. public health law (specifically N.Y. Pub. Health Law § 2500-a.) or Article 49-B of New York’s Executive Law (sections 995, 995-a to 995-f) [N.Y. Civ. R. Law § 79-l(4)(c).] Information derived from an individual’s genetic test may not be incorporated into the records of a non-consenting individual who may be genetically related to the tested individual. In addition, no inferences may be drawn, used or communicated regarding the possible genetic status of the non-consenting individual. [N.Y. Civ. R. Law § 79-l(3)(b).]

Remedies and Penalties

Fines and Penalties. Any person who violates subsections 79-l(2) or 79-l(3) is guilty of a violation punishable by a civil fine of not more than \$1,000. A person who willfully violates these provisions is guilty of a misdemeanor punishable by a fine of not more than \$5,000, by imprisonment for not more than 90 days, or both. [N.Y. Civ. R. Law § 79-l(5).]

2. Insurers

Insurers must obtain an individual’s written informed consent prior to a genetic test, and the consent form must specify the name of the persons or categories of persons or organizations to whom the test results may be disclosed. [N.Y. Ins. Law § 2612(b)(6).] Any further disclosure to persons or organizations not named requires the further informed consent of the subject of the test. [N.Y. Ins. Law § 2612(d).] All records, finding and results of any genetic test are confidential and may not be disclosed without the written consent of the person to whom the genetic test relates. [N.Y. Ins. Law § 2612(f) and (g).] Insurers who fully possess information derived from a genetic test cannot incorporate that information into the records of a non-consenting individual who may be genetically related to the tested individual. [N.Y. Ins. Law §

2612(h).]

3. Researchers

Genetic tests may be performed on anonymous samples for research and statistical purposes, provided that the research protocol assures the anonymity of the sources of the samples and an institutional review board (IRB) has approved the protocol. [N.Y. Civ. R. Law § 79-l(4).] In addition, samples may be used for research purposes for other tests for which specific consent was not obtained, if pursuant to a research protocol approved by an IRB, the individuals gave prior written informed consent for the use of their samples for “general research purposes,” and these individuals did not specify time limits or other factors restricting the use of their samples. Furthermore, these samples must be permanently stripped of identifying information *or* an IRB-approved coding system must be established to protect the identity of the individuals. [N.Y. Civ. R. Law § 79-l(9).] The consent for use of samples for general research purposes must include, among other things, a statement that the sample will be used for future genetic tests; a description of the policies and procedures to protect patient confidentiality; and a statement of the right to withdraw consent at any time. [*Id.*]

Information about an individual derived from genetic tests or information linking an individual with specific genetic test results may not be released to any person or organization without the individual’s explicit written consent and only for the purposes set forth in the consent form. [N.Y. Civ. R. Law § 79-l(9).] The statute prohibits contacting family members of the individual who provided the sample for clinical, research, or other purposes without a specific consent form identifying the particular family members who will be contacted and the specific purpose of the contact. [*Id.*]

Biological samples may be kept for longer than 60 days and used for scientific research with the approval of an IRB and the written informed consent of the individual. [N.Y. Civ. R. Law § 79-l(2)(f).] Samples may be stored for up to 10 years in the absence of genetic testing, if authorized in writing by the individual. To perform genetic tests of these samples, the researcher must obtain the individual’s informed consent. [N.Y. Civ. R. Law § 79-l(10).]

Remedies and Penalties

Fines and Penalties. If the superintendent of insurance determines after a hearing that an insurer has violated section 2612 of New York’s insurance law, the insurer may be fined up to \$5,000 and is subject to other penalties under the insurance code. [N.Y. Ins. Law § 2612(j).]

D. HIV/AIDS

1. General Rules

HIV testing generally requires the written informed consent of the subject of the test. The signed consent form must include an explanation of the protections afforded confidential HIV related information, including the circumstances under which, and the persons to whom, disclosure of information may be required, authorized, or permitted by law. [N.Y. Pub. Health Law § 2781(1).] The individual must be provided with the opportunity to remain anonymous and to provide written informed consent through a coded system that does not link individual identity to the test request or

results. [N.Y. Pub. Health Law § 2781(4).] A health care provider who is not authorized by the commissioner of health to provide HIV related tests on an anonymous basis must refer a person who requests an anonymous test to a test site which does provide anonymous testing. [*Id.*] This rule does not apply to a health care provider ordering the performance of an HIV related test on an individual proposed for insurance coverage. [*Id.*]

A person who obtains confidential HIV related information in the course of providing health or social services, or pursuant to a release, cannot disclose such information except, as specified in the statute, to: the protected individual or his representative; any person to whom disclosure is authorized pursuant to a release; an agent or employee of a health facility or health care provider under certain circumstances; a health care provider or facility when the information is necessary to care for the individual, the individual's child, or one of the individual's contacts; a federal, state, county, or local health officer when such disclosure is mandated by federal or state law; third-party reimbursers; insurance institutions under certain circumstances; and others. [N.Y. Pub. Health Law § 2782.] A person to whom confidential HIV related information has been disclosed cannot disclose the information to another person except as permitted by the statute. [*Id.*] Special rules apply to disclosure by physicians. [*Id.*] In most circumstances, a notation of the disclosure must be placed in the protected individual's medical record. [*Id.*]

Numerous provisions govern disclosure of confidential HIV related information. There are rules governing the issuance of a court order for the disclosure of confidential HIV related information. [N.Y. Pub. Health Law § 2785.] State agencies authorized to obtain such information must have rules prohibiting disclosure except as authorized by law. [N.Y. Pub. Health Law § 2786.] Civil servants may have access to confidential HIV related information only when reasonably necessary to perform their official duties [N.Y. Civ. Serv. Law § 83.4], may disclose it only in accordance with Article 27-F of New York public health law [N.Y. Civ. Serv. Law § 83.5], and may never disclose it in response to a subpoena or Freedom of Information request unless there is also a court order requiring disclosure. [*Id.*] When victims of felony offenses involving sexual intercourse request that the defendant submit to HIV testing, the results are confidential, are not disclosed to the court, and are disclosed only as authorized by statute. [N.Y. Crim. Proc. § 390.15; N.Y. Crim. Proc. § 347.1.] All papers, proceedings, orders, and request made pursuant to a request for testing are sealed. [N.Y. Crim. Proc. § 390.15; N.Y. Crim. Proc. § 347.1.]

Remedies and Penalties

Fines and Penalties. Persons who disclose confidential HIV related information in violation of the law are subject to a maximum civil penalty of \$5,000 per occurrence. Persons who willfully commit violations are guilty of misdemeanors and subject to additional penalties. [N.Y. Pub. Health Law § 2783.]

2. Insurers

Third-party reimbursers and insurance institutions are subject only to sections 2782(i) and (j) of Article 27-F, which authorize disclosure to them of HIV and AIDS related information for reimbursement purposes and other insurance functions under

specified conditions, and to section 2785, which addresses disclosures pursuant to court order. However, health care providers associated with or under contract to an HMO or other medical services plan are subject to Article 27-F. [N.Y. Pub. Health Law § 2784.]

3. Public Health Reporting

Every physician or other person authorized by law to order diagnostic tests or make a medical diagnosis, or any laboratory performing such tests is required to report each case of HIV infection, AIDS, and HIV related illness to the state commissioner of health. [N.Y. Pub. Health Law § 2130.] The report must include information identifying the individual and the names of any contacts of the individual, if available. [*Id.*] The commissioner must promptly forward the report to the health commissioner or the district health officer (if there is no health commissioner) of the municipality where the disease, illness or infection occurred. [*Id.*]

Disclosure of medical information obtained in the course of case reporting may be made *only* to: the protected individual (person who is subject of an HIV related test or who has been diagnosed with HIV infection, AIDS or HIV related illness); the municipal health commissioner or district health officer if the commissioner or officer is not the examining physician; and contacts of the protected individual without specifically identifying the individual. [N.Y. Pub. Health Law § 2134.] All reports and information about AIDS, HIV infection and HIV related illness collected by the state department of health or local health officials are confidential except as necessary to carry out the provisions of state law on the control of HIV. [N.Y. Pub. Health Law § 2135.]

Remedies and Penalties. A person who fails to act in good faith may be subject to civil and criminal liability or a lawsuit brought by the protected individual. [N.Y. Pub. Health Law § 2136.]

E. Mental Illness

1. Patient Access

New York has a statute governing access to, and disclosure of, clinical records held by mental health facilities that is very similar to the general statute, N.Y. Pub. Health Law § 18, governing access to other patient information. [N.Y. Mental Hyg. Law § 33.16.] “Clinical record” is any information concerning or relating to the examination or treatment of an identifiable patient maintained or in the possession of the treating facility. [N.Y. Mental Hyg. Law § 33.16(a) (defining “clinical record”).] It does not include information disclosed to a practitioner in confidence by other persons with the express condition that the information not be disclosed to the patient or others, provided that this information has never been disclosed by the practitioner or facility to any other person. [*Id.*]

Within 10 days of receiving a written request of a patient (or other “qualified person”), the facility must provide an opportunity for the individual to inspect his clinical records. [N.Y. Mental Hyg. Law § 33.16(b).] “Qualified person” includes any properly identified patient or client, a guardian of a mentally retarded or developmentally disabled person, or a parent or guardian of a minor. [N.Y. Mental Hyg. Law § 33.16(a).]

Facilities have a general obligation to furnish copies “within a reasonable time” of a request by a qualified person for any clinical record that the person is authorized to inspect. [N.Y. Mental Hyg. Law § 33.16(b)5.] A facility may place reasonable limitations on the time, place, and frequency of any inspection of clinical records and may not charge more than 75¢ per page for copying. [N.Y. Mental Hyg. Law § 33.16(b).] A qualified person may not be denied access solely because of inability to pay. [*Id.*]

Denial of Access. Access to the record may be denied if the treating practitioner determines that the requested review can reasonably be expected to cause substantial and identifiable harm to the patient or client or others, or would have a detrimental effect on the patient’s treatment, on the practitioner’s relationship with the patient, or on the patient’s relationship with parents, guardians, spouses or children. [N.Y. Mental Hyg. Law § 33.16(c).] In deciding whether to deny access, the practitioner may consider a number of factors, including the patient’s need for continuing care or treatment, the age of the patient if the patient is a minor, and other factors similar to those set forth in N.Y. Pub. Health Law § 18. In cases of denial, the facility may grant access to a summary of the record. [N.Y. Mental Hyg. Law § 33.16(c).] A patient over the age of twelve may be notified of any request by a qualified person to review his record. If that patient objects to the disclosure, the facility, in consultation with the treating practitioner, may deny the request for access. [*Id.*]

Parents or guardians requesting access to a child’s records may be denied access if the treating practitioner determines that access by the parent or guardian “would have a detrimental effect on the practitioner’s professional relationship with the infant, or on the care and treatment of the infant or on the infant’s relationship with his or her parents or guardians.” [N.Y. Mental Hyg. Law § 33.16(b)3.] Similar protections apply when the parent, spouse, or adult child of an adult patient requests access to the adult patient’s records. [N.Y. Mental Hyg. Law § 33.16(b)4.]

Patients or qualified persons who are denied access have the right to a review by the appropriate clinical records access review committee. The facility must transfer the record to the committee within 10 days of the patient or qualified person’s request for review, and the committee must make a “prompt” determination. If the committee denies access, the patient or qualified person has the right to initiate judicial review within 30 days of receiving the committee’s decision. [N.Y. Mental Hyg. Law § 33.16(c).]

Other provisions of section 33.16 are also similar to N.Y. Pub. Health Law § 18. The patient or qualified person may challenge the accuracy of the information and require that a brief written statement prepared by him regarding the challenged information be inserted in his record. [N.Y. Mental Hyg. Law § 33.16(g).] A patient cannot waive his right to seek, copy, or inspect the clinical record. [N.Y. Mental Hyg. Law § 33.16(h).] Any federal law or regulation that is more restrictive with respect to release of the record explicitly takes precedence over section 33.16. [N.Y. Mental Hyg. Law § 33.16(f).]

The major differences between section 33.16 and N.Y. Pub. Health Law § 18 are: section 33.16 does not contain a general provision addressing disclosure to third parties; the definition of “clinical record” under section 33.16 does not contain an exemption for the practitioner’s personal notes and observations; and the clinical

records access review committees under section 33.16 are appointed by the commissioner of mental health, commissioner of mental retardation and developmental disabilities, and commissioner of alcoholism and substance abuse services, not by the health commissioner.

2. Restrictions on Disclosure

Each facility licensed or operated by New York's Office of Mental Health or New York's Office of Mental Retardation and Developmental Disabilities is required to maintain a clinical record for each patient or client. [N.Y. Mental Hyg. Law § 33.13(a).] Information about patients reported to these offices, including the identification of patients and clinical records tending to identify patients, is not considered a public record. It cannot be released outside these offices or its facilities to any person or agency without patient consent with a few exceptions, including disclosures: pursuant to a court order upon the finding by the court that the interests of justice significantly outweigh the need for confidentiality; to the mental hygiene legal service; and to an endangered individual and law enforcement agency when a treating practitioner has determined that a patient presents a serious and imminent danger to the individual. [N.Y. Mental Hyg. Law § 33.13(c).]

Disclosures without patient consent are also permissible to certain entities under specified circumstances with the consent of the appropriate commissioner, such as disclosures to governmental agencies and insurance companies to make payments to or on behalf of a patient, and to qualified researchers upon the approval of an institutional review board or other comparable review committee. [*Id.*]

Disclosures made pursuant to section 33.13 must be limited to the information necessary in light of the reason for disclosure, and the receiving party must keep the information so disclosed confidential. The same restrictions on disclosure under section 33.13 that apply to the disclosing party apply to the party receiving the information. [N.Y. Mental Hyg. Law § 33.13(f).] With some exceptions specified in the statute, a notation of all disclosures must be placed in the patient's clinical record. Upon his request, the patient may be informed of these disclosures. [*Id.*]

Protections under New York law for mental health records also include a statute allowing records pertaining to treatment for mental illness to be sealed under certain circumstances. [N.Y. Mental Hyg. Law § 33.14.]

F. Sexually Transmissible Diseases

Information about sexually transmissible diseases reported to state and local health officials are confidential except in so far as it is necessary to carry out the purposes of state laws on controlling sexually transmissible diseases. [N.Y. Pub. Health Law § 2306.] Reports of sexually transmissible diseases may be disclosed by court order in a criminal or family court proceeding as specified in the statute.

G. Substance Abuse

Every attending and consulting practitioner is required to report to the state commissioner of health information about narcotic drug addicts or habitual users. Such information is kept confidential and may be used only for statistical, epidemiological or research purposes. [N.Y. Pub. Health Law § 3372.] Reports that

originate in the course of a criminal proceeding may not be disclosed except: pursuant to a subpoena or court order; to an agency, department or official board authorized to regulate, license or supervise a person who is authorized to deal in controlled substances; to a central registry; or to another person employed by the health department for purposes of carrying out the provisions of New York state law on controlled substances. [N.Y. Pub. Health Law § 3371.]

© May 2002