New York State law has provided special protections for the confidentiality of HIV-related treatment information since 1989. Amendments to the basic provisions of this law have been infrequent, but have significantly expanded the scope of protected HIV information. Some amendments govern the release of HIV-related treatment information to entities such as insurance companies and require HIV testing for pregnant women and newborns. Recent changes to the HIV law now require physicians, hospitals, and other facilities to offer HIV testing to all patients aged 13-64 who present to a hospital or primary care service.

If a patient agrees to undergo an HIV test in accordance with this new law, and those test results are positive, that patient’s medical records are subject to the HIV confidentiality provisions. However, the New York State Department of Health has advised providers that the mere offer of an HIV test in accordance with the new statute or a patient’s refusal to undergo an HIV test are not considered confidential information.3

Although the New York State HIV confidentiality law is decades old and one of the most stringent in the United States, many dental providers still fail to comply with the law when releasing patient records or discussing patients who are HIV positive or have HIV-related illnesses. Perhaps the most difficult concept to grasp is that the definition of HIV-related information includes far more than just the diagnosis of HIV, AIDS or an HIV-related illness. The fact that a patient has undergone an HIV test, regardless of the test results, is also protected. Any individual who provides health or social services for the patient, or who obtains HIV-related information with the patient’s authorization, or has information which does or could reasonably identify a protected individual or his/her contact, is deemed to possess confidential HIV-related information and must protect this information in full compliance with the law.4

When dental records containing HIV-related information are requested by a third party, dental providers must obtain a written, signed authorization from the patient which specifically directs the release of HIV information to that third party. If the patient lacks capacity, a health care proxy agent or other individual legally authorized to make health care decisions for the patient may sign the authorization. A general authorization to release “my entire medical record” is not sufficient to release HIV-related information except under very limited exceptions.5 The

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1. Public Health Law § 2700 et. seq.
4. 10 N.Y.C.R.R. § 63.1(h)(3)
5. 10 N.Y.C.R.R. § 63.6

continued on page 2
patient, or his/her legally authorized representative, must complete a form similar to the New York State Department of Health (DOH) Authorization for Release of Health Information and Confidential HIV-Related Treatment Information⁶ or the Office of Court Administration (OCA) Authorization for Release of Health Information Pursuant to HIPAA.⁷ If the form requires initials next to the phrase “HIV information,” the patient or his/her representative must initial this section so that the records can be released. Finally, whenever HIV-related information is disclosed to a third party pursuant to a valid written authorization, the information must be accompanied by a Notice of Prohibition against Redisclosure.⁸

**Exemptions to the Specific Disclosure Requirements**

Although the HIV laws are quite strict, HIV-related treatment information may be released upon receipt of a general authorization in certain well-defined circumstances. Some exemptions are based upon the healthcare provider’s need to know such information in order to provide effective treatment to a protected adult or child, or to identify and treat a contact. Only the minimum information necessary for the stated purpose of the release may be provided. Other exemptions include the right of insurance companies and certain government agencies to obtain HIV-related information when necessary for reimbursement for care and treatment rendered to the patient.

If you are uncertain about whether to release a specific patient’s HIV-related information and/or whether there is an applicable exemption to the rules for disclosure, Fager & Amsler, L.L.P, or other healthcare law counsel should be consulted.

**Infection Control and Disclosure**

HIV-related information may not be disclosed to a provider or other individual caring for the patient solely to “protect” that individual from infection or exposure. It is not always possible to know which patients are HIV positive. In dental offices and hospitals, Federal Occupational Safety and Health Administration (OSHA) regulations require implementation of universal precautions for all patients to minimize exposure to potentially infectious blood and other bodily fluids.⁹ However, Federal law does permit disclosure of a patient’s HIV status to an Emergency Medical Services (EMS) provider who has been exposed to a patient’s blood and/or bodily fluids and would potentially require HIV prophylaxis in a timely manner.¹⁰

**Penalties for Disclosure**

Improper disclosure of HIV-related information can be costly. Allegations of professional misconduct may arise, which can involve sanctions ranging from censure and reprimand to license revocation as well as a fine.¹¹ Civil penalties of up to $5,000 can be assessed for each occurrence.¹² Such penalties are not covered by a provider’s professional liability insurance carrier. Further, if the violation is determined to be willful, the individual who made the disclosure can be charged with a crime. Criminal penalties include up to one year in jail and/or a fine up to $10,000.¹³ Additionally, physicians who improperly disclose HIV-related information can also be sued for dental malpractice and breach of confidentiality.¹⁴

Finally, a provider who discriminates against a patient based on his/her HIV status may face allegations of discrimination which often result in legal proceedings brought against the individual by either the New York Division of Human Rights or the Federal Equal Employment Opportunity Commission. Be aware that professional liability insurance policies exclude coverage of claims of discrimination brought by a government agency.

**Subpoenas**

State law requires that subpoenas for patient dental records must be accompanied by the patient’s written authorization for records. However, HIV-related information must not be released unless the patient’s written authorization also includes specific consent for such release. If there is no specific authorization for release of HIV information, subpoenas alone are not sufficient to compel disclosure of HIV information contained in a dental record. If an individual wishes to obtain HIV-related information without a patient authorization, he/she must obtain a court order.¹⁵ However, even a subpoena bearing the simple statement “so ordered,” even if signed by a judge, is not sufficient. Rather, to issue an appropriate court order, the presiding judge must conduct a hearing, giving notice to all parties (including the patient) before granting a court order. The person seeking disclosure must show at least one of the following:

1. a compelling need for disclosure;
2. a clear and imminent danger to an individual, such that disclosure is required;
3. the party making the application is a state, county or local public health officer alleging clear and imminent danger to public health; or
4. the applicant is otherwise lawfully entitled to this information.¹⁶

All papers from the hearing must be sealed, and all judicial proceedings must

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6. Department of Health Form DOH-2557. A copy of this form is available from Fager and Amsler, L.L.P.
7. OCA Official Form No. 960. A copy of this form is available from Fager and Amsler, L.L.P.
8. A copy of this language may be obtained from Fager & Amsler, L.L.P.
9. 42 C.F.R. § 1910.1030 (d) (1).
11. Education Law § 6530 (23).
take place “in camera,” i.e., in the judge’s chambers. The patient’s name must not be disclosed on any of the legal papers.

Finally, if and when a court does issue an order for release of protected HIV-related information, the court must limit the disclosure only to that information necessary for the purpose of the order and only to those individuals with a legitimate “need to know” the information.

In sum, if you receive a subpoena for a record that includes HIV information and you do not have a specific written authorization from the patient, you must not release any information unless the subpoena is accompanied by a formal court order, signed by a judge, and contains the reasons why the information should be disclosed. If you have questions about releasing a record containing HIV information pursuant to a subpoena, please call attorneys at Fager and Amsler, L.L.P., and we will review the subpoena and advise you how to proceed.

Risk Management Principles to Prevent Improper Release of HIV-related Information

1. Carefully review all records before releasing them to determine whether they contain HIV-related information.
2. Carefully review any authorization provided to be certain that it contains wording that specifically authorizes release of HIV-related information, and, if applicable, that the patient or his/her legal representative has initialed the appropriate area.
3. When releasing records containing HIV-related information, always include the Notice of Prohibition against Redisclosure. This includes dental questionnaires asking if a patient is HIV positive.
4. If the authorization does not specifically allow the release of HIV-related information, you must either:
   a. contact the patient directly to request completion of a new written authorization which specifically allows release of HIV-related information; or
   b. if you are unable to contact the patient, and there are only one or two references to HIV-related information, you may redact (remove) the HIV-related information from a copy of the record.
      i. To redact HIV-related information, make a copy of the portion(s) of the record which contain the HIV-related information. On the copy only, white out or blacken only the HIV-related information. Recopy the page(s), so that the redacted portion(s) cannot be read through the black marker or white-out.
      ii. When sending redacted records to the requesting party, you must advise them that the records have been redacted in accordance with New York State law. You cannot say the redaction was done because the patient’s record contains HIV-related information or even cite the relevant law, for to do so would alert the requestor to the fact that HIV information is contained in the record. Although your response may anger the requestor, you must comply with State law.
5. Never release HIV-related information pursuant to a subpoena unless it is accompanied by an authorization specifically releasing the records or by a court order after a hearing with notice to all parties which meets the requirements previously described.

In summary, the HIV law is complex. Unfortunately, it is easy to make a mistake when releasing patient records. However, the foregoing recommendations can help protect dentists and their employees from violating both the law and the patient’s confidentiality. Dentists and staff members who act with due care, and comply fully with HIV laws and regulations, can minimize the risk of facing allegations of professional misconduct, civil or criminal penalties, administrative proceedings, and litigation alleging a breach of confidentiality stemming from negligent or inappropriate disclosure of HIV-related information.

If you have any questions about the release of records containing HIV-related information, please feel free to call Fager and Amsler, L.L.P.

16. A sample letter to accompany redacted records is available from Fager and Amsler, L.L.P.
Case Study:

Failure to Document Informed Consent

Danielle R. Zimbardi, Vice President, Dental Underwriting
Medical Liability Mutual Insurance Company

The patient, a 53-year-old female, initially presented to the cosmetic dentist (dentist) in early 2008 on referral from her periodontist. The referral was for the evaluation of restorative work needed to stabilize the patient's teeth following treatment by the periodontist for moderate to severe periodontal disease. While the primary purpose of the restorative work was to address the health of the patient's teeth, it was also expected to result in secondary cosmetic improvement.

Over the next two visits, the dentist performed an oral examination and evaluation of X-ray studies, and provided the patient with a treatment plan. The plan included anterior gingivectomy, multiple crowns and the placement of veneers, among other treatments. The patient agreed to the plan, which would cost around $30,000. The treatment was then completed over the course of about a year.

Subsequent to the completion of the restorative dental work, the patient instituted a law suit against the dentist. The actual dental work performed was not at issue. Rather, the subject of the law suit involved allegations concerning a breach of confidentiality and violation of the patient-dentist privilege. Specifically, the patient alleged that the dentist used her “before and after” pictures without her knowledge and permission. As a result, the patient claimed to have suffered exacerbation of significant preexisting mental and psychological issues.

The following is a brief summary of the events leading up to the law suit:

At one of the initial office visits, the dentist took pictures of the patient’s teeth. It was his custom and practice, with most patients, to take before and after photos, as well as photos during the course of treatment. At the time the initial photos were taken, the dentist told this patient that the photos were for documenting her treatment, as well as to “market his practice.” It was not his custom and practice, however, to obtain any written consent regarding his use of the photos. The dentist also did not enter anything into the patient’s record at this visit regarding a discussion about photos.

In May 2009, shortly after the completion of her restorative work, the patient was at a restaurant with a friend. She was approached by a stranger who handed her a postcard he had received from the dentist’s office. The postcard prominently displayed before and after pictures of the patient’s entire face.

The patient promptly called the dentist to express her surprise and displeasure at seeing her photos on the postcard, as she had never given him permission to do so. The doctor told the patient he would immediately have the printing company he used to make the postcards cease mailing them.

The patient went to the dentist’s office the next day to retrieve her records and further express her unhappiness about the postcard, since it was not her understanding that her photos would be used in such a way. Shortly thereafter, the patient instituted this law suit.

The dentist maintained that he had obtained the patient’s verbal consent to use her photos at the outset of treatment. He took that verbal consent to mean he had permission to use her photos for any purpose, including “marketing his practice.”

The dentist also maintained that his chart documented this consent discussion. While there was an entry regarding a discussion about use of the photos, it was not entered contemporaneously with their initial discussion. The entry was written the day the patient appeared at the dentist’s office to express her displeasure at having discovered her photos on a postcard. The note indicates the dentist “reminded” the patient that she had given permission to use the photos, and that his office manager remembered the patient agreeing to such use.

During the discovery phase of the lawsuit, the patient, dentist and office manager were deposed.

The patient testified at her examination before trial (EBT) that the dentist showed her “before and after” photos of other patients during the consultation. She also testified seeing “before and after” photos in the reception area, on countertops in the operatory, and in a cabinet, and that the dentist advised her she could also view other photos on his website.

While the patient conceded that she knew the dentist took pictures of her before, during and after treatment, she claimed he never explained why he was taking pictures. Further, she testified that she did not object to the picture taking or inquire why they were being taken.

It was the patient’s testimony that she never consented to the use of her photos other than for use by herself and the dentist in documenting her treatment. It was never her understanding that they might be displayed in his office or otherwise used.
The dentist testified that he always asked a patient’s permission to use his/her before and after photos, and, until this law suit, had always done so verbally. He admitted that he does not clarify what he means by “using” the photos, unless the patient specifically asks. The dentist also testified that he does not explain what is meant by using the photos to “market his practice,” since he assumes patients know what that means as before and after photos are displayed throughout his office and treatment rooms. In particular, he did not specifically explain to this patient that her photos would be used in postcard mailings.

The EBT of the office manager did not add anything to the dentist’s defense. In fact, she had no recollection of the dentist’s discussion with the patient regarding the photos.

The patient’s claims of mental and emotional distress, and the exacerbation of her underlying psychological disorders as a result of the dissemination of the photos, were supported by the records of her treating psychologist.

A defense of the dentist was compromised by the lack of written consent from the patient, no contemporaneous documentation in the record regarding a consent discussion, nor any corroboration of such a discussion from the office manager. Further hindering the defense was the dentist’s own testimony that he provides no information about the intended specific use of before and after photos in “marketing his practice.” The case was settled on behalf of the dentist prior to trial for $100,000.

This case illustrates why a dentist must be extremely careful before using any patient-identifying information for marketing their practice. While it is permissible for the dentist to take “before” and “after” photographs for treatment purposes or his own internal use, a dentist cannot use such photographs for marketing purposes without following stringent legal requirements.

It almost goes without saying that consent is required before a dentist may disclose patient-identifying information for marketing purposes. In this case, the dentist’s first mistake was choosing to rely upon a verbal consent to use the patient’s photographs in his marketing materials. Although the dentist claimed that he obtained the patient’s verbal consent, he did not document the discussion in the dental record at the time it took place. Rather, he documented the discussion by means of a “late entry” on the day the patient showed up to complain. Adding an entry to the dental record after a complaint is made is, at best, suspicious, and, at worst, opens the door to allegations of falsification. Had the record been documented contemporaneously with the discussion, it would have been more credible.

Even if the record had been documented properly, it is generally insufficient to assure legal protection. Documentation in the chart can be attacked, even when the discussion is witnessed by a staff member. If there is a dispute, a plaintiff’s attorney will most surely argue that the documentation is self-serving, does not reflect what occurred, and that any employee witness is biased. Depending on the circumstances, a jury may be inclined to believe that the chart documentation is not accurate.

More importantly, the New York State Civil Rights Law § 50 requires written consent in order to use a patient’s name or likeness for marketing purposes:

“A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”

Not only does the Civil Rights Law impose criminal penalties for inappropriate use of a patient’s name or picture, but, in addition, a lawsuit can be brought by the victim for money damages and/or “exemplary” (punitive) damages. If punitive damages are awarded to punish especially egregious conduct, those damages will not be covered by insurance, and, therefore, must be paid completely out-of-pocket.

Further, if the dentist is a “covered entity” under HIPAA, there are additional considerations. The HIPAA Privacy Rule expressly requires an authorization for uses or disclosures of protected health


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Many of MLMIC’s policyholders continue to receive solicitations from Risk Retention Groups (RRGs) promising lower premiums. When considering the professional liability coverage offered by an RRG, dentists should be aware of the risks involved and should understand how the type of coverage presented relates to the amount of premium to be paid. We suggest they carefully evaluate their current coverage and premiums and compare them with those of an RRG in order to gain a full understanding of the advantages of your program. Below are some key considerations:

Q. Are RRGs eligible for protection by the NYS Property/Casualty Insurance Security Fund (guaranty fund) in the event of their insolvency?
A. Because almost all professional liability RRGs are not licensed by New York State, their policyholders are not protected by the State’s $1 million per claim guaranty fund in the event the RRG becomes insolvent. The guaranty fund, which acts as a safety net, protects MLMIC’s insureds from the risks covered by their policies.

Q. Can dentists obtain free excess coverage if they become insured by an RRG?
A. No, those who purchase primary coverage from an RRG not licensed by New York State do not have access to the $1 million of excess coverage provided by the State. Excess coverage may be provided at no cost to dentists who are insured by a New York State licensed insurer and meet all other requirements of the excess program.

Q. Is the occurrence form of coverage available with an RRG?
A. Typically, no. In fact, RRG premium quotes may appear to be a fraction of current MLMIC premiums due to the fact that RRGs are not comparing “apples to apples.” They typically propose to move the insured from the occurrence form of coverage to either a first year claims made or claims paid (sometimes referred to as “paid claims”) policy. Because claims made and claims paid policies cover a subset of the claims covered by an occurrence policy, each costs less than the occurrence form for the first few years. Both the claims made and claims paid form only give the illusion of cost savings, because both forms would require the purchase of a “Tail” to protect for any subsequently reported claims should the policy be cancelled.

Q. What is the difference in protection afforded by the occurrence, claims made, and claims paid policy forms?
A. Occurrence coverage offers the most comprehensive protection, covering an insured when an incident occurs while the policy is in effect, regardless of when it is reported or paid. Claims made covers an insured when an incident is reported while the policy is in effect, regardless of when it is paid. It is less comprehensive than occurrence, since it does not cover unreported claims if continuing coverage is not maintained, and, therefore, it costs less than occurrence for the first few years. If the insured wishes to be protected for unreported events, “Tail” coverage must be purchased. Claims paid, a new form of coverage offered by some RRGs, is the least comprehensive. It covers an insured only when an incident is paid while the policy is in effect. Because it covers considerably less insurance risk initially than...
Fager & Amsler's attorneys are available during normal business hours to assist MLMIC insureds with a wide range of legal services, including, but not limited to, advisory opinions concerning liability issues, liability litigation activities, lecture programs, consulting services, and legal audits and assessments.

Healthcare law, regulations, and practices are continually evolving. The information presented in Dental Dateline is accurate when published. Before relying upon the content of a Dental Dateline article, you should always verify that it reflects the most up-to-date information available.

Q. Does New York State regulate RRGs?
A. The policy forms and premium rates of an RRG not licensed by New York State are not subject to New York Insurance Law. Therefore, unlike licensed New York State carriers, unlicensed RRGs may change their policy terms or premium rates without first filing and receiving approval from the New York State Department of Financial Services. Furthermore, policy and rate changes may be implemented without meeting the policyholder notice requirements found in New York Insurance Law.

Q. Are there any other fees required to become insured by an RRG?
A. In many cases, yes. By law, RRGs must be owned by their insureds and most require insureds to make a capital contribution for several years, in addition to their annual insurance premiums. This money is at risk and its return is not guaranteed.

Q. Will insuring with an RRG jeopardize privileges at affiliated hospital(s)?
A. Possibly. Since insurance purchased from an RRG that is not licensed by New York State is not regulated by the State, it may differ from what is customarily offered in New York and may well be of significant concern to hospitals granting staff privileges, particularly if the hospital believes it increases its exposure by accepting RRG coverage. It also depends upon the medical staff by-laws and the hospital’s credentialing requirements.

The answers to the questions posed above indicate that a number of issues and concerns are present with the RRG form of insurance. Therefore, it is very important for dentists to thoroughly analyze all aspects of this type of insurance before deciding to make any changes to their current program. In many cases, what appears to be a more cost effective option could, ultimately, lead to even higher costs and greater risks to the insured. Those who are considering transferring their coverage to an RRG should first contact a MLMIC underwriter at one of the offices listed below. MLMIC underwriters are available to answer any questions policyholders may have and can be reached at the office nearest your practice location.

New York 1-800-683-7769
Syracuse 1-888-744-6729
East Meadow 1-888-263-2729

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information for all marketing communications, except in two circumstances:
1. When the communication occurs in a face-to-face encounter between the covered entity and the individual; or
2. The communication involves a promotional gift of nominal value.

The written authorization itself must contain a number of required elements under HIPAA. For example, if the marketing communication involves direct or indirect remuneration to the covered entity from a third party, the authorization must also state that such remuneration is involved.²

Under HIPAA, disclosure of protected health information without an appropriate authorization exposes the dentist to civil monetary penalties, as well as criminal prosecution by the Department of Justice. The amount of any civil penalty is determined by the level of culpability, with maximum penalties for violations of the same HIPAA provision of $1.5 million per year. In addition, a person who knowingly obtains or discloses individually identifiable health information in violation of the Privacy Rule may face a criminal penalty of up to $50,000 and up to one-year imprisonment. However, the criminal penalties increase to $100,000 and up to five years imprisonment if the wrongful conduct involves false pretenses, and to $250,000 and up to 10 years imprisonment if the wrongful conduct involves the intent to sell, transfer, or use identifiable health information for commercial advantage, personal gain or malicious harm.

In sum, the law imposes stringent penalties for improperly using patient information for one's own commercial gain. Therefore, it is recommended that you confer with legal counsel prior to using patient information for marketing purposes, to confirm that any authorization you receive from the patient is legally compliant.²

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² 45 CFR 164.501, 164.508(a)(3).