

# HIPAA AS AN EVIDENTIARY RULE? AN ANALYSIS OF *MIGUEL M.* AND ITS IMPACT

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*In New York suppression of evidence is only appropriate where it is mandated by constitutional, statutory, or decisional authority, even if obtained by unethical or unlawful means. The courts have been split on how to apply this standard to evidence obtained in violation of HIPAA. In the case In re Miguel M., the New York Court of Appeals addressed this question for the first time, finding that such evidence should be suppressed. Because it is the first authoritative case in New York addressing the evidentiary impact of a HIPAA violation, it is tempting to read Miguel M. as creating a new evidentiary rule. The decision, however, was drafted very narrowly in the context of a hearing to compel assisted outpatient treatment under Kendra's Law. Accordingly, Miguel M. should not be interpreted as a bar to the admission of medical evidence obtained in violation of the HIPAA Privacy Rule in other types of cases. Rather, it suggests that courts consider the type of proceeding, the type of medical evidence at issue, the identity of the parties, and the reason for the introduction of the evidence when determining whether suppression is appropriate. In this manner In re Miguel M. can be harmonized with existing jurisprudence and be used to provide more equitable outcomes for litigants.*

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## INTRODUCTION

Since the implementation of the Health Insurance Portability and Accountability Act Privacy Rule<sup>1</sup> ("HIPAA Privacy Rule") in 2000, attorneys and courts have been scrambling to determine its impact on the admissibility of various types of medical evidence. This is particularly the case where parties have obtained medical evidence without a HIPAA authorization form which they seek to introduce in court. In New York, most courts have avoided addressing such HIPAA violations by falling back on the physician-patient privilege.<sup>2</sup> Of the handful of New York's lower courts which have addressed the issue, most have followed the majority opinion of other states, finding suppression for violations to be inappropriate.<sup>3</sup>

On May 19, 2011, New York's highest court reached a different conclusion.<sup>4</sup> In the case *In re Miguel M.*, after a party introduced medical records it had obtained from hospitals without the patient's authorization in a hearing to compel that patient to receive assisted outpatient treatment, the Court of Appeals found those records should have been suppressed. While the Court of Appeals found suppression appropriate for the HIPAA violations in *Miguel M.*, it provided scant analysis of the issue and limited its decision to the facts of the case. Accordingly, *Miguel M.* should not be construed as creating a bright line rule of evidence prohibiting all evidence obtained without the requisite HIPAA authorization. It is, however, the first decision by the Court of Appeals on the issue, and necessarily will be looked to as precedent. This Article puts *Miguel M.* into the context of pre-existing caselaw and suggests how it can be used as guidance in determining whether suppression is appropriate in various types of cases.

Part I of this Article explains the requirements of the HIPAA Privacy Rule, provides a background on suppression of evidence, and reviews the prior cases which have addressed whether suppression is an appropriate remedy for HIPAA violations. Part II describes the trial court, appellate court, and Court of Appeals decisions in *Miguel M.* The Court of Appeals decision is then analyzed in Part III, which also proposes how the holding of the case should be applied in civil, criminal, and administrative hearings. Finally, this Article concludes that *In re Miguel M.* should be narrowly applied and should not create a new rule of evidence dictating that evidence obtained in violation of HIPAA be *per se* inadmissible in New York courts.

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<sup>1</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

<sup>2</sup> See, e.g., *Only Props. LLC v. Beaven*, 2011 N.Y. Misc. LEXIS 2171 (Civ. Ct. 2011); *Hozle v. Healthcare Servs. Grp.*, 801 N.Y.S.2d 234 (Sup. Ct. 2005).

<sup>3</sup> See, e.g., *Valli v. Viviani*, 801 N.Y.S.2d 243 (Sup. Ct. 2005); *Matter of MacLeman*, 808 N.Y.S.2d 918 (Sup. Ct. 2005).

<sup>4</sup> *In re Miguel M.*, 950 N.E.2d 107 (N.Y. 2011).

## I. PRIOR LAW:

A. *The HIPAA Privacy Rule*

In 1996, the legislature enacted the Health Insurance Portability and Accountability Act (HIPAA).<sup>5</sup> HIPAA's stated purpose is "to improve the Medicare program under title XVIII of the Social Security Act, the Medicaid program under title XIX of such Act, and the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information."<sup>6</sup> Indeed, one of the Parts added to the United States Code under HIPAA is titled "Administrative Simplification."<sup>7</sup> Prior to HIPAA's enactment healthcare providers and insurance companies had to follow a complex patchwork of privacy laws that differed from state to state.<sup>8</sup> In order to accomplish its goal of administrative simplification, the Secretary of the United States Department of Health and Human Services ("HHS") created "a national framework for health privacy protection"<sup>9</sup> which has become known as the HIPAA "Privacy Rule."<sup>10</sup>

Under the Privacy Rule, in most circumstances a "covered entity" may not disclose "protected health information" without an "authorization."<sup>11</sup> Protected

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<sup>5</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 U.S. Stat. 1936 (1996) (codified as amended in scattered sections of titles 18, 26, 29 and 42 of the U.S. Code); 42 U.S.C. §§ 1320d-2(d), 1320d-3(a) (2011).

<sup>6</sup> 42 U.S.C. § 1320d note (2011) (Purpose); *see also* HIPAA pmbl., 110 U.S. Stat. at 1936 ("An Act . . . to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.").

<sup>7</sup> 42 U.S.C. pt. C (2011).

<sup>8</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82463 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) ("While virtually every state has enacted one or more laws to safeguard privacy, these laws vary significantly from state to state and typically apply to only part of the health care system. Many states have adopted laws that protect the health information relating to certain health conditions such as mental illness, communicable diseases, cancer, HIV/AIDS, and other stigmatized conditions.").

<sup>9</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82463; *Citizens for Health v. Leavitt*, 428 F.3d 167, 172 (3d Cir. 2005) (the regulations were meant to "provide a federal baseline for privacy protection"); *Kish v. Graham*, 833 N.Y.S.2d 313, 357 (App. Div. 2007) (Pine, dissent), *rev'd on other grounds sub nom* *Arons v. Jutkowitz*, 880 N.E.2d 831 (N.Y. 2007) ("The enactment of HIPAA in 1996 was spawned by the economic efficiency of using electronic technology in transmitting medical records and the concomitant need to formulate national standards to protect the confidentiality of those records").

<sup>10</sup> 45 C.F.R. pts. 160, 164 (2012).

<sup>11</sup> 45 C.F.R. § 164.508(a)(1) (2012); *see also* *Arons*, 880 N.E.2d at 840-41; *People v. Bercume*, 789 N.Y.S.2d 664, 668 (Sup. Ct. 2004).

health information (“PHI”) includes information created or received by healthcare providers relating to the physical or mental health of a patient or the provision of healthcare to a patient, which could be used to identify the patient.<sup>12</sup> A patient’s oral statements to covered entities are included in this definition.<sup>13</sup> Authorizations are not required for the release of PHI when the information is requested through a court or administrative order,<sup>14</sup> nor are they required to respond to a subpoena, discovery request, or other lawful process if the covered entity has received satisfactory assurances that the party seeking disclosure has made reasonable efforts to ensure that the patient has been given notice of the request or has made reasonable efforts to secure a qualified protective order from a court or administrative tribunal.<sup>15</sup> The Privacy Rule contains additional exceptions to the authorization requirement, including: disclosures required by law;<sup>16</sup> disclosures to public health authorities for preventing or controlling disease, injury or disability, and for the conduct of public health surveillance, public health investigations, and public health interventions;<sup>17</sup> disclosures to health oversight agencies for oversight activities authorized by law;<sup>18</sup> and disclosures to avert a serious threat to health or safety to persons reasonably able to prevent or lessen the threat.<sup>19</sup>

In general, the Privacy Rule expressly preempts any contrary provisions in state law.<sup>20</sup> However, state law is not preempted when the Secretary of Health has determined that it is necessary to prevent fraud related to the provision of or payment for health care; to ensure appropriate state regulation of insurance or health plans; for the reporting on health care delivery and costs; or for purposes of serving a compelling need related to public health or safety.<sup>21</sup> In addition, state law is not preempted where its privacy provisions are more stringent than those imposed by the Privacy Rule.<sup>22</sup> Nor is state law preempted where it establishes procedures for the reporting of disease or injury for the conduct of public health surveillance, investigation, or intervention.<sup>23</sup>

HIPAA expressly provides for remedies in the event of a violation. Remedies include civil penalties ranging from \$100 to \$50,000, the amount depending on the mental state of the violator (unknowing versus willful neglect) and whether the

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<sup>12</sup> 45 C.F.R. § 160.103 (2012).

<sup>13</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82539.

<sup>14</sup> 45 C.F.R. § 164.512(e)(1)(i) (2012).

<sup>15</sup> 45 C.F.R. § 164.512(e)(1)(ii).

<sup>16</sup> 45 C.F.R. § 164.512(a).

<sup>17</sup> 45 C.F.R. § 164.512(b)(1)(i).

<sup>18</sup> 45 C.F.R. § 164.512(d).

<sup>19</sup> 45 C.F.R. § 164.512(j).

<sup>20</sup> 45 C.F.R. § 160.203 (2012).

<sup>21</sup> 45 C.F.R. § 160.203(a)(1).

<sup>22</sup> 45 C.F.R. § 160.203(b); 42 U.S.C. § 1320d-7(a)(2)(B) (2011).

<sup>23</sup> 45 C.F.R. § 160.203(c).

violation has been corrected.<sup>24</sup> Intentional violations of HIPAA can also lead to criminal penalties of up to \$250,000 in fines and up to ten years imprisonment.<sup>25</sup> In contrast to other federal legislation addressing privacy concerns,<sup>26</sup> HIPAA does not provide for the suppression of evidence obtained in violation of its provisions. Following queries regarding the use of suppression as a remedy, the Secretary responded: “We do not have the authority to mandate that courts apply or not apply the exclusionary rule to evidence obtained in violation of the regulation. This issue is in the purview of the courts.”<sup>27</sup>

### B. Suppression

In New York, “absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence, such evidence will be admissible”<sup>28</sup> even if procured by “unethical or unlawful means.”<sup>29</sup> Courts have applied this rule in several types of proceedings. For example, in *Radder v. CSX Transportation, Inc.*, a personal injury action, the Fourth Department of New York’s

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<sup>24</sup> 42 U.S.C. § 1320d-5(a)(1)(A)-(C) (2011).

<sup>25</sup> 42 U.S.C. § 1320d-6(b) (2011).

<sup>26</sup> See, e.g., 18 U.S.C. § 2710(d) (2011) (prohibiting the use of evidence obtained in violation of the Video Privacy Protection Act “in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State”); 18 U.S.C. § 2515 (2011) (prohibiting the use of evidence obtained in violation of the Wiretap Act “in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof.”).

<sup>27</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82596 (Dec. 28, 2000); see also 65 Fed. Reg. at 82679 (“[U]nder the HIPAA statutory authority, we cannot impose sanctions on law enforcement officials or require suppression of evidence. We must therefore rely on rules that regulate disclosure of protected health information by covered entities in the first instance.”).

<sup>28</sup> *Radder v. CSX Transp., Inc.*, 893 N.Y.S.2d 725, 726 (App. Div. 2009) (quoting *Heimanson v. Farkas*, 738 N.Y.S.2d 894, 894 (App. Div. 2002)); see also *Cohens v. Hess*, 705 N.E.2d 1202, 1204 (N.Y. 1998) (“all facts having rational probative value are admissible, unless some specific rule forbids.” (quoting *Wigmore*, Evidence §10, at 667(Tillers rev. 1983))).

<sup>29</sup> *Stagg v. N.Y.C. Health & Hosps. Corp.*, 556 N.Y.S.2d 779, 780 (App. Div. 1990); see also *People v. Greene*, 879 N.E.2d 1280, 1281 (N.Y. 2007) (“Our decisions make clear that a violation of a statute does not, without more, justify suppressing the evidence to which that violation leads”); *People v. Wilder*, 712 N.E.2d 652, 654 (N.Y. 1999) (“all evidence that has any tendency in reason to prove the existence of any material fact, i.e., it makes the determination of the action more or less probable than it would be without the evidence, is relevant and admissible unless its admission would violate some exclusionary rule.”); *Mosallam v. Berenson*, 905 N.Y.S.2d 575, 581 (App. Div. 2010) (“in the absence of some constitutional, statutory, or decisional authority, such evidence is admissible in a civil proceeding even if obtained by wrongful means.”); *People v. Liggan*, 878 N.Y.S.2d 735, 737 (App. Div. 2009) (“The exclusionary rule applies to a violation of a statute only where the purpose of the statute is to effectuate a constitutionally protected right.”).

Appellate Division<sup>30</sup> declined to suppress evidence which had been obtained by virtue of a violation of former DR 7-104 of New York's Code of Professional Responsibility (which prohibited lawyers from communicating with an individual on the subject of the representation with a party the lawyer knows to be represented by a lawyer), noting "[h]ere, there is no constitutional, statutory or case law authority mandating the suppression of Pauley's otherwise valid testimony. . . ."<sup>31</sup> Similarly, in *Matter of Quadon H.*, a juvenile delinquency proceeding, where the defendant's fingerprints were matched to fingerprints in the police database, which should have been destroyed pursuant to Family Court Act § 354.1, the Second Department of New York's Appellate Division declined to suppress the defendant's inculpatory statements that would not have been obtained but for the fingerprint match.<sup>32</sup> In so finding, the court reasoned that "the right conferred on the respondent pursuant to Family Court Act § 354.1 to have his fingerprints destroyed does not implicate fundamental constitutional interests or considerations. Hence, the violation of Family Court Act § 354.1, 'does not, without, more, justify suppressing of evidence to which that violation leads.'"<sup>33</sup> The New York Court of Appeals used the same reasoning in *Charles Q. v. Constantine*, where the records from an officer's criminal proceeding, which should have been sealed pursuant to section 160.50 of the New York Criminal Procedure Law ("CPL"), were erroneously used in the officer's disciplinary proceeding.<sup>34</sup> The Court noted a prior decision in which it found that violations of CPL § 160.50 do not implicate constitutional considerations and would not require suppression in a criminal proceeding.<sup>35</sup> Thus, the Court reasoned, "[h]aving concluded that evidence obtained in violation of a CPL 160.50 sealing order need not be suppressed in a criminal proceeding, we discern no basis for excluding from a disciplinary hearing evidence obtained through an erroneous unsealing order."<sup>36</sup>

In terms of HIPAA violations, as previously mentioned HIPAA itself provides no authority for suppression,<sup>37</sup> and the only statute that can serve as a basis for suppression is limited to specific situations in civil trials. Since 2003, section 3122(a) of New York's Civil Procedure Law and Rules ("CPLR") has required written HIPAA authorizations to accompany subpoenas *duces tecum* for patients'

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<sup>30</sup> In New York, appeals from trial courts (officially called Supreme Courts), go to the Appellate Division, which is divided into four departments based on location, appeals from the appellate division go to the New York Court of Appeals (which is the highest court in New York).

<sup>31</sup> *Radder v. CSX Transp., Inc.*, 893 N.Y.S.2d 725, 726 (App. Div. 2009); *see also* *Heimanson v. Farkas*, 738 N.Y.S.2d 894, 894 (App. Div. 2002) (finding evidence admissible even though obtained because of a DR 7-104 violation).

<sup>32</sup> *In re Quadon H.*, 866 N.Y.S.2d 693 (App. Div. 2008).

<sup>33</sup> *Id.* at 695 (quoting *People v. Greene*, 879 N.E.2d 1280, 1281 (N.Y. 2007)).

<sup>34</sup> *In re Charles Q. v. Constantine*, 650 N.E.2d 839 (N.Y. 1995).

<sup>35</sup> *Id.* at 840 (citing *People v. Patterson*, 587 N.E.2d 255 (N.Y. 1991)).

<sup>36</sup> *Id.* at 840.

<sup>37</sup> *See* discussion *supra* Part I.A.

medical records.<sup>38</sup> This provision in CPLR § 3122 ensures that the procurement of medical records via subpoenas complies with HIPAA's requirement that the patient be on notice.<sup>39</sup> Under section 3103(c) of the CPLR, "if any disclosure under [Article 31 of the CPLR] has been improperly or irregularly obtained so that a substantial right of a party is prejudiced" the court may issue a suppression order.<sup>40</sup> Because the requirement for HIPAA authorizations is in Article 31 of the CPLR, section 3103(c) provides statutory authority for a court to suppress information obtained via subpoena without the requisite notice to patients when substantial rights are prejudiced.

The term "substantial right" as used in CPLR 3103(c) is more inclusive than constitutional rights.<sup>41</sup> Thus, New York courts have found that violations of the CPLR affecting such rights as privacy in financial and medical records,<sup>42</sup> and the attorney-client privilege,<sup>43</sup> are cause for suppression. Such was also the result in *Muzio v. Napolitano*, where the Second Department issued a protective order pursuant to CPLR 3103(c) precluding the defendant from calling petitioner's treating physician because the defendant had conducted an interview of the physician without a valid HIPAA authorization.<sup>44</sup>

Suppression under CPLR 3103(c) is discretionary, however, and even where information is obtained by improper means, suppression is not warranted where the party would be entitled to discovery of the information improperly obtained.<sup>45</sup> For example, in the case *In re Estate of Kochovos*, the First Department affirmed the surrogate court's denial of suppression when the contestants issued subpoenas *duces tecum* on various banks and two doctors commanding attendance at depositions and the production of certain records, without notifying the proponent.<sup>46</sup> The court noted that though it disapproved of the contestants' tactics, "[n]one of the material obtained was privileged, and there is no showing that counsel would not have been entitled to obtain the documents at issue in the normal course of discovery, properly

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<sup>38</sup> N.Y. C.P.L.R. 3122 (Consol.2012) ("A medical provider served with a subpoena *duces tecum* requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.").

<sup>39</sup> See 45 C.F.R. § 164.512(e)(1)(ii) (2012).

<sup>40</sup> N.Y. C.P.L.R. 3103(c) (Consol. 2012).

<sup>41</sup> *Henriques v. Boitano*, 1999 N.Y. Misc. LEXIS 693, at \*4-5 (Civ. Ct. Oct. 27, 1999), *aff'd*, 800 N.Y.S.2d 347 (App. Term 2000).

<sup>42</sup> *Id.*

<sup>43</sup> *Parnes v. Parnes*, 915 N.Y.S.2d 345 (App. Div. 2011); *Surgical Design Corp. v. Correa*, 799 N.Y.S.2d 584 (App. Div. 2005).

<sup>44</sup> *Muzio v. Napolitano*, 919 N.Y.S.2d 64, 65-66 (App. Div. 2011).

<sup>45</sup> *Robinson v. Robinson*, 764 N.Y.S.2d 93, 94 (App. Div. 2003); *Gutierrez v. Dudock*, 715 N.Y.S.2d 333, (App. Div. 2000); *DiMarco v. Sparks*, 624 N.Y.S.2d 692, 693 (App. Div. 1995).

<sup>46</sup> *In re Estate of Kochovos*, 528 N.Y.S.2d 37 (App. Div. 1988).

conducted.<sup>47</sup> Accordingly, it found the surrogate court had properly denied suppression.<sup>48</sup> Likewise, in *Santiago v. N.D. Enterprises, Inc.*, though it was undisputed that the HIPAA forms the defendant used to obtain the plaintiff's medical records had been altered, the Appellate Term found that suppression of the records was not appropriate under CPLR 3103 because there was no prejudice to the plaintiff who had waived the physician-patient privilege.<sup>49</sup>

Whether it is appropriate to suppress HIPAA violations under constitutional authority is more problematic as it is less clear whether the constitutional right to privacy is implicated by violations of the Privacy Rule. As noted by the United States Supreme Court, "[t]he Constitution does not explicitly mention any right of privacy," however "a right of personal privacy, or a guarantee of certain areas or zones of privacy," is implicit in the Fourteenth Amendment's concept of personal liberty.<sup>50</sup> This right to privacy "is not a 'bright line' concept"<sup>51</sup> and the United States Supreme Court has traditionally only found it to encompass matters relating to marriage,<sup>52</sup> procreation,<sup>53</sup> contraception,<sup>54</sup> family relationships,<sup>55</sup> and child rearing and education.<sup>56</sup> The Court has avoided ruling on whether it extends to confidentiality in health information.<sup>57</sup> Accordingly, court decisions on the issue are

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<sup>47</sup> *Id.* at 38.

<sup>48</sup> *Id.*

<sup>49</sup> *Santiago v. N.D. Enter., Inc.*, 864 N.Y.S.2d 667 (App. Term 2008).

<sup>50</sup> *Roe v. Wade*, 410 U.S. 113, 152 (1973).

<sup>51</sup> *Ritterband v. Axelrod*, 562 N.Y.S.2d 605, 611 (Sup. Ct. 1990) (citing *Crosby v. State Workers' Comp. Bd.*, 442 N.E.2d 1191, 1193-94 (N.Y. 1982)).

<sup>52</sup> *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a ban on interracial marriage).

<sup>53</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating a state law which provided for compulsory sterilization after a third conviction for a felony involving moral turpitude)

<sup>54</sup> *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (overturning a conviction under a law banning the distribution of contraceptives); *Griswald v. Connecticut*, 381 U.S. 479 (1965) (striking down a ban on the use of contraceptives)

<sup>55</sup> *See, e.g., Moore v. East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning ordinance which limited occupancy of residences to members of a "family" and provided a narrow definition of "family").

<sup>56</sup> *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a law that prohibited the teaching of foreign language to young children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a law requiring children to attend public schools). *See also* *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Paul v. Davis*, 424 U.S. 693, 713 (1976); *Doe v. Axelrod*, 136 A.D.2d 410, 437 (N.Y. App. Div. 1988); *In re Eichner*, 426 N.Y.S.2d 517, 538 (App. Div. 1980).

<sup>57</sup> Mark A. Rothstein, *Currents in Contemporary Bioethics: Constitutional Right to Informational Health Privacy in Critical Condition*, 39 J.L. MED. & ETHICS 280, 283 (2011); *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) ("assum[ing], without deciding, that the Constitution protects a privacy right" in medical information); *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (stating that the state's ability to collect medical information typically is accompanied by a statutory or regulatory duty to avoid unwarranted disclosures which



less than clear. For example, in *Doe v. City of New York*,<sup>58</sup> the Second Circuit found that the plaintiff had a constitutional right to privacy in his HIV status. Likewise, in *Powell v. Schriver*, the court held that postoperative transsexuals “possess a constitutional right to maintain medical confidentiality” about their status.<sup>59</sup> And in *O’Connor v. Pierson*<sup>60</sup> the court found that a school employee had “a protected privacy right in the medical records” relating to his substance-abuse treatment. In contrast, however, the Second Circuit has recently found that a woman’s fibromyalgia status is not covered by any constitutional right to privacy.<sup>61</sup> In so finding, the court explained that “the interest in the privacy of medical information will vary with the condition.”<sup>62</sup> It clarified that the outcome in *O’Connor* “does not suggest that a third party’s disclosure of one particular medical condition in every case violates the right to privacy. Indeed, the ‘privacy of certain medical conditions’ has been ‘constitutionalized’ only ‘within narrow parameters.’”<sup>63</sup> Noting that privacy protections should only attach to serious medical conditions carrying a social stigma, the court found that constitutional rights to privacy in medical conditions should be determined “on a case-by-case basis.”<sup>64</sup>

Even assuming there is a constitutional right to privacy in medical records, however, New York courts have noted that “[a] statute may be based on privacy considerations and yet not implicate the constitutional right to privacy.”<sup>65</sup> To determine whether the constitutional right is implicated, New York courts have looked to the purpose and history behind a statute.<sup>66</sup> For instance, the Court of Appeals has found that the physician-patient privilege serves three core policy objectives: (1) “to maximize unfettered patient communication with medical professionals, so that any potential embarrassment arising from public disclosure will not ‘deter people from seeking medical help and securing adequate diagnosis and treatment,’” (2) to encourage “medical professionals to be candid in recording confidential information in patient medical records,” and (3) to protect “patients’ reasonable privacy expectations against disclosure of sensitive personal information.”<sup>67</sup> In *People v. Greene*, the First Department found that there was

“arguably has its roots in the Constitution,” but finding it need not determine that issue on the facts before it).

<sup>58</sup> *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994).

<sup>59</sup> *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

<sup>60</sup> *O’Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005).

<sup>61</sup> *Matson v. Board of Educ.*, 631 F.3d 57, 69 (2d Cir. 2011).

<sup>62</sup> *Id.* at 64 (citing *Powell*, 175 F.3d at 111).

<sup>63</sup> *Id.* at 66 (quoting *Powell*, 175 F.3d at 112.).

<sup>64</sup> *Id.* at 66-67.

<sup>65</sup> *People v. Greene*, 824 N.Y.S.2d 48, 55 (App. Div. 2006), *aff’d*, 879 N.E.2d 1280 (N.Y. 2007).

<sup>66</sup> *N.Y.C. Health & Hosps. Corp. v. Morgenthau (In re Grand Jury Investigation)*, 779 N.E.2d 173 (N.Y. 2002); *People v. Greene*, 879 N.E.2d 1280 (N.Y. 2007); *People v. Patterson*, 587 N.E.2d 255, 257, (N.Y. 1991).

<sup>67</sup> *In re Grand Jury Investigation*, 779 N.E.2d at 175; *see also Camperlengo v. Blum*, 436 N.E.2d 1299, 1300 (N.Y. 1982); *Dillenbeck v. Hess*, 536 N.E.2d 1126, 113-31 (N.Y. 1989).

“nothing in these core objectives ‘indicating a legislative intent to confer a constitutionally derived substantial right’” and accordingly ruled that information about a defendant divulged by a hospital administrator was admissible even if it violated the physician-patient privilege.<sup>68</sup> The Court of Appeals affirmed this analysis, stating “[t]here is no constitutional right to privacy in physician-patient communications.”<sup>69</sup> Similarly, in an earlier decision addressing the admissibility of a surgeon’s disclosure of drugs discovered during surgery, the First Department stated “with respect to this latter claim of infringement of constitutional rights, we note that the privilege embodied in CPLR 4504(a) is not of constitutional dimension.”<sup>70</sup> The Fourth Department has also stated that “[t]he physician-patient privilege is based on statute, not the State or Federal Constitution,” and accordingly found that suppression of evidence to which the violation had led was unnecessary.<sup>71</sup>

Like the physician-patient privilege, the primary purpose behind the HIPAA Privacy Rule was not to protect individuals’ constitutional rights to privacy. Rather, the goal was administrative simplification.<sup>72</sup> To reach this goal, the Secretary designed the Privacy Rule:

- (1) To protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use of that information;
- (2) to improve the quality of health care in the U.S. by restoring trust in the health care system among consumers, health care professionals, and the multitude of organizations and individuals committed to the delivery of care; and
- (3) to improve the efficiency and effectiveness of health care delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems, and individual organizations and individuals.<sup>73</sup>

Thus, like the physician-patient privilege, the Privacy Rule is not primarily aimed at the Fourteenth Amendment’s prohibition of government interference with an individual’s liberty. And like violations of the physician-patient privilege, the constitutional right to privacy is not necessarily implicated by violations of the Privacy Rule.

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<sup>68</sup> *Greene*, 824 N.Y.S.2d at 55 (quoting *Patterson*, 587 N.E.2d at 257).

<sup>69</sup> *Greene*, 879 N.E.2d at 1281; *see also* *People v. Al-Kanani*, 307 N.E.2d 43, 44 n.1 (N.Y. 1973), *cert. denied*, 417 U.S. 916 (1974) (noting that the physician-patient privilege is “not one of constitutional magnitude.”).

<sup>70</sup> *People v. Figueroa*, 568 N.Y.S.2d 957, 958 (App. Div. 1991).

<sup>71</sup> *People v. Bryant*, 900 N.Y.S.2d 810, 811 (App. Div. 2010) (quoting *Greene*, 879 N.E.2d at 1281); *see also* *People v. Sergio*, 864 N.Y.S.2d 264, 278-79 (Sup. Ct. 2008) (“The principal purpose of the [physician-patient] privilege relates to facilitating full disclosure by the patient, not protection of the patient’s constitutional privacy rights or any other constitutional right.”).

<sup>72</sup> *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82463 (Dec. 28, 2000).

<sup>73</sup> *Id.*

*C. Prior Cases Addressing the Applicability of Suppression to HIPAA Violations*

Since the passage of the Privacy Rule, New York's supreme courts have had to address the issue of suppression as it relates to medical information obtained without the requisite HIPAA authorization. One of the first attempts was made by the Richmond County Supreme Court in *Keshecki v. St. Vincent's Medical Center*.<sup>74</sup> *Keshecki* was a medical malpractice case in which the defense counsel discussed the plaintiff's medical condition with her treating physician without first obtaining a HIPAA authorization form. In addressing the HIPAA violation, the court reasoned that: "HIPAA protects that privacy of the plaintiff, and this court must protect that right. The only adequate remedy is to preclude any evidence obtained contrary to those safeguards."<sup>75</sup> The court went on to detail what must be included in a HIPAA authorization in order for an attorney to have private discussions with a party's physician.<sup>76</sup> Likewise, in *Matter of Derek*, Broome County's Surrogate Court precluded treating physicians' affirmations from a guardianship proceeding where they failed to observe the physician-patient privilege as well as HIPAA's Privacy Rule.<sup>77</sup>

Other New York courts have criticized Richmond County's approach and reached the opposite conclusion. For example in *Valli v. Viviani*, the Suffolk County Supreme Court stated:

what the decision in *Keshecki v. St. Vincent's Medical Center* has done is place the onus to enforce HIPAA upon the trial justice. Should a doctor's testimony be precluded at trial because he or she granted an interview pursuant to a trial subpoena without obtaining the assurances required by HIPAA?... Certainly the conditions set forth in *Keshecki* are a judicial attempt to preemptively set forth what one court deems compliance with the federal regulation... this court declines to follow the holding...<sup>78</sup>

Likewise, the Niagara County Supreme Court stated that "... the *Keshecki* court also imposed a HIPAA based remedy by granting plaintiff's motion to preclude the testimony of two treating physicians. This Court finds nothing under New York law or HIPAA bestowing such rights or authorizing such a remedy."<sup>79</sup> Similarly, the New York County Supreme Court,<sup>80</sup> the Kings County Family Court,<sup>81</sup> the

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<sup>74</sup> *Keshecki v. St. Vincent's Med. Ctr.*, 785 N.Y.S.2d 300 (Sup. Ct. 2004).

<sup>75</sup> *Id.* at 305.

<sup>76</sup> *Id.* at 304.

<sup>77</sup> *Matter of Derek*, 821 N.Y.S.2d 387, 390 (Sur. Ct. 2006).

<sup>78</sup> *Valli v. Viviani*, 801 N.Y.S.2d 243, 243 (Sup. Ct. 2005).

<sup>79</sup> *Holzle v. Healthcare Servs. Grp., Inc.*, 801 N.Y.S.2d 234, 234 (Sup. Ct. 2005).

<sup>80</sup> *Perry v. Mount Sinai Med. Ctr.*, No. 122908/01, slip op at 2 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 16, 2005); *see also* *Crystal v. Constantino*, No. 0106552/2003, slip op at 6 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 27 2005) ("Although defense counsel acknowledged non-compliance with HIPAA, the Court is not satisfied that preclusion is the most fair remedy.").

<sup>81</sup> *Matter of B. Children*, 886 N.Y.S.2d 70 (Fam. Ct. 2009) ("While HIPAA regulates disclosure of medical information by medical providers and establishes a uniform reporting system for health facilities, its privacy provisions are procedural in nature and do not create any new privileges.")

Westchester County Surrogate Court,<sup>82</sup> and the United States District Court for the Eastern District of New York<sup>83</sup> have each concluded that HIPAA does not create any new physician–patient privilege.

The decisions of New York’s lower courts mimic those of federal courts and the majority of other states’ courts which have addressed the issue. In refusing to suppress improperly obtained medical evidence, the most common analysis points to the fact that HIPAA provides its own remedies and suppression is not among them. For example, the Idaho Supreme Court found “suppression of the evidence is not the proper remedy for a HIPAA violation . . . HIPAA expressly provides for monetary fines in the event of a violation. Thus, the proper remedy for a HIPAA violation is a monetary fine, consistent with the express provisions of the statute.”<sup>84</sup> Likewise the Florida District Court of Appeals stated, “[e]ven where evidence is disclosed by a covered entity in violation of HIPAA standards, suppression of the records is not provided for by HIPAA and is thus not a proper remedy.”<sup>85</sup> Similar statements have been made by the Supreme Court of Georgia,<sup>86</sup> the Wisconsin Court of Appeals,<sup>87</sup> the Indiana Court of Appeals,<sup>88</sup> the Kansas Court of Appeals,<sup>89</sup> the Illinois Appeals Court,<sup>90</sup> the Court of Appeals of Louisiana,<sup>91</sup> the Michigan Court of Appeals,<sup>92</sup> the

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<sup>82</sup> *In re Estate of MacLeman*, 808 N.Y.S.2d 918 (Sup. Ct. 2005) (Declining to follow *Keshecki*, noting that “... HIPAA did not create any substantive rights or remedies in the courts”).

<sup>83</sup> *EEOC v. Boston Mkt. Corp.*, 2004 U.S. Dist. LEXIS 27338, at \*8 n.3 (E.D.N.Y. Dec. 16, 2004) (“The court notes that HIPAA’s limitations on the ways in which health information may be released is separate and apart from any claim of privilege that the plaintiff may have had or waived.”).

<sup>84</sup> *State v. Mubita*, 188 P.3d 867, 878-79 (Idaho 2008) (internal citations omitted).

<sup>85</sup> *State v. Carter*, 23 So. 3d 798, 801 (Fla. Dist. Ct. App. 2009).

<sup>86</sup> *Moreland v. Austin*, 670 S.E.2d 68, 72 (Ga. 2008) (“The remedies for HIPAA violations are set forth in 42 U.S.C. § 1320d-5. That section merely authorizes the Secretary to impose a fine not to exceed \$100 for each violation. It does not authorize a remedy or penalty in the context of a civil lawsuit.”).

<sup>87</sup> *State v. Straehler*, 2008 WI App 14, ¶ 13, 745 N.W.2d 431, 436 (Ct. App. 2007) (“HIPAA does not provide for suppression of the evidence as a remedy for a HIPAA violation. Suppression is warranted only when evidence has been obtained in violation of a defendant’s constitutional rights or if a statute specifically provides for suppression as a remedy.”).

<sup>88</sup> *State v. Eichhorst*, 879 N.E.2d 1144, 1154-55 (Ind. Ct. App. 2008) (“HIPAA provides for civil and criminal penalties for improper disclosures of medical information ... [the defendant] cites no authority for the proposition that evidence given in violation of HIPAA should be suppressed or excluded in a criminal setting. HIPAA does not contain such a remedy.”).

<sup>89</sup> *State v. Yenzer*, 195 P.3d 271 (Kan. Ct. App. 2008) (concluding that regardless of whether a HIPAA violation occurred, the defendant was not entitled to suppression because HIPAA did not provide for it as a remedy).

<sup>90</sup> *People v. Bauer*, 931 N.E.2d 1283, 1292 (Ill. App. Ct. 2010) (“Even if the grand jury subpoena had been insufficient pursuant to HIPAA’s law enforcement exception... the defendant fails to cite any authority which compels that medical information so obtained must be suppressed, and HIPAA does not contain such a remedy.”).

United States Court of Appeals for the Ninth Circuit,<sup>93</sup> the United States District Court of Maryland,<sup>94</sup> and the United States District Courts of Eastern and Southern California.<sup>95</sup>

## II. IN RE MIGUEL M.

### A. Background

In the case *In re Miguel M.*,<sup>96</sup> the New York Court of Appeals had its first opportunity to address the admissibility of medical evidence obtained in violation of the HIPAA Privacy Rule. The case arose out of a Queens County hearing held pursuant to section 9.60 of the Mental Hygiene Law (“Kendra’s Law”) to order Assisted Outpatient Treatment (“AOT”) for Miguel M.<sup>97</sup> Kendra’s Law is named for Kendra Webdale, who was killed when a mentally ill man, Andrew Goldstein, pushed her off a subway platform in January 1999.<sup>98</sup> In the two years prior to the fatal attack, Mr. Goldstein had attacked thirteen other individuals, most of whom were hospital workers or patients.<sup>99</sup> Despite Mr. Goldstein’s history of violent behavior and his requests for treatment, he had been released by the state mental

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<sup>91</sup> State v. Downs, 04-2402 (La. App. 1st Cir. 09/23/05); 923 So. 2d 726, 731(2005) (noting that if the complaint is that HIPAA was violated, the complainant “should file a complaint against the covered entity that disclosed the information.”).

<sup>92</sup> Belote v. Strange, 2005 Mich. App. LEXIS 2642, at \*16-17 (Ct. App. Oct. 25, 2005) (The remedies for failure to comply with the requirements and standards of HIPAA are found under 42 USC 1320d-5. However, these remedies do not address how courts [sic] should treat health information obtained in violation of its provisions. . . . As with every discovery violation, whether and in what manner the violation should be sanctioned is a matter committed to the sound discretion of the court.).

<sup>93</sup> United States v. Streich, 560 F.3d 926, 935 (9th Cir. 2009) (“HIPAA does not provide any private right of action, much less a suppression remedy.”) (Kleinfeld, J., concurring).

<sup>94</sup> United States v. Elliott, 676 F. Supp. 2d 431, 438 (D. Md. 2009) (“Neither *Sutherland* nor *Kreshecki* compel a finding that medical information obtained through the use of an improper subpoena under HIPAA’s law enforcement exception should be prohibited from use at trial. . . . HIPAA itself does not provides that medical information so obtained must be suppressed. The Court is unaware of any authority which compels the suppression of the records at trial.”); Law v. Zukerman, 307 F. Supp. 2d 705, 712 (D. Md. 2004) (“Since HIPAA does not include any reference to how a court should treat such a violation [of HIPAA] during discovery or at trial, the type of remedy to be applied is within the discretion of the Court under Fed. R. Civ. P. 37.”).

<sup>95</sup> Frye v. Ayers, 2009 U.S. Dist. LEXIS 124339, at \*8 (E.D. Cal. May 11, 2009) (“HIPAA does not provide for exclusion of evidence as a remedy for its violation.”); Crenshaw v. MONY Life Insurance Co., 318 F. Supp. 2d 1015, 1029-30 (S.D. Cal. 2004) (noting that HIPAA has its own sanctions).

<sup>96</sup> *In re Miguel M.*, 950 N.E.2d 107 (N.Y. 2011).

<sup>97</sup> *In re Miguel M.*, 882 N.Y.S.2d 698, 699 (App. Div. 2009).

<sup>98</sup> *Miguel M.*, 950 N.E.2d at 110; *In re K.L.*, 806 N.E.2d 480, 482 (N.Y. 2004).

<sup>99</sup> David Rohde, *Jury Still Considering Subway Killing Verdict*, N.Y. TIMES, Oct. 30, 1999, at B2.

health system.<sup>100</sup> At the time he pushed Ms. Webdale, he had stopped taking his anti-psychotic medication.<sup>101</sup> Following the public outcry after Ms. Webdale's death,<sup>102</sup> the New York Legislature enacted Kendra's Law, which was "designed to protect the public and individuals living with mental illness by ensuring potentially dangerous mentally ill outpatients are safely and effectively treated."<sup>103</sup> Under Kendra's Law, an individual may be ordered to receive outpatient treatment if he or she meets the following criteria: the person is at least 18 years old; suffering from a mental illness; unlikely to survive in a community safely without supervision; has a history of failing to comply with treatment, which caused hospitalization at least twice within 36-months of the petition or caused one or more acts of serious violent behavior; as a result of the individual's mental illness he or she is unlikely to voluntarily participate in outpatient treatment; assisted outpatient treatment is necessary to prevent a relapse or deterioration which would likely result in harm to the person or others; and assisted outpatient treatment is likely to benefit the person.<sup>104</sup> A petition for an order authorizing AOT may be filed by anyone over 18 years old who is living with the subject individual, or the parent spouse, sibling, or child of the subject individual.<sup>105</sup> It may also be filed by specified professionals involved in treating the subject individual, as well as the director of community services, social services officials, or an individual's parole officer.<sup>106</sup> The petition must identify facts supporting the petitioner's assertion that the individual meets the criteria for AOT.<sup>107</sup>

### B. Trial Court Ruling

The petition in *Miguel M.* was filed by Charles Barron, M.D., the Director of the Department of Psychiatry at Elmhurst Hospital Center ("Elmhurst"), who was seeking to require Miguel M. to receive AOT.<sup>108</sup> In support of the petition, Dr. Barron presented the testimony of Dr. Garza, the Director of AOT at Elmhurst.<sup>109</sup>

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<sup>100</sup> Anemona Hartocollis, *Nearly 8 Years Later, Guilty Plea in Subway Killing*, N.Y. TIMES, Oct. 11, 2006, at B1; David Rohde, *Subway Killer Apologizes at Sentencing*, N.Y. TIMES, May 5, 2000, at B1.

<sup>101</sup> Anemona Hartocollis, *Subway Victim's Mother Speaks at Killer's Sentencing*, N.Y. TIMES, Nov. 3, 2006, at B3.

<sup>102</sup> Kathryn A. Worthington, *Kendra's Law and the Rights of the Mentally Ill: An Empirical Peek Behind the Courts' Legal Analysis and a Suggested Template for the New York State Legislature's Reconsideration for Renewal in 2010*, 19 CORNELL J. L. & PUB. POL'Y 213, 221 (2009); Jennifer Gutterman, *Waging a War on Drugs: Administering a Lethal Dose to Kendra's Law*, 68 FORDHAM L. REV. 2401, 2402 (2000).

<sup>103</sup> Div. of Budget Rep. on Bills, B. Jacket, N.Y. Laws 1999, ch. 408, at 15 (1999).

<sup>104</sup> N.Y. MENTAL HYG. LAW § 9.60(c) (Consol. 2012).

<sup>105</sup> N.Y. MENTAL HYG. LAW § 9.60(e)(1)(i), (ii).

<sup>106</sup> N.Y. MENTAL HYG. LAW § 9.60(e)(1)(vii), (viii).

<sup>107</sup> N.Y. MENTAL HYG. LAW § 9.60(e)(2).

<sup>108</sup> *In re Miguel M.*, 882 N.Y.S.2d 698, 700 (App. Div. 2009); *In re Barron v. M.M.*, 852 N.Y.S.2d 696, 697 (Sup. Ct. 2007).

<sup>109</sup> *Miguel M.*, 882 N.Y.S.2d at 700; *Barron*, 852 N.Y.S.2d at 697.

As the Director of AOT, Dr. Garza's duties included investigating and evaluating referrals to the Elmhurst AOT program.<sup>110</sup> Dr. Garza testified that based on his evaluation of Miguel M. and a review of Miguel M.'s clinical records from Elmhurst and Holliswood Hospital, he diagnosed Miguel M. with schizoaffective disorder. His office had received the records after requesting them from the hospitals.<sup>111</sup> It was uncontested that the records contained protected health information.<sup>112</sup> It was also uncontested that Dr. Garza "was not the director of medical records for either of the hospitals, never obtained Miguel M.'s authorization to obtain the clinical records, and had not obtained a court order permitting him to obtain the clinical records."<sup>113</sup> During Dr. Garza's testimony petitioner sought to introduce the medical records into evidence.<sup>114</sup> Thereafter, Miguel M.'s attorney made a motion to preclude the clinical records and Dr. Garza's testimony regarding them as the records had been obtained in violation of the HIPAA Privacy Rule.<sup>115</sup>

After receiving briefs on the issue, the trial court denied the motion.<sup>116</sup> While the court declined to find that the release of records was proper under 45 C.F.R. § 164.512(a)(1), which permits disclosure of medical records where disclosure is required by law, the court found disclosure was proper under 45 C.F.R. § 164.512(b)(1)(i).<sup>117</sup> That section of the Privacy Rule permits disclosure "to a public health authority that is authorized by law to collect or receive such information for the purposes of preventing or controlling disease, . . . and the conduct of public health surveillance, public health investigations, and public health interventions."<sup>118</sup> The court found that Dr. Garza qualified as "a public health authority" and that the AOT program qualified as a "public health intervention" and "public health investigation."<sup>119</sup> Because the court found that the disclosures were authorized under HIPAA, it deemed the records admissible and relied heavily upon them in its judgment directing Miguel M. to receive and accept AOT for a period of six months.<sup>120</sup>

### C. Second Department Decision

On appeal, the Second Department of the New York State Supreme Court, Appellate Division reached the same conclusion.<sup>121</sup> HIPAA defines "public health

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<sup>110</sup> *Miguel M.*, 882 N.Y.S.2d at 700.

<sup>111</sup> *Id.*; *Barron*, 852 N.Y.S.2d at 697.

<sup>112</sup> *Miguel M.*, 882 N.Y.S.2d at 700.

<sup>113</sup> *Id.* at 700-01.

<sup>114</sup> *Id.* at 700.

<sup>115</sup> *Miguel M.*, 882 N.Y.S.2d at 700.

<sup>116</sup> *Id.* at 701.

<sup>117</sup> *Barron*, 852 N.Y.S.2d at 700.

<sup>118</sup> 45 C.F.R. § 164.512(b)(1)(i) (2012).

<sup>119</sup> *Miguel M.*, 882 N.Y.S.2d at 702; *Barron*, 852 N.Y.S.2d at 700.

<sup>120</sup> *Miguel M.*, 882 N.Y.S.2d at 702.

<sup>121</sup> *Id.* at 704-05.

authority” as “an agency or authority of the United States, a State, a territory, a political subdivision . . . or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public entity . . . that is responsible for public health matters as part of its official mandate”.<sup>122</sup> The court reasoned that Dr. Garza qualified as a public health authority because his duties as the director of AOT included investigating and evaluating referrals to the AOT program.<sup>123</sup> Such investigation was provided for in Kendra’s Law, which specifically authorized the director of AOT to obtain the medical records as part of its investigations.<sup>124</sup> Citing the fact that the purpose of Kendra’s Law is to protect the public from persons with mental illness who pose a potential risk to public health and safety, the court reasoned that the AOT investigation qualified as a “public health investigation” and “public health intervention” under HIPAA.<sup>125</sup> Accordingly, the disclosure of Miguel M.’s medical records to Dr. Garza was authorized by HIPAA and suppression was not warranted.<sup>126</sup>

The Second Department went on to note that even if the disclosures were not authorized by HIPAA, HIPAA did not preempt Kendra’s Law with respect to AOT investigations.<sup>127</sup> HIPAA’s preemption provision specifically exempts circumstances in which “[t]he provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury . . . or for the conduct of public health surveillance, investigation, or intervention”.<sup>128</sup> Because HIPAA only preempts state law which is contrary to the Privacy Rule and the court had found that AOT investigations qualify as “public health investigations” or “public health interventions,” it found that Kendra’s Law was not preempted and AOT investigations were excepted from HIPAA’s Privacy Rule.<sup>129</sup>

#### *D. Court of Appeals Decision*

Before the Court of Appeals, Miguel M. again argued that Dr. Barron’s request for his medical records was too broad and should have been on notice.<sup>130</sup> The records could have been obtained in a manner which complied with HIPAA (for example by seeking a court order or subpoena), but Dr. Barron did not bother to attempt any of them.<sup>131</sup> This HIPAA violation should result in the suppression of the medical records because it would be unreasonable to allow a party to place the other

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<sup>122</sup> 45 C.F.R. § 164.501.

<sup>123</sup> *Miguel M.*, 882 N.Y.S.2d at 703-04.

<sup>124</sup> *Id.* at 704.

<sup>125</sup> *Id.* at 704-05.

<sup>126</sup> *Id.* at 705.

<sup>127</sup> *Id.* at 705-06.

<sup>128</sup> 45 C.F.R. § 160.203(c).

<sup>129</sup> *Miguel M.*, 882 N.Y.S.2d at 706.

<sup>130</sup> *In re Miguel M.*, 950 N.E.2d 107 (N.Y. 2011).

<sup>131</sup> *Id.*



party's condition at issue and then seek to prove its *prima facie* case solely on the basis of improperly obtained records.<sup>132</sup>

In response, Dr. Barron argued that the request for Miguel M.'s records was made pursuant to the Mental Health Law, which authorizes disclosure when a referral has been made to the AOT program.<sup>133</sup> Dr. Barron contended that the AOT program is a public health activity, designed to protect the public from violent individuals, in the aggregate; in enacting Kendra's Law the New York legislature found that there was a public problem with mentally ill individuals supervising their own medical care.<sup>134</sup> Kendra's Law was meant to make the treatment process more open, with greater communications between health facilities and the Department of Health.<sup>135</sup> A requirement that AOT directors comply with HIPAA disclosure regulations would be unduly burdensome and result in fewer proceedings being brought.<sup>136</sup> This would result in individuals not receiving needed treatment and possibly harming others.<sup>137</sup>

Upon review, the Court of Appeals found that it was a stretch to read the language of the "public health" exception in the Privacy Rule to include AOT investigations.<sup>138</sup> Looking to the intent behind the exception, the Court noted that its apparent purpose "is to facilitate government activities that protect large numbers of people from epidemics, environmental hazards, and the like, or that advance public health by accumulating valuable statistical information."<sup>139</sup> AOT investigations are not this type of activity.<sup>140</sup> Thus, the Court ruled that AOT investigations were not within the scope of the exception, stating, "[t]o disclose private information about particular people, for the purpose of preventing those people from harming themselves or others, effects a very substantial invasion of privacy without the sort of generalized public benefit that would come from, for example, tracing the course of an infectious disease."<sup>141</sup> This conclusion, the Court reasoned, is bolstered by the fact that Dr. Barron could have invoked the provisions of the Privacy Rule permitting disclosure in response to an order from a court or administrative tribunal or a subpoena, discovery request, or other lawful process, all of which would have provided Miguel M. with notice and an opportunity to object.<sup>142</sup>

After it determined that the Privacy Rule applied and that Dr. Barron had violated it, the Court then had to decide what impact it had on the admissibility of

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<sup>132</sup> Oral Argument at 00:01-03:10, *In re Miguel M.*, 950 N.E.2d 107 (No. 76), available at [http://www.courts.state.ny.us/CTAPPS/arguments/2011/Mar11/Mar11\\_OA.htm](http://www.courts.state.ny.us/CTAPPS/arguments/2011/Mar11/Mar11_OA.htm).

<sup>133</sup> *Id.* at 08:51.

<sup>134</sup> *Id.* at 11:04.

<sup>135</sup> *Id.* at 17:57.

<sup>136</sup> *Id.* at 17:00.

<sup>137</sup> *Id.* at 17:37.

<sup>138</sup> *In re Miguel M.*, 950 N.E.2d 107, 111 (N.Y. 2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (citing 45 C.F.R. §§ 164.512(e)(1)(i), (ii)).

the evidence.<sup>143</sup> Dr. Barron argued that even if the disclosure was unlawful, suppression was inappropriate as HIPAA contains its own remedies for violations: civil penalties and, for the knowing and wrongful disclosure of covered information, fines and imprisonment.<sup>144</sup> Dr. Barron cited state court decisions from Florida,<sup>145</sup> Kansas,<sup>146</sup> and Wisconsin<sup>147</sup> in support of his argument.<sup>148</sup> In response, Miguel M. maintained that the remedies under HIPAA are limited to filing a complaint with the Secretary and thus are insufficient to address his situation.<sup>149</sup> While other states have found suppression inapplicable to evidence obtained in violation of HIPAA, those cases are distinguishable in that they were all criminal cases where disclosure was made to law enforcement officials.<sup>150</sup> Thus, Miguel M. argued, the Court should follow *Keshecki*<sup>151</sup> and *Matter of Derek*<sup>152</sup> which both found suppression to be an appropriate remedy in civil cases.<sup>153</sup>

The Court agreed with Miguel M.<sup>154</sup> It noted that, as was the case with violations of the doctor-patient privilege, in criminal cases a violation of HIPAA or the Privacy Rule does not always require the suppression of evidence.<sup>155</sup> However, the Court continued,

this case is different. It is one thing to allow the use of evidence resulting from improper disclosure of information in medical records to prove that a patient has committed a crime; it is another to use the records themselves, or their contents, in a proceeding to subject to unwanted medical treatment a patient who is accused of no wrongdoing. Using the records in that way directly impairs, without adequate justification, the

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<sup>143</sup> *Id.* at 112.

<sup>144</sup> *Id.* (citing 42 U.S.C. §§ 1320d-5, 1320d-6).

<sup>145</sup> *State v. Carter*, 23 So. 3d 798, 801 (Fla. Dist. Ct. App. 2009).

<sup>146</sup> *State v. Yenser*, 195 P.3d 271, 273 (Kan. Ct. App. 2008).

<sup>147</sup> *State v. Strachler*, 2008 WI App 14, ¶ 13, 745 N.W.2d 431, 435 (Ct. App. 2007).

<sup>148</sup> *Miguel M.*, 950 N.E.2d at 112; *see also* Oral Argument, *supra* note 132.

<sup>149</sup> Oral Argument, *supra* note 132.

<sup>150</sup> *Id.*

<sup>151</sup> *Keshecki v. St. Vincent's Med. Ctr.*, 785 N.Y.S.2d 300 (Sup. Ct. 2004).

<sup>152</sup> *Matter of Derek*, 821 N.Y.S.2d 387 (Sur. Ct. 2006).

<sup>153</sup> While in oral argument Miguel M.'s counsel stated "we have at least three trial court decisions that all hold in the context of civil litigation ... that records obtained in violation of HIPAA should be precluded," he does not give any citations for those cases. Scott M. Wells, Representative for Appellant, Oral Argument (Mar. 23, 2011). His brief only cites *Keshecki* and *Matter of Derek* in support of this position. Telephone Interview with Susan Dautal, Assistant Deputy Clerk, N.Y. Court of Appeals (Sept. 2, 2011).

<sup>154</sup> *In re Miguel M.*, 950 N.E.2d 107, 112 (N.Y. 2011).

<sup>155</sup> *Id.* (citing *People v. Greene*, 879 N.E.2d 1280 (N.Y. 2007)).

interest protected by HIPAA and the Privacy Rule: the interest in keeping one's own medical condition private.<sup>156</sup>

Thus, the Court ruled that medical evidence obtained in violation of HIPAA is "not admissible in a proceeding to compel AOT."<sup>157</sup>

### III. ANALYSIS

Overall, the Court's decision appears to be guided by the underlying assumption that Dr. Barron could have easily obtained Miguel M.'s medical records in compliance with HIPAA by issuing a subpoena. The decision stressed that "it is far from our purpose to make enforcement of Kendra's Law difficult," but that Dr. Barron could have issued a subpoena, and that it would be "no great burden on the public agencies charged with enforcing Kendra's Law to give patients a chance to object before records are delivered."<sup>158</sup> Notably, the first question during oral argument, asked by Justice Read within the first 35 seconds, was, "assuming we agree with you, are there other ways that the information can be obtained?"<sup>159</sup> Miguel M. responded that Dr. Barron could have obtained a court order or issued a subpoena.<sup>160</sup> He later noted that issuing a subpoena for the records "wouldn't be too hard."<sup>161</sup> When Justice Smith asked if it would be necessary to bring a proceeding to obtain a subpoena, Miguel M. responded "no, I think they could issue a subpoena for these records under their authority under the Mental Hygiene Law."<sup>162</sup> Justice Read later pressed Dr. Barron on this point, asking "What's wrong with the other methods, how are they burdensome, or if anything, a subpoena, is it that difficult?"<sup>163</sup> When Dr. Barron started to respond that obtaining a court order would be burdensome, Justice Smith interjected, "They don't say you have to get a court order, they say a subpoena would do. . . as I read it, if you issue a subpoena and give him notice he can move to quash the subpoena, but then it becomes his problem, why don't you want to do that?"<sup>164</sup> Oddly, Dr. Barron never disputed that it could easily issue a subpoena, which is not provided for in the Mental Hygiene Law.

However, the authority to issue subpoenas is granted under section 2302 of the CPLR.<sup>165</sup> Subsection a of CPLR 2302 states that "a subpoena to compel production of a patient's clinical record maintained pursuant to the provisions of section 33.13 of the mental hygiene law shall be accompanied by a court order."<sup>166</sup> Moreover,

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 112.

<sup>158</sup> *Id.*

<sup>159</sup> Oral Argument, *supra* note 132, at 00:34.

<sup>160</sup> Oral Argument, *supra* note 132, at 00:39-00:50.

<sup>161</sup> Oral Argument, *supra* note 132, at 07:20.

<sup>162</sup> Oral Argument, *supra* note 132, at 07:40.

<sup>163</sup> Oral Argument, *supra* note 132, at 14:26.

<sup>164</sup> Oral Argument, *supra* note 132 at 15:06-15:15.

<sup>165</sup> N.Y. C.P.L.R. 2302 (Consol. 2012).

<sup>166</sup> N.Y. C.P.L.R. 2302(a) (Consol. 2012).

CPLR 2302(b) states that “In the absence of an authorization by a patient, a trial subpoena *duces tecum* for the patient's medical records may only be issued by a court.”<sup>167</sup> Likewise section 3122(a) of the CPLR states that a medical provider need not respond to a subpoena unless it is accompanied by a HIPAA authorization.<sup>168</sup> When the references to HIPAA requirements were added to these sections in 2003, there was no differentiation between subpoenas issued by a court and subpoenas issued by attorneys. Accordingly, in *Campos v. Payne*, a Richmond County judge ruled that he was without authority to issue subpoenas for medical records without the patient's signed authorization.<sup>169</sup> Nonetheless, it was not the New York Legislature's intention “that the requirement for such an authorization apply to trial subpoenas.”<sup>170</sup> Accordingly, the Legislature recently passed an amendment to sections 2302 and 3122 of the CPLR to clarify their intentions.<sup>171</sup> The newly amended versions, enacted August 3, 2011, specify that HIPAA compliant authorizations need to accompany subpoenas other than trial subpoenas issued by a court.<sup>172</sup> Thus, in the absence of a HIPAA authorization, Dr. Barron cannot simply subpoena Miguel M.'s medical records, as Miguel M. and the Justices suggested. Moreover, at the time the Court of Appeals issued *Miguel M.*, he could not have even obtained a court ordered subpoena without a HIPAA authorization.<sup>173</sup> In order

<sup>167</sup> N.Y. C.P.L.R. 2302(b); *see also* N.Y. C.P.L.R. 3122(a) (Consol. 2012).

<sup>168</sup> N.Y. C.P.L.R. 3122(a)(2).

<sup>169</sup> *Campos v. Payne*, 766 N.Y.S.2d 535, 539 (Sup. Ct. 2003).

<sup>170</sup> Sponsor's Mem. In Support of B. S4586A (2011), *available at* <http://open.nysenate.gov/legislation/bill/S4586A-2011>.

<sup>171</sup> *Id.*

<sup>172</sup> The amended version of N.Y. C.P.L.R. 3122(a)(2) states:

A medical provider served with a subpoena *duces tecum*, other than a trial subpoena issued by a court, requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena otherwise directed the production of the documents.

Assemb. B. A7465-A, State Assemb., 2011 Sess. (N.Y. 2011); S.B. 4586-A, State S., 2011 Sess. (N.Y. 2011), *available at* <http://public.leginfo.state.ny.us/menugetf.cgi>; *see also* N.Y. C.P.L.R. 2302(b) (Consol. 2012) (“In the absence of an authorization by a patient, a trial subpoena *duces tecum* for the patient's medical records may only be issued by a court.”).

<sup>173</sup> Notably, the New York State Legislature has recently expressed its displeasure at the Court's failure to follow Article 31 of the CPLR. On June 14, 2011, the Assembly passed the Personal Healthcare Information Privacy Act, stating that “In its decision of *Arons v. Jutkowitz* 9 NY 3d 393 (2007) the Court of Appeals ignored the rules of Article 31 and by judicial fiat created a new rule. This bill would correct that ill-advised decision.” Sponsor's Mem., Assemb. B. 694A, *available at* <http://assembly.state.ny.us/leg/>. The Act, which has not yet been passed by the Senate, would add a subsection c-1 to CPLR 3102 prohibiting *ex parte* interviews with healthcare providers of any other party in a personal injury, malpractice, or wrongful death action. Assemb. B. A694, State Assemb., 2011 Sess. (N.Y. 2011), *available at* <http://assembly.state.ny.us/leg/>.

to comply with CPLR 2302, Dr. Barron would have had to obtain a court order directing Miguel M. to provide the HIPAA authorization for his medical records to accompany the subpoena (though arguably there would be no use for the subpoena once the authorization was obtained). The emphasis the Court placed on the availability of an unburdensome, alternative method for obtaining medical records during oral argument and in its decision suggests that it may have reached a different outcome on the suppression issue if the provisions of CPLR 2302 had been brought to its attention.

In terms of the suppression issue, at first glance, *Miguel M.* seems inconsistent with existing jurisprudence. Unfortunately, the decision contains little analysis to explain the Court's determination of the issue and no citations in support of its decision to suppress.<sup>174</sup> This is likely due to the fact that when the Court ruled on the issue, neither the trial court nor the appellate division had addressed it; both lower courts found no violation of HIPAA, and accordingly it was not vigorously briefed and argued by the parties on appeal.<sup>175</sup> However, by considering the facts of the case the jurisprudence can be harmonized.

One of the most important facts in *Miguel M.* is that the medical evidence unlawfully obtained consisted of psychiatric records. In this sense, its outcome is consistent with prevailing notions that mental health records are extremely sensitive and deserving of protection. As found in *O'Connor*, "information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind."<sup>176</sup> Likewise, the United States Supreme Court recognized the unique nature of this information by creating a psychotherapist privilege in *Jaffee v. Redmond*.<sup>177</sup> Notably, the Privacy Rule treats psychotherapy notes with "heightened protection" above that provided to regular PHI.<sup>178</sup> The Secretary explained, "we have provided additional protections for psychotherapy notes because of *Jaffee v. Redmond* and the unique role of this type of information."<sup>179</sup> Thus, disclosure without a patient authorization is only permitted to the originator of the psychotherapy note for purposes of treatment; for the covered entity's use for its own training programs; for the covered entity's use in defending against a legal action brought by the individual; when required by law; for health oversight activities with respect to the oversight of the note's originator; to a coroner or medical examiner for the purpose of identifying the deceased individual or

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<sup>174</sup> *In re Miguel M.*, 950 N.E.2d 107, 112 (N.Y. 2011).

<sup>175</sup> *In re Miguel M.*, 882 N.Y.S.2d 698 (App. Div. 2009); Oral Argument, *supra* note 132.

<sup>176</sup> *O'Connor v. Pierson*, 426 F.3d 187, 201(2d Cir. 2005); *see also* *Martin v. Martelli*, 554 N.Y.S.2d 787, 788 (Sup. Ct. 1990) ("While exposure of medical records may reveal highly sensitive and personal information about an individual, the potential depth of privacy violation is far greater in the case of mental health records."); *In re State (Off. of Mental Health Buffalo Psychiatric Ctr.) v. Civil Serv. Emp. Assoc.*, 430 N.Y.S.2d 510, 513 (Sup. Ct. 1980) (stating that a mental health record "is of such a highly personal nature that it should be embraced within that special area of protected privacy").

<sup>177</sup> *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

<sup>178</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82731 (Dec. 28, 2000).

<sup>179</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82652.

determining a cause of death; and when it is necessary to prevent or lessen a serious and imminent threat to health or safety of a person or the public.<sup>180</sup> The exceptions permitting disclosure without authorization for judicial and administrative proceedings do not apply.<sup>181</sup> Considering the jurisprudence suggesting that there is a constitutional right to privacy in one's mental health records,<sup>182</sup> *In re Miguel M.* can be harmonized with the rule that evidence will only be suppressed where there are constitutional considerations or statutory or decisional authority mandating suppression.<sup>183</sup>

Another important fact in *Miguel M.* is the relationship between the party introducing the unlawfully obtained medical records and the office from which the records were obtained. Again, here the outcome is consistent with the Court's prior statements on the role of suppression. In *People v. Drain*, the Court explained:

The exclusionary rule's primary function is deterrence of future unlawful police activity; the rule has never been viewed as a 'personal remedial right of a party aggrieved' by the misconduct. This court has long recognized, therefore, that the application and scope of the exclusionary rule is ascertained by balancing the foreseeable deterrent effect against the adverse impact of suppression upon the truth-finding process. Consequently, we consistently have refused to suppress relevant evidence if little or no deterrent benefit could be anticipated from the exclusion.<sup>184</sup>

Likewise, in *People v. Greene*, the Court declined to suppress evidence obtained in violation of CPLR 4505, stating "The primary obligation to comply with CPLR 4504 is the doctor's--or, in this case, the hospital's. To suppress evidence resulting from a violation of section 4504 would be to punish the State for a doctor's or hospital's misconduct--a punishment unlikely to deter doctors and hospitals, who have little interest in whether criminal prosecutions succeed or not."<sup>185</sup>

As noted above, the petition in *Miguel M.* was brought by Dr. Barron, in his role as the Director of the Department of Psychiatry at Elmhurst Hospital Center.<sup>186</sup> The

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<sup>180</sup> 45 C.F.R. § 164.508(c)(2) (2012).

<sup>181</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82653 (Dec. 28, 2000).

<sup>182</sup> See *O'Connor v. Pierson*, 426 F.3d 187, 202 (2d Cir. 2005).

<sup>183</sup> *People v. Greene*, 879 N.E.2d 1280, 1282-83 (N.Y. 2007); *People v. Wilder*, 712 N.E.2d 652, 654 (N.Y. 1999); *Mosalle v. Berenson*, 905 N.Y.S.2d 575, 581 (App. Div. 2010); *Radder v. CSX Transp., Inc.*, 893 N.Y.S.2d 725, 727 (App. Div. 2009).

<sup>184</sup> *People v. Drain*, 535 N.E.2d 630, 631 (N.Y. 1989) (citations omitted); see also *Boyd v. Constantine*, 613 N.E.2d 511, 514 (N.Y. 1993) (permitting the use of illegally obtained evidence in a police disciplinary hearing as "only negligible deterrence would result from the exclusion of evidence.").

<sup>185</sup> *Greene*, 879 N.E.2d at 1283; see also *Stone v. Powell*, 428 U.S. 465, 466 (1976) ("[The exclusionary rule] is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.' Instead, 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect....'" (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965); *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

<sup>186</sup> *In re Miguel M.*, 950 N.E.2d 107, 109 (N.Y. 2011).

evidence had been obtained from both Elmhurst and Holliswood Hospital in violation of HIPAA by Dr. Garza, the Director of AOT at Elmhurst.<sup>187</sup> While the decisions do not reveal who released the information, the Elmhurst records had to have been released by an employee because the records were in Elmhurst Hospital's custody.<sup>188</sup> As Director of the Department of Psychiatry, Dr. Barron can presumably influence the policies and management of patient records within the Department of Psychiatry. Accordingly, suppressing Dr. Barron's evidence based on his hospital's failure to comply with HIPAA is likely to deter the hospital from similar violations in the future.

Because most AOT proceedings will be brought by health professionals and all will involve a patient's mental health record,<sup>189</sup> it is not surprising that in *Miguel M.*, the Court announced that medical records obtained in violation of HIPAA "are not admissible in a proceeding to compel AOT."<sup>190</sup> However, the Court did not hold that records obtained in violation of HIPAA are always inadmissible. Notably, its decision is void of any broad statements or dicta which could support suppression in other types of cases. In keeping with the frequently quoted rule that "[t]he language of any opinion must be confined to the facts before the court,"<sup>191</sup> in terms of creating a new rule of evidence, *Miguel M.* should be narrowly interpreted as applying solely to AOT proceedings.

Though *Miguel M.* may not state a firm rule of evidence for cases outside of AOT proceedings, it does provide some guidance on how HIPAA violations should be treated. Its reasoning as to why suppression was appropriate suggests that the justification for the HIPAA violation would be considered in ruling on suppression motions. By stating that suppression may not be required in criminal cases, the Court also indicated that the type of proceeding would influence whether evidence was admitted or suppressed.

#### A. Criminal Trials

In the context of criminal trials, *Miguel M.* indicates that it is unlikely a violation of the Privacy Rule will lead to suppression of medical evidence. After noting the cases referenced by Dr. Barron (*State v. Carter*,<sup>192</sup> *State v. Yenzer*,<sup>193</sup> and *State v. Straehler*<sup>194</sup>), the Court stated "[w]e assume it is correct that, in a criminal case, a HIPAA Privacy Rule violation does not always require suppression of evidence. Indeed we have held that suppression is not required in such a case where evidence

<sup>187</sup> *Miguel M.*, 882 N.Y.S.2d 698, 700 (App. Div. 2009).

<sup>188</sup> N.Y. MENTAL HYG. LAW § 33.13(a) (Consol. 2012).

<sup>189</sup> See N.Y. MENTAL HYG. LAW § 9.60(c),(e) (Consol. 2012).

<sup>190</sup> *Miguel M.*, 950 N.E.2d at 112.

<sup>191</sup> *Dougherty v. Equitable Life Assurance Soc'y.*, 193 N.E. 897, 902 (N.Y. 1934); see also *People v. Anderson*, 488 N.E.2d 1231, 1235 (N.Y. 1985); *Staber v. Fidler*, 482 N.E.2d 1204, 1206 (N.Y. 1985); *Banc of Am. Sec. LLC v. Solow Bldg. Co.*, 847 N.Y.S.2d 49, 55 (App. Div. 2007); *Owner-Operator Indep. Drivers Ass'n. v. Urbach*, 718 N.Y.S.2d 282, 285 (App. Div. 2000).

<sup>192</sup> *State v. Carter*, 23 So. 3d 798 (Fla. Dist. Ct. App. 2009).

<sup>193</sup> *State v. Yenzer*, 195 P.3d 271 (Kan. Ct. App. 2008).

<sup>194</sup> *State v. Straehler*, 2008 WI App. 14, 745 N.W.2d 431 (2007).

was obtained as a result of a violation of New York's physician-patient privilege."<sup>195</sup> With this language, the Court implicitly approved the analyses in those out-of-state criminal cases.

The out-of-state decisions referenced in *Miguel M.* relied on the fact that HIPAA provided its own remedies to find that suppression of evidence obtained in violation of HIPAA was not appropriate. In *Carter* a pharmacist revealed prescription records to an officer investigating a "doctor shopping violation" without obtaining the defendant's consent.<sup>196</sup> The defendant was then charged with the crime of doctor shopping.<sup>197</sup> In *Yenzer*, a receptionist revealed a patient's dental appointment records to a police officer who was attempting to serve a warrant. When the officer attempted service on the defendant at the appointment, the defendant ran, leading to charges of obstructing legal process.<sup>198</sup> In *Straehler*, a nurse revealed observations about the defendant and the defendant's statements (made during the course of treatment) to a police officer who was investigating a car crash. This led to driving while intoxicated charges against the defendant.<sup>199</sup> Each case noted that the defendant's constitutional rights were not at issue.<sup>200</sup> Reciting the basic rule that suppression is only warranted where evidence has been obtained in violation of a defendant's constitutional rights or where the statute specifically provides for suppression as a remedy, each court found it was not proper to suppress the evidence.<sup>201</sup>

Notably, none of these decisions concerned the type of medical information that the Second Circuit has deemed protected by a constitutional right to privacy (*i.e.* mental health records, HIV diagnoses, and substance abuse records).<sup>202</sup> While the New York Court of Appeals is likely to follow the reasoning in *Carter*, *Yenzer* and *Straehler* in most criminal cases, where more sensitive medical information is involved there is justification for its analysis to diverge. Notably, the Court of Appeals used tentative language in *Miguel M.* when distinguishing it from criminal cases.<sup>203</sup> However, as the HIPAA Privacy Rule was not designed to protect a constitutional right to privacy, it is more appropriate to attribute suppression in cases involving sensitive medical information to constitutional violations than it is to justify the suppression with reference to HIPAA.

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<sup>195</sup> *In re Miguel M.*, 950 N.E.2d 107, 112 (N.Y. 2011).

<sup>196</sup> *Carter*, 23 So. 3d at 800.

<sup>197</sup> *Id.*

<sup>198</sup> *Yenzer*, 195 P.3d at 272.

<sup>199</sup> *Straehler*, 745 N.W.2d at 433-34.

<sup>200</sup> *Id.* at 435 ("[defendant] does not argue a constitutional violation. . ."); *Yenzer*, 195 P.3d at 273 ("[the defendant] has not made a constitutional claim warranting suppression"); *Carter*, 23 So. 3d at 801 (finding no constitutional violation had occurred).

<sup>201</sup> *Straehler*, 745 N.W.2d at 435; *Yenzer*, 195 P.3d at 273; *Carter*, 23 So. 3d at 801.

<sup>202</sup> See *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005); *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994).

<sup>203</sup> *In re Miguel M. v. Barron*, 950 N.E.2d 107, 112 (N.Y. 2011).



### B. Civil Trials

In the context of civil trials, *Miguel M.* suggests that the justification for the procurement of the medical evidence at issue is an important consideration. In its decision, the Court expressed its unease at the prospect of parties using unlawfully obtained medical evidence as a basis for bringing a civil action.<sup>204</sup> Accordingly, *Miguel M.* suggests that where that is the case the medical evidence obtained in violation of HIPAA will be suppressed, even outside the context of an AOT proceeding.

However, it is likely the Court of Appeals would find suppression of relevant medical evidence inappropriate in certain circumstances. It has long been held that “notwithstanding New York’s strong policy in favor of the [physician-patient] privilege, a party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party’s claim.”<sup>205</sup> Thus, the Court of Appeals has found that where an individual affirmatively places privileged information or conduct at issue, statutory and constitutional rights and privileges are deemed waived.<sup>206</sup>

The drafters of the HIPAA Privacy Rule specifically endorsed this approach, stating:

[its provisions] are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.<sup>207</sup>

Accordingly, at least one New York supreme court has found that by affirmatively raising a party’s own mental or physical condition in a personal injury action, that party waives any rights or remedies under HIPAA as to the mental or physical conditions asserted in the litigation.<sup>208</sup> The court stated that in such cases, “the waiver of any HIPAA rights . . . has the practical effect of assuring [the other party] that the state court will not impose any remedy for a purported violation of HIPAA, *i.e.* the type of preclusion that occurred in *Keshecki*.”<sup>209</sup> As placing one’s own medical condition at issue in a civil case is seemingly the antithesis of the

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<sup>204</sup> *Id.*

<sup>205</sup> *Dillenbeck v. Hess*, 536 N.E.2d 1126, 1132 (N.Y. 1989); *see also Clifford v. Denver & Rio Grande R.R. Co.*, 80 N.E. 1094 (N.Y. 1907) (“The patient cannot use this privilege both as a sword and a shield to waive when it inures to her advantage and wield when it does not”).

<sup>206</sup> *Arons v. Jutkowitz*, 880 N.E.2d 831, 842 (N.Y. 2007); *Green v. Montgomery*, 746 N.E.2d 1036, 1041 (N.Y. 2001); *Koump v. Smith*, 250 N.E.2d 857, 861 (N.Y. 1969).

<sup>207</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82530 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

<sup>208</sup> *Hozle v. Healthcare Servs. Grp., Inc.*, 801 N.Y.S.2d 234 (Sup. Ct. 2005).

<sup>209</sup> *Id.*

situation in *Miguel M.* (where the medical records were obtained to bring the suit), it is unlikely the Court of Appeals would have the same aversion to admitting medical records when that scenario arises.

### C. Administrative Hearings

*In re Miguel M.* can also provide guidance for administrative hearings, which arise out of similar circumstances—an agency bringing an action to enforce its legislative mandate. Though usually civil in nature, administrative proceedings have broader rules of evidence.<sup>210</sup> The New York State Administrative Procedure Act (“APA”) specifies that “[u]nless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts”.<sup>211</sup> Likewise, the APA empowers agencies to adopt their own rules of procedure for adjudicatory proceedings.<sup>212</sup> Moreover, the APA empowers agencies to adopt their own rules for discovery to the extent and in the manner appropriate for their proceedings.<sup>213</sup> And agencies are not required to adopt the rules governing discovery sanctions in the CPLR, and without having done so are not bound by them.<sup>214</sup> Thus, in administrative proceedings parties can rely on evidence that might not be admissible under the ordinary rules of evidence.<sup>215</sup> Significantly, without the application of section 3103 of the CPLR, it is more likely that evidence obtained in violation of HIPAA will be admitted.

The Court of Appeals has looked to the deterrence function of suppression in deciding whether unlawfully obtained evidence is required to be suppressed in administrative hearings.<sup>216</sup> For example, in *Boyd v. Constantine*, where city police had uncovered drugs in an unlawful search, that Court found that those drugs were admissible in the disciplinary hearing of a state police officer. Citing the deterrence analysis in *Drain*,<sup>217</sup> the Court stated:

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<sup>210</sup> William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 884-85 (2005).

<sup>211</sup> N.Y. A.P.A. § 306(1) (Consol. 2012); *see also* *Rojas v. Sobol*, 563 N.Y.S.2d 284, 285 (App. Div. 1990) (“It is well settled that the strict rules of evidence do not apply in administrative proceedings”).

<sup>212</sup> N.Y. A.P.A. § 301(3) (Consol. 2012).

<sup>213</sup> N.Y. A.P.A. § 305 (Consol. 2012).

<sup>214</sup> *Seneca Foods Corp. v. Jorling*, 565 N.Y.S.2d 347, 348 (App. Div. 1990); *Heim v. Regan*, 456 N.Y.S.2d 257, 258 (App. Div. 1982).

<sup>215</sup> *See Ragin v. N.Y.C. Emps. Ret. Sys.*, 797 N.Y.S.2d 133, 135 (App. Div. 2005).

<sup>216</sup> *Boyd v. Constantine*, 613 N.E.2d 511, 513-14 (N.Y. 1993); *People v. McGrath*, 385 N.E.2d 541, 550-01 (N.Y. 1978); *see also* *Charles Q. v. Constantine*, 612 N.Y.S.2d 687, 688-89 (App. Div. 1994) (“in an administrative proceeding, suppression of illegally obtained evidence will be required only when, on balance, the deterrent effect in applying the exclusionary rule outweighs the adverse impact of exclusion upon the truth-finding process”); *Stedronsky v. Sobol*, 572 N.Y.S.2d 445, 445 (App. Div. 1991) (“applicability of the exclusionary rule in an administrative proceeding turns on whether, accepting the obvious detrimental impact upon the truth-finding process which the exclusionary rule often produces, its accompanying deterrent effect is sufficiently probable to justify its application” (citations omitted)).

<sup>217</sup> *People v. Drain*, 535 N.E.2d 630 (N.Y. 1989).

The Buffalo City Police could not have foreseen, when they searched the vehicle, that defendant would be subject to an administrative disciplinary proceeding by the Division of State Police. They did not know, prior to the search, that defendant was a State Trooper. Nor were the Buffalo City police officers acting as agents of the Division of State Police. Thus, only negligible deterrence would result from the exclusion of the evidence. On the other hand, the suppression of the evidence would have a significant adverse impact upon the truth-finding process in administrative proceedings concerning police officers involved in drug-related incidents. Stated differently, the benefit to be gained from precluding police officers, who unlawfully possess controlled substances, from making arrests—including arrests for drug-related offenses—clearly outweighs any deterrent effect that may arise from applying the exclusionary rule to preclude evidence unlawfully obtained by Buffalo City police officers and sought to be admitted by the Division of State Police in an administrative disciplinary proceeding.<sup>218</sup>

Central to its analysis on why suppression would have little deterrence effect was the fact that the party seeking to introduce the unlawfully obtained evidence was not an agent of the party that unlawfully obtained it.<sup>219</sup> *In re Miguel M.* further supports this approach by providing an example of the opposite situation: where the party seeking to introduce the unlawfully obtained evidence worked for, and indeed was head of the Department that unlawfully produced it, the Court found suppression to be appropriate.<sup>220</sup> Thus, the potential deterrent effect of suppression should continue to be a factor considered in determining if evidence obtained in violation of HIPAA is admissible in an administrative proceeding.

Whether or not a party has placed his or her medical condition at issue should also be a consideration in determining admissibility in administrative hearings. Like the supreme courts, agencies took this position prior to *In re Miguel M.* For example, in *Department of Environmental Protection v. Rodriguez*, an administrative law judge at the New York City Office of Administrative Trials and Hearings found that a letter from an employee's doctor was admissible in the employee's disciplinary hearing.<sup>221</sup> The judge stated that "by submitting medical notes and claiming that he was sick on the dates in question, respondent implicitly waived his right to confidentiality."<sup>222</sup> As discussed above with respect to civil proceedings, this approach should continue in administrative proceedings as well.

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<sup>218</sup> *Boyd*, 613 N.E.2d at 514.

<sup>219</sup> *Id.*

<sup>220</sup> *In re Miguel M.*, 950 N.E.2d 107, 109 (N.Y. 2011).

<sup>221</sup> *Dep't of Env'tl Prot. v. Rodriguez*, OATH Index No. 1438/08, 2008 NY OATH LEXIS 518 (Apr. 29, 2008), *modified on penalty*, Comm'r Dec. (May 15, 2008), *aff'd sub nom Rodriguez v. City of New York*, 896 N.Y.S.2d 346 (App. Div. 2010).

<sup>222</sup> *Id.* at 4-5; *see also Dep't of Env'tl. Prot. v. Ballach*, OATH Index No. 1574/08 at 4 (Apr. 30, 2008), *available at* [http://archive.citylaw.org/oath/08\\_Cases/08-1574.pdf](http://archive.citylaw.org/oath/08_Cases/08-1574.pdf).

## IV. CONCLUSION

As the first Court of Appeals decision on the issue, *In re Miguel M.* is bound to be considered in future cases addressing whether or not it is appropriate to admit evidence obtained in violation of HIPAA. Like the limited statutory and constitutional authority supporting suppression when HIPAA violations occur, *Miguel M.* should be viewed as narrow decisional authority, limited to AOT hearings. With respect to other proceedings, however, *Miguel M.* should not be used as a new evidentiary rule, justifying suppression of all evidence obtained in violation of HIPAA. Instead, *Miguel M.* should stand for the proposition that the type and circumstances of a case need to be carefully considered in determining if suppression is appropriate. Special attention should be paid to the type of medical evidence at issue, the identity of the parties, and the reason for the introduction of the evidence. In this manner *In re Miguel M.* can be harmonized with existing jurisprudence and be used to provide more equitable outcomes for litigants.