



# Ethical Record Retrieval

Presented by

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*macro-pro*

# Outline

- Ethics
- HIPAA & Privacy
- Gathering Evidence, the Deposition Officer
- Government Records
- Sister-State Subpoena Power
- Road Blocks & Challenges
- You Want Us to Do What?



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# Ethics

## Rule 1.6 (a) Confidential Information of a Client

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).





- Ethics are moral principles and obligations.
- Laws are an enforced rules of conduct.
- Laws are a codifying of ethics with penalties.
- In the past personal information was not always protected even though it was ethical to do so.
- As a result, laws were written to provide protection for the individual and punishment for the offenders.

## PII & PHI????

- **Sensitive personally identifiable information (PII)** is **personally identifiable information**, which if lost, compromised , or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. Personal and medical record retrieval laws are federal, including HIPAA, and state.
- **HIPAA** uses the term **Protected Health Information (PHI)** to refer to protected data, but the concept is very similar to the term **Personally Identifiable Information (PII)**, which is used in other compliance regimes.

- PII includes data such as a Social Security number, driver's license number, financial accounts, email addresses, login credentials and passwords, addresses, phone numbers and birth date.
- PII is almost always included in every type of record, for instance: medical, educational, financial and employment information.
- Attorneys have the responsibility to protect these records once they are in their possession pursuant to Rule 1.6 (a) Confidential Information of a Client.

## PII on Your Computer

California's new data privacy law, the

### **California Consumer Privacy Act (CCPA)**

was unanimously passed with new guidelines that any firm doing business with California consumers and companies must comply.

The law went into effect in 2020. If a company is found noncompliant, they could be fined anywhere between **\$100 - \$750** in damages **per exposed individual**.

There are many different types of medical records.  
Some have more legal protection than others.

- Standard Doctor Visit Records
- Hospital
- Clinic Records
- Physical Therapist
- Substance Abuse
- Psychological
- HIV/AIDs

- Records concerning substance abuse, psychological, genetic, sexually-transmitted disease and HIV/AIDS information have more legal protection because of the social stigma that may attach to them.
- Most facilities will only release these records with a special patient-signed authorization that specifically authorizes the release of these records.
- A subpoena may be used **ONLY** when plaintiff has raised the issue and the claim of injury is related to drug, alcohol, psych/stress, genetic, sexually-transmitted disease or HIV/AIDS.

## Privileged or Not?

California Evidence Code §912(a): The right of any person to claim a privilege provided by §954 (lawyer-client privilege), §966 (lawyer referral service-client privilege), .... §994 (physician-patient privilege), § 1014 (psychotherapist-patient privilege), ..... is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.

# HIPAA

Rule 1.6 (a) Confidential Information of a Client

The HIPAA Privacy Rule 45 CFR § 164.501 et seq., regulates the release of PHI information held by hospitals, health plans and associates, which the HIPAA law designates as covered entities.

The privacy rule requires that PHI records cannot be released unless:

A HIPAA-compliant authorization, signed by the patient or assignee, with sufficient information to identify the specific patient and the exact wording and permissions is presented to the covered entity.

## Requirements for a HIPAA Compliant Authorization:

- Identify the information to be disclosed,
- The name of the facility that is the custodian of the patient's records,
- The name of the entity that is entitled to receive the records and their agent,
- The purpose of the disclosure,
- A statement informing the patient of the **right to revoke**, the procedure to revoke and any exceptions to that right,
- The **date** on which the authorization will expire or the occurrence upon which it will expire,
- The signature of the patient and the date the patient signed.

- You must use HIPAA compliant authorizations to obtain medical records.
- You must protect the information you receive.
- HIPAA does not apply to lawful subpoenas.
- The Macro-Pro authorization is HIPAA compliant.

# HIPAA Compliant Authorization Exercise

## HIPAA-COMPLIANT AUTHORIZATION FOR THE RELEASE OF RECORDS

1 I hereby authorize: \_\_\_\_\_  
Name of Facility with Records/Disclosing Party

2 To disclose to: \_\_\_\_\_  
Name of Requesting Party (Requester): Insurance Carrier/Third Party Administrator/Self-Insured Employer/Attorney Firm  
and/or their attorneys, through **Macro-Pro their agent**, to review, inspect, and/or photocopy **any and all of the following from any and all dates** which are in your possession or control:

Name of Patient (List Other Names Used) \_\_\_\_\_ Date of Birth \_\_\_\_\_

- **Medical records**, to include but not limited to: Medical files, reports, charts, graphs, notes, tests, x-rays, MRI's, billings and laboratory reports.
- **Employment and/or Union records** to include but not limited to: Personnel file, medical and insurance, pension benefit records and wage records.
- **EDD Disability and Unemployment Records**
- **Police, Prison or Probation Records**
- **Scholastic Records**
- **Insurance and Claim Records**
- **Pharmacy Records**

**SENSITIVE INFORMATION:** By initialing below, I hereby authorize the release of information concerning:

\_\_\_\_\_ **Psychiatric and Mental Health Information** \_\_\_\_\_ **HIV and/or AIDS Information**  
Initial Initial

\_\_\_\_\_ **Alcohol and/or Drug Information** \_\_\_\_\_ **Genetic Records**  
Initial Initial

\_\_\_\_\_ **Sexually Transmitted Disease Information** \_\_\_\_\_  
Initial

Date Range of Records to be Released \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_

4 The health information authorized on this form will be used for the following purposes only:  
**Discovery for a Liability or Workers' Compensation claim.**

5 **DURATION:** This authorization shall become effective immediately and shall remain in effect until \_\_\_\_\_ or for ONE full year from date of signature.

6 **REVOCATION:** This authorization is subject to written revocation by the undersigned at any time between now and the disclosure of information by the disclosing party. My written revocation will be effective upon receipt but will not be effective to the extent that the requester or others have acted in reliance upon this authorization. **Written revocation is to be sent to those parties listed on line 1.) and line 2.) above.**

7 **PROHIBITION OF USAGE, TRANSFER OR REDISCLOSURE OF INFORMATION:** Except as required by state or federal laws, use of information released for other than the stated purpose or redisclosure or transfer of this information to any person or entity not named herein is prohibited. An additional written authorization must be obtained for any proposed new use of the information or its redisclosure or transfer of such information. Authorized information may be subject to redisclosure by the recipient and no longer protected by the privacy regulations.

CA I understand that I have the right to receive a copy of this authorization.  
A copy of this authorization shall be considered as valid as the original.

8 \_\_\_\_\_  
Signature \_\_\_\_\_ Print Name \_\_\_\_\_ Date \_\_\_\_\_

If Signed by Other than Patient, Indicate Relationship \_\_\_\_\_

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Initial

Initial

\_\_\_\_ Alcohol and/or Drug Information

\_\_\_\_ Genetic Records

Initial

Initial

\_\_\_\_ Sexually Transmitted Disease Information

Initial

Date Range of Records to be Released \_\_\_\_ / \_\_\_\_ / \_\_\_\_ to \_\_\_\_\_

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**I understand that I have the right to receive a copy of this authorization.**

**A copy of this authorization shall be considered as valid as the original.**

Signature \_\_\_\_\_

Print Name \_\_\_\_\_

Date \_\_\_\_\_

## HIPAA-COMPLIANT AUTHORIZATION FOR THE RELEASE OF RECORDS

1.) I hereby authorize: Leave this BLANK  
Name of Facility with Records/Disclosing Party

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Name of Requesting Party (Requester) Insurance Carrier/Third Party Administrator/Self-Insured Employer/Attorney Firm  
and/or their attorneys, through **Macro-Pro their agent**, to review, inspect, and/or photocopy any  
and all of the following from any and all dates which are in your possession or control.

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Date of Birth \_\_\_\_\_

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Initial

\_\_\_\_\_ **HIV and/or AIDS Information**

Initial

\_\_\_\_\_ **Alcohol and/or Drug Information**

Initial

\_\_\_\_\_ **Genetic Records**

Initial

\_\_\_\_\_ **Sexually Transmitted Disease Information**

Initial

Date Range of Records to be Released \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_\_

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**I understand that I have the right to receive a copy of this authorization.  
A copy of this authorization shall be considered as valid as the original.**

Signature \_\_\_\_\_

Print Name \_\_\_\_\_

Date \_\_\_\_\_

## HIPAA-COMPLIANT AUTHORIZATION FOR THE RELEASE OF RECORDS

1.) I hereby authorize: \_\_\_\_\_  
Name of Facility with Records/Disclosing Party

2.) To disclose to: Kivo & Adamie LLP  
Name of Requesting Party (Requester): Insurance Carrier/Third Party Administrator/Self-Insured Employer/Attorney Firm  
and/or their attorneys, through **Macro-Pro their agent**, to review, inspect, and/or photocopy any and all of the following from any and all dates which are in your possession or control:

Jane Doe aka Jane Jackson, Janie Jackson, JJ Jackson      11 / 05 / 1965

Name of Patient (List Other Names Used)      Date of Birth

- **Medical records**, to include but not limited to: Medical files, reports, charts, graphs, notes, tests, x-rays, MRI's, billings and laboratory reports.
- **Employment and/or Union records** to include but not limited to: Personnel file, medical and insurance, pension benefit records and wage records.
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Initial      Initial

\_\_\_\_\_ **Alcohol and/or Drug Information**      \_\_\_\_\_ **Genetic Records**  
Initial      Initial

\_\_\_\_\_ **Sexually Transmitted Disease Information**  
Initial

Date Range of Records to be Released \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_\_

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Signature \_\_\_\_\_

Print Name \_\_\_\_\_

Date \_\_\_\_\_

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Date of Birth

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- **Pharmacy Records**

**SENSITIVE INFORMATION:** By **initialing** below, I hereby authorize the release of information concerning:

<u>JJD</u> <small>Initial</small>	Psychiatric and Mental Health Information	<u>JJD</u> <small>Initial</small>	HIV and/or AIDS Information
<u>JJD</u> <small>Initial</small>	Alcohol and/or Drug Information	<u>JJD</u> <small>Initial</small>	Genetic Records
<u>JJD</u> <small>Initial</small>	Sexually Transmitted Disease Information		

Date Range of Records to be Released \_\_\_/\_\_\_/\_\_\_ to \_\_\_\_\_

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A copy of this authorization shall be considered as valid as the original.

Signature: \_\_\_\_\_

Print Name \_\_\_\_\_

Date \_\_\_\_\_

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JJD **Alcohol and/or Drug Information**      JJD **Genetic Records**

JJD **Sexually Transmitted Disease Information**

JJD **Date Range of Records to be Released** 7 / 7 / 2010 to present

The health information authorized on this form will be used for the following purposes only:

**Discovery for a Liability or Workers' Compensation claim.**

**DURATION:** This authorization shall become effective immediately and shall remain in effect until 11/1/2025 or for ONE full year from date of signature.

**REVOCATION:** This authorization is subject to written revocation by the undersigned at any time between now and the disclosure of information by the disclosing party. My written revocation will be effective upon receipt but will not be effective to the extent that the requester or others have acted in reliance upon this authorization. **Written revocation is to be sent to those parties listed on line 1.) and line 2.) above.**

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Signature

Print Name

Date

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and all of the following from any and all dates which are in your possession or control:

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Name of Patient (List Other Names Used)

Date of Birth

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JD **HIV and/or AIDS Information**

Initial

Initial

JD **Alcohol and/or Drug Information**

JD **Genetic Records**

Initial

Initial

JD **Sexually Transmitted Disease Information**

Initial

Date Range of Records to be Released 7 / 7 / 2010 to present

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**I understand that I have the right to receive a copy of this authorization.**

**A copy of this authorization shall be considered as valid as the original.**

X

Signature

Jane Doe

Print Name

8/24/2020

Date

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JD **HIV and/or AIDS Information**

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Initial

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JD **Genetic Records**

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Initial

JD **Sexually Transmitted Disease Information**

Initial

Date Range of Records to be Released 7 / 7 / 2010 to present

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I understand that I have the right to receive a copy of this authorization.  
A copy of this authorization shall be considered as valid as the original.

X Jane Doe

Jane Doe

8/24/2020

Signature

Print Name

Date

# Gathering Evidence The Deposition Officer

Rule 4.1 False Statements and Duty to Disclose

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## Rule 4.1 of the California Rules of Professional Conduct

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person
- (b) Fail to disclose a material fact to a third person . . .

## The Deposition Officer must:

- Be a Neutral Third Party
- Have No Fiduciary Interest in the Proceedings
- Obtain the Records Efficiently and in a Timely Manner
- Ensure Code Requirement Compliance
- Memorialize, Retain and Distribute Records
- Support Discovery Efforts

# Role of the Deposition Officer

- Some exceptions allow attorneys to act as a Deposition Officer
- “Shall not be financially interested in the action”
- “Shall not act as an advocate before a jury which will hear testimony from a member except under specific circumstances” State Bar Rules of Professional Conduct

# Role of the Subpoena Service as Deposition Officer

## CCP 2020.420 Subpoena for Business Records

- Must be Professional Photocopier as defined in the Business and Professions Code 22450 - 22463
- Registered in the county of their main office location
- Be Bonded
- One member of management must be a Notary Public
- No Felony Conviction, Officers or Employees.

# Role of the Subpoena Service as Deposition Officer

- Locates all the evidence and records available.
- Ensures all parties receive the identical records.
- Provides for timely service throughout the state and nationally.
- Has database of custodian requirements/preferences.
- Highly experienced with difficult custodians.
- Can advance fees or can issue checks for fees.
- Provides a secure, encrypted environment for data protection.

# Role of the Subpoena Service as Deposition Officer

- Ensure all pertinent jurisdictional code requirements are followed
- Notice all parties properly

## For the attorney:

- Be aware of upcoming dates including depositions, mediations, trial and communicate those to your service providers.
- Review your records to make certain you have received everything.
- Contact your service ASAP if you didn't.

# Obtain More Records

## How do you word a request so you receive all relevant information?

- Be sure to include clear identifiable information for locating records including date of birth, SSN, policy and account numbers, etc.
- Some facilities have formal description requirements  
The Subpoena Service can assist with wording.
- Be mindful that some records are not in the standard file and to ask for specific items as necessary, i.e. brain scan, fetal monitor strips, psychiatric records.

## Avoid Common Errors

- Ask for the correct spelling of the name, Jr. or Sr.?
- Ask for AKA's-Maiden name, nickname, previous married name.
- Provide an authorization for each facility or leave the name of the facility off the authorization.
- Make certain the Date of Expiration is NOT identical to the date signed.
- Be aware of upcoming dates, depositions, mediations, trial, and communicate those to your service providers.
- Review your records to make certain you have received everything.  
Contact your service ASAP if you didn't.

# Why did I Get a Certificate of No Records?

- Social Security Number does not match name or gender
- Multiple people are using the same Social Security Number
- No AKA is provided
- Old records are under a maiden name
- Current records under a married name
- The name is spelled incorrectly
- Auto Insurance - No Claim for medical filed
- Custodian doesn't look for records or is in error
- The records are lost or destroyed . . .

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**Gathering Evidence**  
**Government Records**

# Getting Records from the Federal Government

- The Federal Government does not honor a state subpoena.
- You must use an authorization to obtain records.
- The client must sign and date the authorization forms.
- Some federal agencies can take a year to produce records.

# Government Healthcare

- Medicare Authorization - Patient gets their own records
- Medicare Beneficiary Authorization - \*Act on behalf of the patient
- Medi-Cal Authorization - Patient gets own records
- Medi-Cal Authorization - \*Act on behalf of the patient

\*These authorizations used to obtain records for a case.

# Social Security Records

- **Social Security** - Consent Form  
General and Medical, SSA-3288
- **Social Security** - Earnings & Benefits Detail, SSA-7050

**Avoid any delays or having the request rejected:**

All required fields must be completed, signed and dated.

Specify the type of records you are requesting. They will not honor  
“Any and All” or “Entire File”

# Military Records

- **Military Records** - Request for Information Needed to Locate Medical Records - NA-13042
- **Military Dependent** - Medical Records
- **Military Records** - SF 180, Request Pertaining to Military Records, All Services and National Guard
- **Naval Medical Center** (Medical or Dental) - Form DD 2870 Rev.

# Military Records

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# Veteran's Administration Records

- **Veteran's Administration - Form 10-5345 (Page 2)**

# Local Government Emergency Service Records

- Ambulance Companies
- Paramedics/EMTs
- Fire
- Police
  
- Records are filed by the date and place of incident. Not by the individual's information.
  
- It is extremely important to provide the following information:  
Date, Time, Place of Incident Address, Cross Streets or Freeway Exits

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**Gathering Evidence  
Out-of-State Subpoena Power**

# Out of State Subpoena Power-UIDDA

## Uniform Interstate Depositions and Discovery Act (UIDDA)

- Previously, a subpoena from one state was not valid to obtain records from another state.
- The Interstate Depositions and Discovery Act allows litigants to present to a court, located in the state where discoverable materials are sought, with a California subpoena.
- If all foreign state requirements are met, the court will issue their state subpoena for service.
- The terms of the issued subpoena must incorporate the same terms as the original subpoena and contain the contact information for all Counsel of record and any party not represented by counsel.

# Out of State Subpoena Power-UIDDA

8 States have not enacted UIDDA:

Connecticut

Nebraska

Massachusetts

Missouri

New Hampshire

Oklahoma

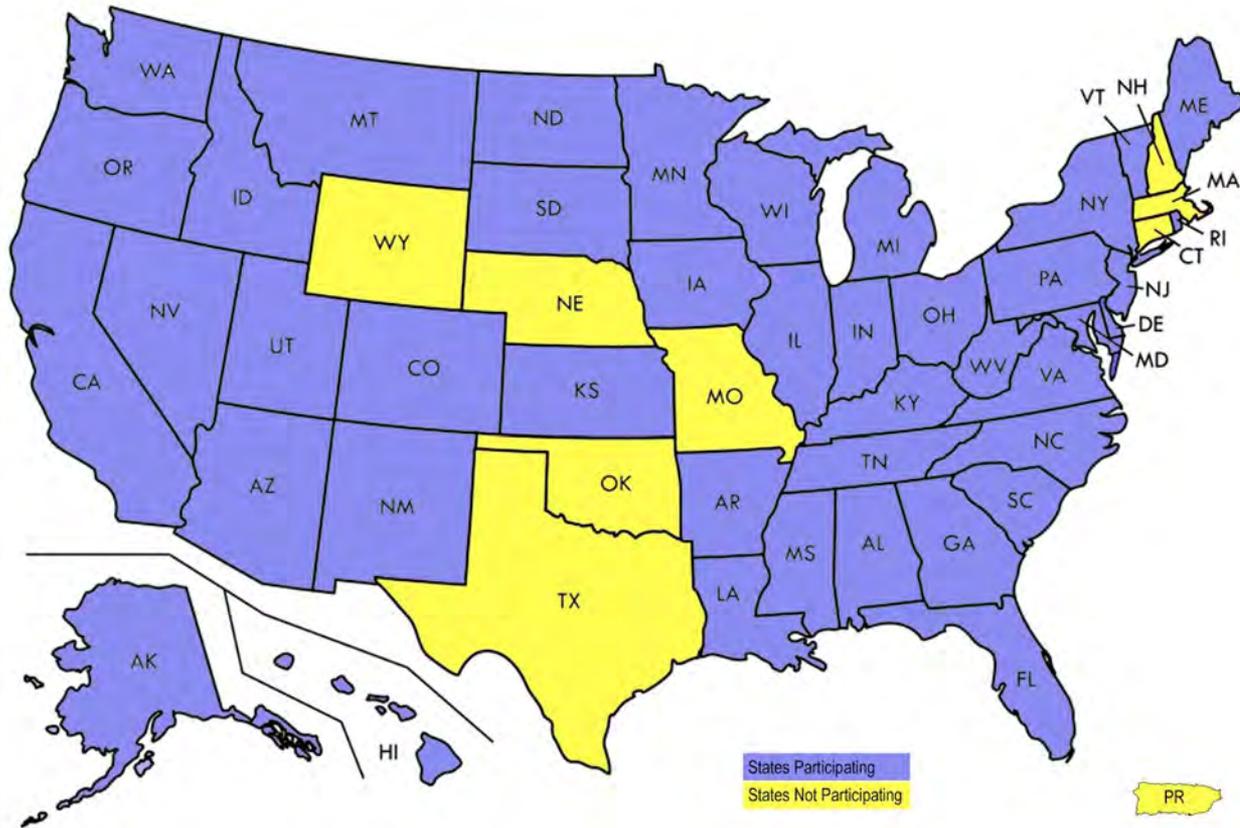
Texas

Wyoming

US Commonwealth

Puerto Rico

# Out of State Subpoena



# Out of State Subpoena Power

IF:

- The entity being subpoenaed is located out-of-state, and
- The records are located out-of-state, but
- The entity is registered with the California Secretary of State as a foreign corporation, and
- The entity has designated an agent for service of process inside the State of California, and
- The entity performed the service or the incident occurred inside the State of California, and
- The entity is a party or named in the case.

***Then the entity MUST honor a California subpoena for records.***

***However, often the entities refuse to honor the California subpoena. Then you resort to the UIDDA process. If the state has not adopted the UIDDA, you must hire an attorney in that state to obtain the records.***

# Road Blocks and Challenges

Rule 3.4 Fairness to Opposing Party and Counsel

# Role of the Deposition Officer

## Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document . . . .

(b)(c) suppress or falsify evidence

# Objection

- An objection is designed to be used by a non-party to the case, usually the facility whose records are being subpoenaed.
- But often the opposing counsel will send an objection letter to the facility telling them not to release records.
- Most of the time the opposing counsel wants to limit the scope of the subpoena.
- The attorneys confer and, if agreement is not obtained, the opposing counsel may file a Motion to Quash.

# Motion to Quash

- All work to obtain records must cease if a Motion to Quash is filed with the court.
- Any Objection or Motion to Quash should be served on the attorney and the record retrieval company.
- If there is an Order to Quash or if the Objection is agreed upon by the attorneys, all records subject to the order or agreement obtained, but not yet distributed, must be destroyed by the record retrieval company.

# Receiving Improper Records

Medical records must only be distributed to those authorized to receive them:

- The parties
- The attorneys
- Their agents
- The court

# Receiving Improper Records

- The custodian is responsible for releasing only the records called for in the authorization or the subpoena.
- Sometimes the custodian inadvertently releases records which contain substance abuse, psychological, HIV/AIDS records or records which include the medical records of another person.
- Usually these records are discovered by the attorney or their staff as they go through the records page-by-page.
- When these records are discovered, all those in possession of the records should destroy them. This includes the record retrieval company.

# Receiving Improper Records

## Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

- a) Refrain from examining the writing any more than necessary
- b) Promptly notify the sender
- c) Return or destroy the records

# You want us to do WHAT?

Rule 8.4 Misconduct

Maintaining the Integrity of the Profession

# You want us to do WHAT?

- Want to delay notice to other parties.
- Want to issue a federal subpoena when a California subpoena wasn't honored out-of-state.
- Want us to sign an authorization, change or write-in other information.
- Gave a case number when the case wasn't litigated.
- Gave an incorrect address for the opposing party.
- Want to see the records before having them sent to the opposing party.

# You want us to do WHAT?

## Rule 8.4 Misconduct - Maintaining the Integrity of the Profession

- It is professional misconduct for a lawyer to:
  - (a) violate these rules or knowingly solicit another to violate these rules
  - (b) commit a criminal act that reflects adversely on the lawyer's honesty
  - (c) engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation;

# Contact Info

**Macro-Pro, Inc.**

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