

**HEALTH  
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INSTITUTE FOR HEALTH CARE  
RESEARCH AND POLICY  
GEORGETOWN UNIVERSITY

JANLORI GOLDMAN, J.D.  
DIRECTOR

**The State of Health  
Privacy**  
SECOND EDITION

A SURVEY OF STATE HEALTH PRIVACY STATUTES

JOY PRITTS, J.D.  
ANGELA CHOY, J.D.  
LEIGH EMMART, J.D.  
JOANNE HUSTEAD, J.D.

VOLUME II  
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# The State of Health Privacy Second Edition

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# NEBRASKA

Nebraska statutorily grants a patient the right of access to his health records in the possession of health care providers, including physicians, hospitals and psychologists. The state does not have a general, comprehensive statute restricting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

## I. PATIENT ACCESS

### A. Providers, Including Hospitals

#### 1. Scope

Nebraska statutorily grants patients the right of access to their medical records that are maintained by providers. [Neb. Rev. Stat. § 71-8403.] These provisions apply to physicians, psychologists, chiropractors, dentists, hospitals, clinics and any other licensed or certified health care practitioner or entity. [Neb. Rev. Stat. § 71-8402 (defining “provider”).] Pharmacists appear to be covered by these provisions. (See Neb. Rev. Stat. 71-1.142 et seq. and § 71-8402.) The medical records encompassed in the statute are a provider’s record of a patient’s health history and treatment rendered. [Neb. Rev. Stat. § 71-8402 (defining “medical record”).] These provisions do not apply to the release of medical records under the Nebraska Workers' Compensation Act. [Neb. Rev. Stat. § 71-8407.]

#### 2. Access Requirements

Upon receiving a patient’s written request to examine his medical records, a provider must, as promptly as required under the circumstances but no later than 10 days after receiving the request: (a) make the medical records available for examination during regular business hours; (b) inform the patient if the records do not exist or cannot be found; (c) if the provider does not maintain the records, inform the patient of the name and address of the provider who maintains such records, if known; or (d) if unusual circumstances have delayed handling the request, inform the patient in writing of the reasons for the delay and the earliest date, when the records will be available for examination. [Neb. Rev. Stat. § 71-8403.] Even if there is a delay, access must be given within 21 days after receiving the request. [*Id.*]

There is a different time frame for providers to respond to requests for copies of medical records. A provider must furnish a patient with a copy of his medical records within 30 days of receiving such a written request. [Neb. Rev. Stat. § 71-8403.]

**Copying fees.** Providers may charge up to a \$20 handling fee and no more than 50¢ per page for copying. [Neb. Rev. Stat. § 71-8404.] Providers may also charge for the reasonable cost of all copies of records that cannot routinely be copied on a standard

photocopy machine. [*Id.*] A provider may charge an amount necessary to cover the cost of labor and materials for duplicating an x-ray or similar special medical record. [*Id.*] A provider may not charge a fee for medical records requested by a patient for use in supporting an application for disability or other benefits or assistance or an appeal relating to the denial of such benefits or assistance under Social Security and other specified programs. [Neb. Rev. Stat. § 71-8405.]

**Denial of Access.** Mental health records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his professional opinion that release of the records would not be in the patient's best interest (except where the release is required by court order). [Neb. Rev. Stat. § 71-8403.]

## II. RESTRICTIONS ON DISCLOSURE

### A. Emergency Care Providers

Emergency medical service providers and out-of-hospital emergency care providers may not release patient information they receive or record without the written authorization of the patient, except to the receiving health care facility or to the department of health for statistical purposes. The department of health must keep this information confidential. It may release case-specific data to researchers approved by the Department of Health and Human Services for specific research projects. [Neb. Rev. Stat. § 71-5185.] Researchers must submit detailed applications for approval and must substantiate the need for patient-identifying data if such data is requested. [*Id.* and Neb. Rev. Stat. § 81-666.] Researchers who obtain such data from the department must maintain its confidentiality. [Neb. Rev. Stat. § 71-5185.]

### B. Health Carriers, HMOs, Preferred Provider Organizations, and Prepaid Limited Health Service Organizations

Generally, health carriers, HMOs, preferred provider organizations and prepaid limited health service organizations may not disclose any data or information pertaining to the diagnosis, treatment or health of an enrollee or applicant without that person's express consent. [Neb. Rev. Stat. §§ 44-7210 (health carrier); 44-32,172 (HMOs); 44-4110.01 (preferred provider); 44-4725 (prepaid limited health service).] Disclosure without the enrollee/applicant's consent is permitted: to the extent necessary to carry out the purposes of the statutes governing these organizations; pursuant to a statute or court order for the discovery or production of evidence; or in order for the organization to defend itself against claims or litigation between the organization and the covered person.

#### Remedies and Penalties

**Fines and Penalties.** With respect to HMOs, the director of insurance may issue an order directing such an organization to cease and desist from engaging in any action or practice in violation of the Health Maintenance Organization Act, including the confidentiality provisions. [Neb. Rev. Stat. § 44-32, 166.] When an HMO has substantially failed to comply with the HMO Act, the director may suspend, revoke or deny its certificate of authority. [Neb. Rev. Stat. § 44-32,153.]

## C. Insurers

### 1. Scope

Nebraska's Privacy of Insurance Consumer Information Act prevents the unauthorized disclosure of consumers' health information. This Act governs the practices of "licensees" (*i.e.*, all licensed insurers, including fraternal benefit societies, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under Nebraska insurance law) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [Neb. Rev. Stat. § 44-903(17) (defining "licensee").] "Nonpublic personal health information" is health information that identifies an individual or with respect to which there is a reasonable basis to believe that the information could be used to identify an individual. [Neb. Rev. Stat. § 44-903(21) (defining "nonpublic personal health information").] "Health information" is any information (except age or gender), recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment for the provision of health care. [Neb. Rev. Stat. § 44-903(15) (defining "health information").] Insurance "consumers" are individuals who seek to obtain, obtain or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. "Customers" are generally consumers who have a continuing relationship with the licensee. [Neb. Rev. Stat. § 44-903(5), (8) & (9) (defining "consumer," "customer" and "customer relationship").]

Licensees are required to comply with the Act with respect to nonpublic personal health information by January 1, 2003. [Neb. Rev. Stat. §§ 44-916 to 44-920.] However, they are not subject to the Act if they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [Neb. Rev. Stat. § 44-919.]

### 2. Requirements

The Act generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Neb. Rev. Stat. § 44-916.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee will make the disclosure; the purpose of the disclosure; how the information will be used; the signature of the consumer or customer and the date signed; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [Neb. Rev. Stat. § 44-917.]

The Act permits disclosures without the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee, including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; actuarial, scientific,

medical or public policy research; and any activity otherwise permitted by law, required pursuant to governmental reporting authority or to comply with legal process. [Neb. Rev. Stat. § 44-916.]

### **3. Remedies and Penalties**

**Fines and Penalties.** In addition to any other remedies available under Nebraska law, each violation of the Privacy of Insurance Consumer Information Act is an unfair trade practice in the business of insurance subject to the Unfair Insurance Trade Practices Act. [Neb. Rev. Stat. § 44-923; see Neb. Rev. Stat. § 44-1521 et seq.]

### **D. Pharmacists**

Patient information maintained by pharmacists is privileged and confidential and may be released only to: the patient, the patient's caregiver or others authorized by the patient; a physician treating the patient; other physicians or pharmacists when, in the professional judgment of the pharmacist, such release is necessary to protect the patient's health or well-being; or other persons or governmental agencies authorized by law to receive the information. [Neb. Rev. Stat. § 71-1,147.36.] Confidential information may be disclosed to researchers conducting biomedical, pharmaco-epidemiologic or pharmaco-economic research approved by an institutional review board. [*Id.*] Pharmacy technicians may not perform the task of releasing any confidential information maintained by a pharmacy. [Neb. Rev. Stat. § 71-1,147.33.]

### **E. State Government**

Medical records (other than births and deaths) maintained by the state in any form concerning any person are not considered public records open to inspection. [Neb. Rev. Stat. § 84-712.05.]

Records maintained by medical institutions over which the state has jurisdiction, such as the Beatrice State Developmental Center, the Nebraska veterans homes, and the hospitals for the mentally ill, are generally required to be kept confidential and may not be released without the signed written consent of the patient or his legally authorized representative. [Neb. Rev. Stat. § 83-108 and § 83-109.] There are a number of exceptions to this general rule, under which such records may be made accessible without the patient's consent including, but not limited to: any federal agency requiring medical records to adjudicate claims for federal benefits; and any public or private agency under contract to provide facilities, programs, and patient services; upon order of a judge or court; and pursuant to certain specified victim notification laws. [Neb. Rev. Stat. § 83-109.]

## **III. PRIVILEGES**

Nebraska recognizes the physician-patient, psychologist-patient and professional counselor-client privileges that allow a patient, in legal proceedings, to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of diagnosis or treatment. [Neb. Rev. Stat. § 27-504 (Rule 504).] Health carriers, HMOs, preferred provider plans and prepaid limited health service plans are entitled to claim any statutory privilege against disclosure that the provider who

furnished such information to the organization could claim. [Neb. Rev. Stat. §§ 44-7210 (health carrier); 44-32,172 (HMOs); 44-4110.01 (preferred provider); 44-4725 (prepaid limited health service).]

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Birth Defects

The Nebraska Department of Health and Human Services Regulation and Licensure maintains a birth defects registry that includes identifiable data. [Neb. Rev. Stat. § 71-646.] All case-specific and patient-identifying data obtained from medical records of individual patients shall be for the confidential use of the department and the public health agencies (federal, state and local) and approved researchers that the department determines may view such records for specific purposes or research projects. [Neb. Rev. Stat. § 81-668.] Researchers must submit detailed applications for approval and must substantiate the need for patient-identifying data if such data is requested. [*Id.* and Neb. Rev. Stat. § 81-666.] Approved researchers and receiving agencies must maintain the confidentiality of the information. [Neb. Rev. Stat. §§ 81-666; 81-671.] No agency or researcher that obtains registry data may contact a patient or patient's family without first obtaining the permission of the patient's physician. [Neb. Rev. Stat. §§ 81-666; 81-671.]

#### Remedies and Penalties

**Fines and Penalties.** The improper disclosure of confidential data obtained from the registry or the use of such information with the intent to deceive constitutes a Class IV misdemeanor punishable by a \$100 - \$500 fine. [Neb. Rev. Stat. §§ 81-674; 28-106 (specifying penalties for misdemeanors).]

### B. Cancer

The Nebraska Department of Health and Human Services Regulation and Licensure maintains a cancer registry that includes identifiable data. [Neb. Rev. Stat. §§ 81-642; 81-644; 81-646.] All case-specific and patient-identifying data obtained from medical records of individual patients shall be for the confidential use of the department and the public health agencies (federal, state and local) and approved researchers that the department determines may view such records for specific purposes or research projects. [Neb. Rev. Stat. § 81-668.] Approved researchers and receiving agencies must maintain the confidentiality of the information. [Neb. Rev. Stat. §§ 81-666; 81-671.] No agency or researcher that obtains registry data may contact a patient or patient's family without first obtaining the permission of the patient's physician. [Neb. Rev. Stat. §§ 81-649; 81-666; 81-671.]

#### Remedies and Penalties

**Fines and Penalties.** The improper disclosure of confidential data obtained from the registry or the use of such information with the intent to deceive constitutes a Class IV misdemeanor punishable by a \$100 - \$500 fine. [Neb. Rev. Stat. §§ 81-674; 28-106 (specifying penalties for misdemeanors).]



## C. Communicable Diseases, Including Sexually Transmitted Diseases

Physicians are required to report communicable diseases (including sexually transmitted diseases, particularly HIV) to the Department of Health and Human Services Regulation and Licensure. [Neb. Rev. Stat. §§ 71-502; 71-502.01; 71-503; 71-532 (HIV).] These reports are confidential, not subject to subpoena and are inadmissible in evidence in any legal proceeding. [Neb. Rev. Stat. § 71-503.01.] The reports may not be disclosed to any other department or agency of the state of Nebraska except they shall be shared with the immunization program within the department that has programs designed for the surveillance, prevention, education and outbreak control of diseases preventable through immunization. Disclosure, including identifying information, may also be made to other state or local health departments so as to ensure that necessary investigations are conducted. [Neb. Rev. Stat. § 71-503.01.] The department may publish analyses of such reports only in such a manner that no identifying information is disclosed. It may also discuss the report with the attending physician and use the information to make such investigations as necessary. [*Id.*] Disclosure of non-identifiable data to the federal Centers for Disease Control and Prevention is also permissible.

### Remedies and Penalties

**Fines and Penalties.** A violation of these non-disclosure provisions constitutes a misdemeanor punishable by fine. [Neb. Rev Stat. §§ 71-506; 28-106 (specifying penalties for misdemeanors.)] Imprisonment is a potential penalty when the violating disclosure is willful or malicious. [*Id.*]

When an emergency services provider has had a significant exposure to body fluids or airborne pathogens from a patient who is subsequently tested and determined to have an infectious disease or condition, the emergency services provider will be notified of his exposure to the disease. The notification may not disclose the patient's name or other identifying information. [Neb. Rev. Stat. §§ 71-507 through 71-509.] Information concerning the patient or test results must be maintained as confidential by the health care facility that received or tested the patient, by physicians involved in attending the patient, and by the emergency services provider, except as otherwise provided by statute. [Neb. Rev. Stat. § 71-511.] This information may not be made public upon subpoena, search warrant, discovery proceedings or otherwise, except as otherwise provided by statute. [*Id.*]

## D. Genetic Test Results

Nebraska has a number of statutory provisions restricting the use of information derived from genetic tests. For purposes of the following provisions, the term genetic information means information about a gene, gene product, or inherited characteristic derived from a genetic test. [Neb. Rev. Stat. §§ 48-236; 77-5518] "Genetic test" is defined as the analysis of human DNA, RNA, and chromosomes and those proteins and metabolites used to detect heritable or somatic disease-related genotypes or karyotypes for clinical purposes. A genetic test must be generally accepted in the scientific and medical communities as being specifically determinative for the presence, absence, or mutation of a gene or chromosome in order to qualify under this definition. "Genetic test" does not include a routine physical examination or a routine

analysis, including a chemical analysis, of body fluids unless conducted specifically to determine the presence, absence, or mutation of a gene or chromosome. [Neb. Rev. Stat. §§ 44-7,100; 48-236; and 77-5519.]

## **1. Employers**

Employers may not require an employee or an employment applicant to submit to a genetic test or provide genetic information as a condition of employment or promotion. [Neb. Rev. Stat. § 48-236.] Employers may not use genetic information that is unrelated to the ability of the individual to perform the job to affect the individual's employment. [*Id.*]

A company entering into an agreement under the Invest Nebraska Act is prohibited from requiring, as a condition of employment, that an employee or applicant submit to a genetic test or provide genetic information outside the scope of normal blood testing. [Neb. Rev. Stat. § 77-5537.]

## **2. Insurers**

Any hospital, medical or surgical expense-incurred policy or certificate issued or renewed in Nebraska may not require a covered person (or dependent) or an asymptomatic applicant (or dependent) to undergo any genetic test before issuing or renewing the policy or certificate. [Neb. Rev. Stat. § 44-7,100.] This statute does not prohibit requiring an applicant for coverage to answer questions about family medical history. [*Id.*]

## **E. Mental Health**

### **1. Commitment Records**

All records kept on any person who is the subject of a commitment petition are confidential except as otherwise provided by law. [Neb. Rev. Stat. § 83-1068.] The following persons have access to such records: the person who is the subject of the proceeding, his counsel, his guardian (if any), others having his written authorization, persons authorized by a court order, the mental health board having jurisdiction over the subject, and, in accordance with specific statutes, the Nebraska State Patrol or the Department of Health and Human Services. [Neb. Rev. Stat. § 83-1068(1).] Upon application by the county attorney or the facility director where the subject is in custody, a court may deny access to the subject when it finds that the availability of such records will adversely affect the patient's mental state. [Neb. Rev. Stat. § 83-1068(2).] In addition, when a person who has been committed is absent from a hospital or treatment program and is currently considered to be dangerous to others, the person's name and description and a statement that the person is considered to be dangerous may be released to aid in the person's apprehension and to warn others. [Neb. Rev. Stat. § 83-1068(3).]

### **Remedies and Penalties**

**Right to Sue.** A person who breaches the confidentiality of mental health records may be sued in a civil action. [Neb. Rev. Stat. § 83-1069.]

**Fines and Penalties.** A person who willfully breaches the confidentiality of records required by § 83-1068 is guilty of a Class II misdemeanor. [*Id.*]

## **2. Mental Health Practitioners**

A mental health professional may not disclose any information acquired while consulting a person in his professional capacity without the written consent of the person. [Neb. Rev. Stat. § 71-1,335.] If the person is engaged in family therapy, each family member must execute a separate waiver. [*Id.*] Disclosure without the client's authorization is permitted: where the mental health practitioner-patient privilege is limited by state law or pursuant to the rules of the Board of Mental Health Practice; when the person waives the privilege by bringing charges against the practitioner; or when there is a duty to warn of a patient's serious threat of physical violence against himself or a reasonably identifiable victim. [Neb. Rev. Stat. §§ 71-1,335; 71-1,336.]

### **Remedies and Penalties**

**Fines and Penalties.** A disclosure in violation of these provisions is a misdemeanor and, if committed by a licensed or certified mental health counselor or practitioner, may also serve as the cause for disciplinary action. [Neb. Rev. Stat. § 71-1,338.]

For a discussion about patient access to medical records, including mental health records, see "Patient Access," Section I, above.

## **F. Substance Abuse Testing**

Employers may not release or disclose the results of drug and alcohol tests to the public. [Neb. Rev. Stat. § 48-1906.] Disclosure may be made to the employee and to other officers, agents and employees of the employer who need to know the information for reasons connected to their employment. [*Id.*]

## **NEVADA**

Nevada statutorily grants a patient the right of access to his health records in the possession of health care providers, including physicians, hospitals and pharmacists. The state does not have a general, comprehensive statutory prohibition against the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### **I. PATIENT ACCESS**

#### **A. Health Care Providers, Including Physicians, Hospitals and Pharmacists**

A health care provider must make a patient's health care records available to him for inspection and must upon request furnish a copy of the record. [Nev. Rev. Stat. § 629.061.] This provision is applicable to physicians, dentists, homeopathic physicians, licensed nurses, opticians, psychologists, physical therapists, doctors of Oriental medicine, osteopathic physicians, pharmacists, hospitals, facilities that maintain health care records of patients, and others. [Nev. Rev. Stat. §§ 629.031; 629.061.] "Health care records" include any reports, notes, orders, photographs, X-rays or other recorded data or information in written, electronic or other form that is received or produced by a health care provider and relates to the medical history, examination, diagnosis or treatment of a patient. [Nev. Rev. Stat. §§ 629.021 (defining "health care records") and 629.011 (stating applicability of definition).]

For physical inspection, the records must be made available at a place within the depository convenient for such an inspection, and inspection must be permitted at all reasonable office hours and for a reasonable length of time. If the records are located outside Nevada, the provider must make any records requested pursuant to this section available in Nevada for inspection within 10 working days after the request. [Nev. Rev. Stat. § 629.061.]

With respect to copies, the patient must pay copying and mailing costs. [Nev. Rev. Stat. § 629.061.] The cost of photocopies is limited to 60¢ per page for photocopies and a reasonable fee for copies of X-rays and other similar records. [Nev. Rev. Stat. § 629.061.] No administrative fee or additional service fee of any kind may be charged for furnishing the copies. [*Id.*] No fee may be charged for the first copy of health records requested to support a claim or appeal under the Social Security Act or under any federal or state financial needs-based benefit program.

#### **B. Medical Facilities**

Medical facilities must provide a patient with a complete and current description of his diagnosis, treatment plan and prognosis. [Nev. Rev. Stat. § 449.710(5).] For purposes

of this statute, “medical facility” is defined as including a hospital, a surgical center for ambulatory patients, an independent center for emergency medical care, an agency that provides nursing in the home and others. [Nev. Rev. Stat. §§ 449.0151 (defining "medical facility") and 449.001 (making definition applicable to entire chapter.) If it is not medically advisable to provide the information directly to the patient, the facility or physician must provide the information to an appropriate person responsible for the patient and inform that person that he may not disclose the information to the patient. [Nev. Rev. Stat. § 449.710(5).]

### **C. Medical Laboratories**

A patient of a rural hospital is entitled to access the results of his tests performed at a licensed laboratory. [Nev. Rev. Stat. §§ 449.2465; 652.193.]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Group Insurers**

Insurers who provide group or blanket health insurance policies are prohibited from disclosing to the policyholder or any employee of the policyholder the fact that an insured person is taking a prescribed drug or medicine or the identity of that drug or medicine. [Nev. Rev. Stat. § 689B.280.] They may disclose this information to an administrator who acts as an intermediary for claims for insurance coverage. [*Id.*]

### **B. Homeopathic Physician**

A homeopathic physician who willfully discloses a communication that is privileged under statute or court order may be subject to disciplinary action. [Nev. Rev. Stat. § 630A.380.]

### **C. Medical Facilities**

Every patient of a medical facility has the right to privacy concerning his medical care. [Nev. Rev. Stat. § 449.720.] Any discussions of a patient’s care, consultation with other persons concerning the patient, examinations or treatments, and all communications and records concerning the patient are confidential. [*Id.*] In addition, patients must consent to the presence of any person who is not directly involved with his care during any examination, consultation or treatment. [*Id.*]

When a patient is transferred to another medical facility, a facility may forward a copy of a patient’s medical record to that facility without the patient’s consent. [Nev. Rev. Stat. § 449.705(1).] The facility is not required to obtain the patient consent to forward a copy of the medical records. [*Id.*]

### **D. Medical Laboratories**

A licensed laboratory may release the results of tests performed at the laboratory regarding a patient of a rural hospital only to the patient, the physician who ordered the tests and a health care provider currently treating or providing assistance in the treatment of the patient. [Nev. Rev. Stat. § 652.193.]

## **E. Pharmacists**

Prescriptions filled and on file in a pharmacy are not public records. [Nev. Rev. Stat. § 639.238.] A pharmacist may not disclose the contents of any prescription or provide a copy of any prescription except to: a patient for whom the prescription was issued; the practitioner who issued the prescription; the practitioner who is currently treating the patient; an inspector of the FDA; a state agency responsible for providing care to the patient; an insurance carrier, on receipt of a written authorization of the patient; any person authorized by an order of the district court, professional licensing board; and other registered pharmacists for a few limited purposes. [*Id.*]

## **F. Physicians, Physician Assistants and Practitioners of Respiratory Care**

Physicians, physician assistants and practitioners of respiratory care who willfully disclose communications that are privileged under a statute or court order may be subject to disciplinary action or the denial of licensure. [Nev. Rev. Stat. § 630.3065.]

## **G. Prepaid Limited Health Service Organizations**

Generally, a prepaid limited health service organization may not disclose any information relating to the diagnosis, treatment or health of any enrollee obtained from that person or from any provider without the written consent of the enrollee. [Nev. Rev. Stat. § 695F.410.] Disclosure without the enrollee's consent may be made: to carry out the statutory provisions governing such organizations; pursuant to a specific statute or court order for the production of evidence or discovery; or for a claim or legal action if that information is relevant. [*Id.*]

# **III. PRIVILEGES**

Nevada recognizes a number of health care provider-patient privileges that allow a person in a legal proceeding to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his health care provider. [Nev. Rev. Stat. §§ 49.209 (psychologist); 49.225 (“doctor” including physician, dentist, osteopath, and psychiatric social worker); 49.215 (defining “doctor”); 49.247 (marriage and family therapist); 49.252 (social worker).] A prepaid limited health service organization is entitled to claim any privilege against disclosure that the provider who furnished the information to the organization is entitled to claim. [Nev. Rev. Stat. § 695F.410.]

# **IV. CONDITION-SPECIFIC REQUIREMENTS**

## **A. Birth Defects**

Nevada maintains a system for the collection and analysis of information concerning birth defects. [Nev. Rev. Stat. § 442.320.] The health division of the state department of human resources must inform a patient that his name will be used for research unless he requests that his name be excluded from the system. [*Id.*] A patient's name must be excluded from the collection and analysis system if the patient or, if the

patient is a minor, a parent or legal guardian of the patient has requested in writing to exclude the name of the patient. [Nev. Rev. Stat. § 442.325.]

## **B. Cancer**

Nevada maintains a cancer registry requiring physicians, hospitals, medical laboratories and other facilities to report incidents of cancer to the state health division. [Nev. Rev. Stat. § 457.230.] The health division of the state department of human resources may provide a qualified researcher with data upon his compliance with conditions established under the state board of health regulations and the payment of a fee to cover the cost of providing the data. [Nev. Rev. Stat. § 457.260.] The health division may not reveal the identity of any patient whose information is reported without that patient's prior written consent. [Nev. Rev. Stat. § 457.270.]

### **Remedies and Penalties**

**Right to Sue.** A person or organization may be held liable in a civil or criminal action if he or it divulges confidential information in bad faith or with malicious purpose. [Nev. Rev. Stat. § 457.280.]

## **C. Communicable Diseases, including Sexually Transmitted Diseases**

Incidents of diagnosed or suspected communicable disease must be reported to the state health authority by health care providers, medical facilities and laboratory directors. [Nev. Rev. Stat. § 441A.150; Nev. Admin. Code ch. 441A, § 040 (defining "communicable disease" to include AIDS/HIV infection and other sexually transmitted diseases).] In general, all information of a personal nature about any person contained in these reports or provided by a person who has a communicable disease or as determined by investigation of the health authority is "confidential medical information" and may not be disclosed without that person's written consent to any person under any circumstances including pursuant to any subpoena, search warrant or discovery proceeding. [Nev. Rev. Stat. § 441A.220.] Disclosure without consent is permissible: to any person who has a medical need to know the information for his own protection; to personnel providing emergency medical services (if the information pertains to a disease significantly related to that occupation); to the victim of a sex crime in the case of a sexually transmitted disease; if disclosure is authorized or required by a specific statute; and others. [Nev. Rev. Stat. §§ 441A.220; 441A.230; 441A.320.]

## **D. Genetic Test Results**

### **1. In General**

Nevada has general, comprehensive provisions regulating the acquisition, retention and disclosure of genetic test results and information. [Nev. Rev. Stat. §§ 629.101 through 629.201.] For purposes of these provisions, genetic information is any information obtained from a genetic test. Genetic tests include any test, including laboratory tests using deoxyribonucleic acid from a person's cells or a diagnostic test, to determine the presence of abnormalities or deficiencies (including carrier status) that are either linked to physical or mental disorders or impairments; or may indicate a susceptibility to illness, disease, impairment or disorder. [Nev. Rev. Stat. § 629.111; 629.121.]

**Patient Access.** Nevada statutorily grants a person who takes a genetic test the right to inspect or obtain any genetic information included in the records of his test. [Nev. Rev. Stat. § 629.141.]

**Collection.** Generally, genetic information may not be obtained without the informed consent of the person or the person's legal guardian. [Nev. Rev. Stat. § 629.151.] Exceptions to this general rule include: for a federal, state, county or city law enforcement agency to establish the identity of a person or dead human body; for the determination of parentage or paternity of a person; for use in a study (but the identities of individuals may not be disclosed); for the determination of the presence of certain preventable inheritable disorders; or pursuant to a court order. [*Id.*]

**Retention.** Retention of genetic information must have prior informed consent of the person or the person's legal guardian. [Nev. Rev. Stat. § 629.181.] Prior informed consent is not necessary for retention of information in certain circumstances including: when necessary to conduct a criminal investigation, pursuant to a court order, or necessary for a medical facility to maintain a medical record of the person. [Nev. Rev. Stat. § 629.161.] A person who has authorized another person to retain his genetic information may request that person to destroy the genetic information. The information must be destroyed unless it is necessary to conduct a criminal investigation or for a medical facility to maintain a medical record of the person, authorized by a court order, or required by law. [Nev. Rev. Stat. § 629.161.]

**Disclosure.** Generally, it is unlawful to disclose or to compel a person to disclose the identity of a person who was the subject of a genetic test or to disclose genetic information of that person in an identifying manner without first obtaining the informed consent of that person or his legal guardian. [Nev. Rev. Stat. § 629.171.] Exceptions to this general rule include disclosure: to conduct a criminal investigation; to determine parentage; to determine the paternity of a person; pursuant to a court order; to a government law enforcement agency to establish the identity of a person; to determine the presence of certain preventable or inheritable disorders in an infant; and by an agency of criminal justice. [*Id.*]

## **Remedies and Penalties**

**Right to Sue.** Any person who suffers an injury as a result of the disclosure of his genetic information may bring a civil action for the recovery of actual damages, costs and reasonable attorney's fees. [Nev. Rev. Stat. § 629.201.]

**Fines and Penalties.** A person who violates these provisions is guilty of a misdemeanor. [Nev. Rev. Stat. § 629.191.]

## **2. Insurers**

Nevada prohibits insurers from requiring an insured person or any member of his family to take a genetic test or disclose genetic information. This prohibition covers insurers who provide health insurance, group health insurance, serve small employers, health maintenance organizations, as well as corporations that provide health insurance. Furthermore, an insurer must not determine the rates or any other aspect of the coverage or benefits for health care on a genetic test or information. [Nev. Rev. Stat. §§ 689A.417; 689B.069; 689C.198; 695B.317; 695C.207.] Insurers who



issue health insurance coverage for long-term care or disability income are not covered by this provision. [Nev. Rev. Stat. §§ 689A.417; 689B.069; 689C.198; 695B.317.]

“Genetic test” is defined as a test, including laboratory tests that use deoxyribonucleic acid (DNA) extracted from a person’s cells or a diagnostic test, to determine the presence of abnormalities or deficiencies (including carrier status) that are linked to physical or mental disorders or impairments, or indicate a susceptibility to illness, disease or impairment. [Nev. Rev. Stat. §§ 689A.417; 689B.069; 689C.198; 695B.317; 695C.207 (defining “genetic test”).]

## E. Mental Health

### 1. Generally

**Patient Access.** A client of a mental health facility operated by the government or any hospital clinic or other institution operated by any public or private entity for mental health care or treatment is entitled to inspect and obtain a copy of his records upon request and payment of copying costs. [Nev. Rev. Stat. § 433.504.] Access may be denied if a psychiatrist has made a specific entry to the contrary in a client’s records. [*Id.*]

**Restrictions on Disclosure.** The clinical record for each client in a public or private institution or facility offering mental health services is not a public record and generally may not be released without the written authorization of the client. [Nev. Rev. Stat. § 433A.360.]

The record must be released to: physicians, attorneys and social agencies as specifically authorized in writing by the client, his parent, guardian or attorney and to persons authorized by court order. [*Id.*] The information may be released without client authorization to a qualified staff member of the mental health division and other agencies established to assist those with developmental disabilities or mental illness when the administrator deems it necessary for the proper care of the client. Information may be released for statistical and evaluative purposes if the information is abstracted in such a way as to protect the identity of individual clients. [*Id.*]

Furthermore, if a patient at a state facility is transferred to the care of another facility or health care professional, the patient’s records must be forwarded in advance of his transfer. [Nev. Rev. Stat. § 433.332.] The facility is not required to obtain the patient’s consent. [*Id.*] For purposes of this section, “medical records” is defined as medical history, summary of current physical condition and discharge summary that contains information necessary for the proper treatment of the patient. [*Id.*]

A patient at a mental health facility has the right to deny access to his records to any person other than: a member of the staff of the facility; a person who has obtained the patient’s waiver; and a person who obtains a court order authorizing access. [Nev. Rev. Stat. § 433.482(8).] A patient who has been released from a hospital or mental health facility as recovered or with his mental illness in substantial remission may have the court and clinical records relating to his admission and treatment sealed (*i.e.*, placed in a separate file, not accessible to the general public) and may lawfully treat his admission as never having occurred. [Nev. Rev. Stat. §§ 433A.703; 433A.711.]

## 2. Children treated for mental health

When a child who is a patient at a state facility is transferred to the care of another facility or health care professional, the patient's records must be forwarded in advance of his transfer. [Nev. Rev. Stat. §§ 433B.200; 433B.050 (defining "client" as a child receiving mental health treatment).] The facility is not required to obtain the patient's consent. [*Id.*] For purposes of this section, "medical records" is defined as medical history, summary of current physical condition and discharge summary that contains information necessary for the proper treatment of the patient. [Nev. Rev. Stat. § 433B.200(2).] In addition, the protections provided to patient under chapter 433A apply to all persons subject to the provisions of this chapter. [Nev. Rev. Stat. § 433B.350.]

## F. Substance Abuse

A person may not disclose, use or authorize the disclosure of confidential information concerning a patient treated for alcohol and drug abuse. [Nev. Rev. Stat. § 458.055.] The records of a patient treated by an alcohol treatment facility are confidential and must not be disclosed to any person not connected with the treatment facility without the consent of the patient. [Nev. Rev. Stat. § 458.280.] A patient's records may be used without consent for research into the causes and treatment of alcoholism if the information is not published in a way that discloses any patient identifying information. [*Id.*]

Information in possession of the health division, a rehabilitation clinic or certified hospital concerning treatment of a person for narcotic addiction is confidential and privileged. [Nev. Rev. Stat. § 453.720.]

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## NEW HAMPSHIRE

New Hampshire statutorily grants a patient the right of access to his medical records in the possession of a health care provider or a health care facility. The state also restricts the disclosures these entities may make of confidential medical information. Additionally, there are privacy protections addressed in other statutory provisions governing specific entities or medical conditions.

### I. PATIENT ACCESS

#### A. Health Care Providers, Including Physicians and Hospitals

The medical information contained in the medical records in the possession of any health care provider is the property of the patient. [N.H. Rev. Stat. § 332-I:1.] Upon request, a patient is entitled to a copy of his medical records, for a cost not to exceed \$15 for the first 30 pages or 50¢ per page, whichever is greater, and reasonable costs for duplicating filmed records, such as x-rays. [*Id.*] This directive applies to any person, corporation, facility or institution either licensed by the state or lawfully providing health care services, including, but not limited to, a physician, hospital, dentist, nurse, optometrist, podiatrist, physical therapist, psychologist, and their agents and employees. [*Id.*]

#### B. Home Health Care Providers

Medical information contained in the client's record of a home health care provider is deemed to be the client's property and the client has the right to a copy of these records upon request and at a reasonable cost. [N.H. Rev. Stat. § 151:21-b(II)(i).]

#### Remedies and Penalties

**Right to Sue.** Any person who is denied access to a copy of his medical records has the right to maintain an action for equitable relief and damages. [N.H. Rev. Stat. § 151:30.]

**Fines and Penalties.** A facility that violates this access provision is liable for the sum of \$50 for each violation per day or part of a day or for all damages proximately caused by the violations, whichever is greater. [*Id.*] If a facility is found to be in contempt of a court order issued under this section, the facility is liable for the plaintiff's reasonable attorney fees and costs. [*Id.*]

#### C. Hospitals and Other Health Facilities

The medical information contained in the medical records at any licensed health care facility is the property of the patient. [N.H. Rev. Stat. § 151.21(X).] A patient is entitled to a copy of his medical records upon request. [*Id.*] The charge for copies may not exceed \$15 for the first 30 pages or 50¢ per page, whichever is greater. Copies of filmed records such as x-rays and sonograms may be copied at a reasonable cost. [*Id.*] This directive applies to any licensed hospital, infirmary or health service maintained by an educational institution, laboratory performing tests or analyses of human

samples, outpatient rehabilitation clinic, ambulatory surgical center, hospice, emergency medical care center, drop-in or walk-in care center, dialysis center, birthing center, or other entity where health care associated with illness, injury, deformity, infirmity, or other physical disability is provided, whether operated for profit, for free or at a reduced cost, and others. [N.H. Rev. Stat. §§ 151:19 (defining “facility”); 151:2 (detailing facilities that must be licensed).]

### **Remedies and Penalties**

**Right to Sue.** Any person who is denied access to a copy of his medical records has the right to maintain an action for equitable relief and damages. [N.H. Rev. Stat. § 151:30.]

**Fines and Penalties.** A facility that violates this access provision is liable for the sum of \$50 for each violation per day or part of a day or for all damages proximately caused by the violations, whichever is greater. [*Id.*] If a facility is found to be in contempt of a court order issued under this section, the facility is liable for the plaintiff’s reasonable attorney fees and costs. [*Id.*]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Health Care Providers**

Health care providers are expressly prohibited from releasing or using patient-identifiable medical information for the purpose of sales or marketing of services or products unless they have obtained the patient’s written authorization. [N.H. Rev. Stat. § 332-I:1.] A “health care provider” is any person, corporation, facility or institution either licensed by the state or lawfully providing health care services, including, but not limited to, a physician, hospital, dentist, nurse, optometrist, podiatrist, physical therapist, psychologist, and their agents and employees. [*Id.*]

### **B. Health Carriers, Including Insurance Companies and HMOs**

Any health carrier offering a managed care plan may not disclose data or information pertaining to the diagnosis, treatment, or health of a covered person obtained from the person or a provider without the express consent of the covered person. [N.H. Rev. Stat. §§ 420-J:2 (defining scope of provisions); 420-J:10.] This provision covers insurance companies, HMOs, health service corporations and others offering managed care plans. [N.H. Rev. Stat. § 420-J:3 (defining “health carrier”).]

Disclosure is allowed: to the extent it is necessary to carry out the purposes of the statutory provisions governing health carriers and as allowed by any applicable state or federal law; pursuant to statute or court order for the production of evidence or discovery; or in the event of a claim or litigation between the person and the health carrier, to the extent such information is pertinent.

### **Remedies and Penalties**

**Fines and Penalties.** Any health carrier or other organization violating any of these provisions may be subject to an administrative fine not to exceed \$2,500 per violation. [N.H. Rev. Stat. § 420-J:14.] The insurance commissioner may also suspend or revoke

the certificate of authority or license of a health carrier or other organization for any violation of this provision. [*Id.*]

### **C. Home Health Care Providers**

Home health care providers must ensure the confidential treatment of all information contained in the client's personal and clinical record. The client's written request is necessary to release personal and clinical record information to anyone not otherwise authorized by law to receive it.

#### **Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of this provision has the right to maintain an action for equitable relief and damages. [N.H. Rev. Stat. § 151:30.]

**Fines and Penalties.** A facility that violates this provision is liable for the sum of \$50 for each violation per day or part of a day or for all damages proximately caused by the violations, whichever is greater. [*Id.*] If a facility is found to be in contempt of a court order issued under this section, the facility is liable for the plaintiff's reasonable attorney fees and costs. [*Id.*]

### **D. Hospitals and Other Health Facilities**

A patient of a health facility must be ensured confidential treatment of all information contained in the patient's personal and clinical record, including that stored in an automatic data bank. [N.H. Rev. Stat. § 151:21(X).] The patient's written consent is required for the release of information to anyone not otherwise authorized by law to receive it. [*Id.*]

This provision applies to any licensed hospital, infirmary or health service maintained by an educational institution, laboratory performing tests or analyses of human samples, outpatient rehabilitation clinic, ambulatory surgical center, hospice, emergency medical care center, drop-in or walk-in care center, dialysis center, birthing center, or other entity where health care associated with illness, injury, deformity, infirmity, or other physical disability is provided, whether operated for profit, for free or at a reduced cost, and others. [N.H. Rev. Stat. §§ 151:19 (defining "facility"); 151:2 (detailing facilities that must be licensed).]

#### **Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of this provision has the right to maintain an action for equitable relief and damages. [N.H. Rev. Stat. § 151:30.]

**Fines and Penalties.** A facility that violates this provision is liable for the sum of \$50 for each violation per day or part of a day or for all damages proximately caused by the violations, whichever is greater. [*Id.*] If a facility is found to be in contempt of a court order issued under this section, the facility is liable for the plaintiff's reasonable attorney fees and costs. [*Id.*]

## **E. Insurers**

### **1. Scope**

The New Hampshire Insurance Department adopted a privacy regulation (Privacy of Consumer Financial and Health Information Regulation) to prevent the unauthorized disclosure of consumers' health information. These rules govern the practices of "licensees," (*i.e.*, all licensed insurers, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under New Hampshire Insurance Law) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [N.H. Code Admin. R. Ann. [Ins] 3001.04(q) (defining "licensee").] "Nonpublic personal health information" is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [N.H. Code Admin. R. Ann. [Ins] 3001.04(u) (defining "nonpublic personal health information").] "Health information" is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [N.H. Code Admin. R. Ann. [Ins] 3001.04(o) (defining "health information").] Insurance "consumers" are individuals who seek to obtain, obtain, or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. "Customers" are generally consumers who have a continuing relationship with the licensee. [N.H. Code Admin. R. Ann. [Ins] 3001.04(f) & (i) (defining "consumer" and "customer").]

Licensees are required to comply with the requirements of the state regulation with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [N.H. Code Admin. R. Ann. [Ins] 3005.04.]

### **2. Requirements**

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [N.H. Code Admin. R. Ann. [Ins] 3005.01.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [N.H. Code Admin. R. Ann. [Ins] 3005.02.]

The regulation permits disclosures without the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: claims administration; underwriting; quality assurance;

disease management; utilization review; fraud investigation; and actuarial, scientific, medical or public policy research. [N.H. Code Admin. R. Ann. [Ins] 3005.01.]

This regulation does not supercede existing New Hampshire law related to medical records, health or insurance information privacy. [N.H. Code Admin. R. Ann. [Ins] 3005.05.]

### **3. Remedies and Penalties**

**Fines and Penalties.** A violation of these rules is subject to the penalty provisions of N.H. Rev. Stat. Ann. § 400-A:15(III) and N.H. Rev. Stat. Ann. § 417:12. [N.H. Code Admin. R. Ann. [Ins] 3006.03.]

### **F. Pharmacists**

The sale, rental, trade, transfer, or release of patient-identifiable medical information by a pharmacist for the purpose of sales or marketing of services or products without the written authorization of the patient constitutes misconduct sufficient to support disciplinary action by the New Hampshire pharmacy board. [N.H. Rev. Stat. § 318:29 (V)(j).]

**Remedies and Penalties.** The board may, after notice and hearing, suspend the pharmacy permit. [*Id.*]

### **G. State Government**

**1. Generally.** Government-maintained records pertaining to medical files whose disclosure would constitute an invasion of privacy are exempt from the state Right-to-Know Law that grants persons the right to inspect public records. [N.H. Rev. Stat. § 91-A:5.] An agency may release information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected. [*Id.*]

#### **Remedies and Penalties**

**Right to Sue.** Any person aggrieved by a violation of this provision may petition the superior court for injunctive relief. [N.H. Rev. Stat. § 91-A:7.]

**2. Medical and scientific research information.** Personal medical data obtained for the purpose of medical or scientific research by the commissioner of public health or by anyone authorized by the commissioner to obtain such data is confidential and may be used solely for medical or scientific purposes. [N.H. Rev. Stat. § 126-A:11.] This information may not be exhibited nor its contents disclosed except as necessary to further the study or research project to which they relate. [*Id.*] Furthermore, this information is not admissible as evidence in any action in any forum. [*Id.*]

#### **Remedies and Penalties**

**Fines and Penalties.** A person who discloses confidential medical information in violation of this provision is guilty of a misdemeanor. [N.H. Rev. Stat. § 126-A:11.]

### **III. PRIVILEGES**

New Hampshire recognizes a number of health care provider-patient privileges under which a patient, in legal proceedings, may refuse to disclose and may prevent others from disclosing confidential communications made with the professional for the purpose of diagnosis and treatment. [N.H. Rules of Evidence, Rule 503 (physician-patient and psychologist-client) and N.H. Rev. Stat. § 329:26 (physician/surgeon-patient); N.H. Rev. Stat. §§ 316-A:27 (chiropractor-patient); 326-B:30 (nurse-patient); 328-F:2 and 328-F28 (allied health professional-client (including occupational therapist, physical therapist, respiratory therapist, and speech-language therapist)); 330-A:32 (mental health practitioner-client).] A health carrier that offers managed care plans, such as an HMO and insurer, may claim any statutory privilege against disclosure that the provider who furnished the information to the carrier is entitled to claim. [N.H. Rev. Stat. § 420-J:10.]

### **IV. CONDITION-SPECIFIC REQUIREMENTS**

#### **A. Cancer**

New Hampshire maintains a cancer registry for the compilation and analysis of information relating to the incidence, diagnosis, and treatment of cancer. [N.H. Rev. Stat. § 141-B:5.] All health facilities are required to provide a report to the cancer registry containing information regarding a cancer diagnosed or being treated. [N.H. Rev. Stat. § 141-B:7.] Reports that disclose the identity of an individual who was reported as having a cancer, may only be released to persons demonstrating an essential need for health-related research, except that the release is conditioned upon the personal identities remaining confidential. [N.H. Rev. Stat. § 141-B:9.]

#### **B. Communicable Diseases**

Physicians and others are required to report to the commissioner of health the name, age, address and other identifying information of those suspected of or diagnosed as having a communicable disease. [N.H. Rev. Stat. §§ 141-C:7; 141-C:8.] These reports and any other information gathered as part of a public health investigation or examination that identifies the individual investigated or examined may only be released to persons demonstrating a need that is essential to health-related research or to protecting the health of the public. [N.H. Rev. Stat. § 141-C:10.] Any release of information pursuant to this provision is conditioned upon the personal identities remaining confidential. [*Id.*]

#### **C. Genetic Test Results**

New Hampshire statutes place numerous restrictions on the use and disclosure of information derived from genetic testing. [See N.H. Rev. Stat. Ann. §§ 141-H:1 through H:6.] For purposes of these provisions, “genetic testing” is defined as a test, examination or analysis that is generally accepted in the scientific and medical communities for identifying the presence, absence or alteration of any gene or chromosome, and any report, interpretation or evaluation of such test. It does not include lawful tests undertaken for determining whether an individual meets



reasonable functional standards for a specific job or task. [N.H. Rev. Stat. Ann. § 141-H:1 (defining “genetic testing”).]

**In general.** Genetic testing may not be performed without the prior written and informed consent of the subject of the test. [N.H. Rev. Stat. § 141-H:2.] No person may disclose that an individual or a member of the individual’s family has undergone genetic testing or the results of the test without the prior written and informed consent of the individual. [*Id.*] Disclosure without the consent of the subject’s consent is permitted: as required to establish paternity; as required for reporting tests on newborns for metabolic disorders; for purposes of criminal investigations and prosecutions; and as is necessary to the functions of the office of the chief medical examiner. [*Id.*] Discussion and disclosure of genetic testing for a patient, requested of a physician by a patient, by appropriate professionals within a physician’s medical practice or hospital is not a violation of this provision. [*Id.*]

**Health Insurers.** In connection with providing health insurance, a health insurer may not require or request, directly or indirectly, any individual or his family member to undergo or reveal whether he has undergone genetic testing or the results of the testing. [N.H. Rev. Stat. § 141-H:4.]

**Employers.** Employers may not directly or indirectly solicit, require or administer genetic testing as a condition of employment. [N.H. Rev. Stat. Ann. § 141-H:3.] Employers must obtain a written and informed consent for genetic testing, and may *only* use the test information to investigate a workers compensation claim, or to determine exposure to toxic substances in the workplace. [N.H. Rev. Stat. Ann. § 141-H:3.]

### **Remedies and Penalties**

**Right to Sue.** Any person whose confidential medical information is disclosed in violation of this section may bring a civil action and recover special or general damages of not less than \$1,000 per violation, costs and reasonable legal fees. [N.H. Rev. Stat. § 141-H:6.]

## **D. HIV**

The results of an HIV test performed by a laboratory or the department of health may only be disclosed to the physician ordering the test or the person authorized by the physician, and the commissioner of health in certain circumstances. [N.H. Rev. Stat. §§ 141-F:7.] The physician must disclose the test result to the person who was tested and must offer counseling. [*Id.*]

Generally, the identity of a person tested for HIV may not be disclosed without the tested person’s written authorization. [N.H. Rev. Stat. §§ 141-F:7; 141-F:8.] All records and any other information pertaining to a person’s HIV test must be maintained by the department of health, a health care provider or any other entity, public or private, as confidential and protected from inadvertent or unwarranted intrusion. [N.H. Rev. Stat. § 141-F:8.]

If the person who has a positive test result is under 18 or is mentally incapable of understanding the ramifications of a positive test result, the physician may disclose the test result to a parent or guardian. [N.H. Rev. Stat. § 141-F:7.] Furthermore, HIV-related information may be disclosed without the person's consent to other physicians and health care providers directly involved in the health care of the person when the disclosure is necessary to protect the health of the tested person. [N.H. Rev. Stat. § 141-F:8.] This information may also be disclosed to a blood bank provided that the information remains confidential and protected. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who purposely violates these provisions and discloses the identity of a person infected by HIV is liable to such person for actual damages, court costs and attorneys' fees, plus a civil penalty of up to \$5,000 for such disclosure. [N.H. Rev. Stat. § 141-F:10.]

## **E. Mental Health Patients of Public Facilities**

Although a patient's communications with a mental health care provider are generally privileged, a community mental health center or state facility providing services to seriously or chronically mentally ill clients may disclose to a patient's family member certain information concerning the client, such as diagnosis, medications prescribed and possible manifestations that would result from failure to take the medication, if the family member lives with the client or provides direct care to the client. [N.H. Rev. Stat. § 135-C:19-a.]

The mental health center or facility must first notify the client of the specifics of the requested disclosure (including the name of the person requesting the information, the information requested and the reasons for the request), and attempt to obtain the client's written consent. [*Id.*] If consent cannot be obtained, the mental health center or facility may still disclose the information but must inform the client of the reason for the intended disclosure, the specific information to be released and the person(s) to whom the disclosure is to be made. [*Id.*] When a patient has been involuntarily admitted, a mental health facility may request and a health provider may furnish specified information about the patient (such as medications prescribed) essential to the medical or psychiatric care of the person admitted. [*Id.*] The facility must attempt to obtain the client's consent prior to requesting such information, but may request it, if necessary, absent the consent. [*Id.*] The facility may disclose such information as is necessary to identify the person and the requesting facility. [*Id.*]

## **F. Substance Abuse**

Reports or records on any client of a certified alcohol or drug abuse treatment facility may only be used for rehabilitation, research, statistical or medical purposes without the client's written consent. Information about the client is not discoverable by the state in any criminal prosecution. [N.H. Rev. Stat. § 172:8-a.]

In addition, alcohol and other drug abuse professionals may not disclose information that was acquired from clients or persons consulting with the professionals in the course of rendering professional services unless otherwise required by law. [N.H. Rev. Stat. § 330-C:12.]

## NEW JERSEY

New Jersey statutorily grants a patient the right of access to hospital records and to his medical information in the possession of HMOs and other insurance entities. The state also prohibits these entities from disclosing confidential medical information. In addition, privacy protections are addressed in statutes governing other specified entities or medical conditions.

### I. PATIENT ACCESS

#### A. Hospitals

##### 1. In General

The Health Care Facilities Planning Act grants patients access to their hospital records, including a copy of the records, upon request and payment of a reasonable cost. [N.J. Stat. Ann. § 26:2H-12.8(g).] If the patient’s physician states, in writing, that access by the patient is not advisable, access can be denied. [*Id.*] A summary of the bill of rights must be given to each patient upon admission and posted in a conspicuous place in the patient’s room and in the hospital. [N.J. Stat. Ann. § 26:2H-12.9.]

#### **Remedies and Penalties**

**Fines and Penalties.** A patient may file a written complaint against a hospital for failure to comply with these provisions either with the hospital or with the Department of Health. [N.J. Stat. Ann. § 26:2H-12.10.] The department or hospital must respond promptly in writing to the complaint. [*Id.*] If the complaint is filed with the Department of Health, the department must investigate the complaint and report its findings to the hospital and the patient. [*Id.*] Additionally, the department may assess penalties, and deny, revoke or otherwise restrict licenses to any person or entity violating or failing to comply with the provisions of this act. [N.J. Stat. Ann. § 26:2H-13.]

#### B. Insurance Entities, Including HMOs

##### 1. Scope

The access provisions of the New Jersey Insurance Information Practices Act apply to insurance institutions, including HMOs, inter-insurers and medical service corporations; insurance agents and insurance-support organizations. [N.J. Stat. Ann. §§ 17:23A-1 (detailing entities and persons covered); 17:23A-2(L) (defining “insurance institutions”).]

The Act covers “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [N.J. Stat. Ann. § 17:23A-2 (defining “personal information”).] “Medical record information” is personal information that (1) relates to the physical or mental condition, medical history or medical treatment of an individual, and (2) is obtained from a medical professional (such as physicians, pharmacists, nurses, and psychologists) or medical care institution (such

as hospitals, nursing facilities, HMOs and public health agencies), or an individual, the individual's spouse, parent or legal guardian. [N.J. Stat. Ann. § 17:23A-2 (defining "medical record information," "medical professional," and "medical-care institution").] The Act does not apply to medical information that has had all personal identifiers removed. [*Id.*]

With respect to health insurance, the rights granted by the Act extend to New Jersey residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [N.J. Stat. Ann. § 12:23A-1.]

## **2. Requirements**

Insurance institutions, including HMOs, inter-insurers and medical service corporations; insurance agents and insurance-support organizations (referred collectively to as "insurance entities" in this summary) must permit an individual to inspect and copy his personal information in person or obtain a copy of it by mail, whichever the individual prefers, within 30 business days of receiving a written request and proper identification from the individual. [N.J. Stat. Ann. § 17:23A-8.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [N.J. Stat. Ann. § 17:23A-8(a)(2).]

**Fees.** The insurance entity can impose a reasonable fee to cover copying costs. [N.J. Stat. Ann. § 17:23A-8(d).]

In addition to giving the individual a copy of his personal information, the insurance entity must also give the individual a list of the persons to whom it has disclosed such personal information within two years prior to the request for access, if that information is recorded. If such an accounting of disclosures is not recorded, the entity must inform the individual of the names of those persons to whom it normally discloses personal information. [N.J. Stat. Ann. § 17:23A-8(a)(3).]

Medical record information that was provided to the insurance entity by a medical professional or medical care institution that is requested may be supplied either directly to the requesting individual or to a medical professional designated by the individual, at the option of the insurance entity. [N.J. Stat. Ann. § 17:23A-8.]

**Right to Amend.** A person has a statutory right to have any factual error corrected and any misrepresented or misleading entry amended or deleted, in accordance with stated procedures. [N.J. Stat. Ann. § 17:23A-9.] Within 30 business days from the date of receipt of a written request, the insurance institution, agent or support organization must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) notify the individual of its refusal to make the correction, amendment or deletion, the reasons for the refusal, and the individual's right to file a statement of disagreement. [*Id.*]

If the individual files a statement of disagreement, the insurance institution, agent or support organization must file that statement with the disputed personal information and provide a means by which anyone reviewing the personal information will be made

aware of the individual's statement and have access to it. The statement must be provided with the personal information that is the subject of disagreement in any subsequent disclosure. [*Id.*]

If the insurance entity makes the correction, amendment, or deletion as requested, it must notify the individual in writing and notify: any person designated by the individual who may have, within the preceding 2 years, received the personal information; any insurance support organization whose primary source of personal information is insurance institutions if the organization has systematically received personal information from the institution within the preceding seven years; and any insurance organization that provided the personal information that has been corrected, amended or deleted. [*Id.*]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose rights under this statute are violated has the right to file a civil action seeking equitable relief within 2 years from the date that the alleged violation is or should have been discovered. [N.J. Stat. Ann. § 17:23A-20.] The court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Fines and Penalties.** Additionally, the Insurance Commissioner may hold hearings and impose administrative remedies, including, in the case of knowing violations, monetary fines of not more than \$500 per violation but not to exceed \$10,000 in the aggregate for multiple violations. [N.J. Stat. Ann. § 17:23A-18.] The commissioner may also impose a cease and desist order. [N.J. Stat. Ann. § 17:23A-17.] A person who violates a cease and desist order may, after notice and hearing and upon order of the commissioner, be subject to a fine not more than \$10,000 per violation; a fine not more than \$50,000 for violations that have occurred with such frequency as to constitute a general business practice; or suspension or revocation of the insurance institution's or agent's license. [N.J. Stat. Ann. § 17:23A-18.]

## **C. Nursing Homes**

Every resident has the right to obtain complete and current information concerning his medical diagnosis, treatment and prognosis from his own physician or the physician attached to the nursing home. [N.J. Stat. Ann. § 30:13-5(g).] The information must be provided in terms and language the resident can reasonably be expected to understand. [*Id.*] If the physician deems it medically inadvisable to give such information to the resident, he must record the reason for such denial in the resident's medical record and must inform the resident's next-of-kin or guardian. [*Id.*]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Dental Plans**

Information pertaining to the diagnosis, treatment or health of any enrollee obtained by a dental plan organization from the enrollee or any dentist is confidential and may not be disclosed without the express consent of the enrollee. [N.J. Stat. Ann. § 17:48D-21.] Disclosure without the enrollee's consent is allowed to the extent it is necessary to carry out the purposes of the statutory provisions governing dental plan organizations,

pursuant to statute or court order for the production of evidence or discovery, or in the event of claim or litigation between the person and the dental plan, to the extent such information is pertinent. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A dental plan organization that violates this provision, or neglects, fails or refuses to comply with this provision is liable for a civil penalty of no less than \$500 and no more than \$10,000 per violation, which may be sued for and recovered by the Commissioner of Insurance. [N.J. Stat. Ann. § 17:48D-18.]

## **B. HMOs**

Generally, HMOs may not disclose any information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from that person or from any provider without the patient’s or applicant’s express consent. [N. J. Stat. Ann. § 26:2J-27.] Disclosure without the patient’s consent is allowed to the extent it is necessary to carry out the purposes of the statutory provisions governing HMOs, pursuant to statute or court order for the production of evidence or discovery, or in the event of claim or litigation between the person and the HMO, to the extent such information is pertinent. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A person who violates this provision is considered a “disorderly person” and is prosecuted and punished pursuant to the “disorderly persons law.” [N.J. Stat. Ann. § 26:2J-24.] Additionally, if the Commissioner of Insurance has reason to believe that violations of the provisions governing HMOs, including the non-disclosure provisions, have occurred he may hold hearings to arrive at an adequate and effective means of correcting or preventing the violations. [*Id.*] The commissioner may issue an order directing the HMO to cease and desist from engaging in the prohibited conduct or institute a proceeding to obtain injunctive or other appropriate relief. [*Id.*] Violators may be fined not less than \$250 or more than \$10,000 for each day that the HMO is in violation of this section. [*Id.*]

## **C. Hospitals**

The Health Care Facilities Planning Act grants a hospital patient the statutory right to privacy and confidentiality of all records pertaining to his treatment, except as otherwise provided by law or a third party payment contract. [N.J. Stat. Ann. § 26:2H-12.8(g).]

### **Remedies and Penalties**

**Fines and Penalties.** A patient may file a written complaint against a hospital for failure to comply with these provisions either with the hospital or with the Department of Health. [N.J. Stat. Ann. § 26:2H-12.10.] The department or hospital must respond promptly in writing to the complaint. [*Id.*] If the complaint is filed with the Department of Health, the department must investigate the complaint and report its findings to the hospital and the patient. [*Id.*] Additionally, the department may assess penalties, and deny, revoke or otherwise restrict licenses to any person or entity violating or failing to comply with the provisions of this act. [N.J. Stat. Ann. § 26:2H-13.]

## **D. Insurance Entities, Including HMOs**

### **1. Scope**

The New Jersey Insurance Information Practices Act (IIPA) applies to insurance entities including HMOs, inter-insurers, medical service corporations, insurance agents and insurance support organizations. [N.J. Stat. Ann. §§ 17:23A-1 (detailing entities and persons covered); 17:23A-2(L) (defining “insurance institutions”).]

The Act covers “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [N.J. Stat. Ann. § 17:23A-2 (defining “personal information”).] “Medical record information” is personal information that (1) relates to the physical or mental condition, medical history or medical treatment of an individual, and (2) is obtained from a medical professional (such as physicians, pharmacists, nurses, and psychologists) or medical care institution (such as hospitals, nursing facilities, HMOs and public health agencies), or an individual, the individual’s spouse, parent or legal guardian. [N.J. Stat. Ann. § 17:23A-2 (defining “medical record information”).] The Act does not apply to medical information that has had all personal identifiers removed. [*Id.*]

With respect to health insurance, the rights granted by the Act extend to New Jersey residents who are the subject of the information collected, received or maintained in connection with insurance transactions, and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [N.J. Stat. Ann. § 12:23A-1.]

### **2. Requirements**

#### **a. Authorizations for Obtaining Health Information from Others**

If an insurance entity uses an authorization form to obtain health information in connection with an insurance transaction, the authorization form must conform to the requirements of the IIPA. [N.J. Stat. Ann. §§ 17:23A-6 and 17-23A-13.] The authorization form must be written in plain language; must be dated; specify the types of persons authorized to disclose information concerning the individual; specify the nature of the information authorized to be disclosed; identify who is authorized to receive the information; specify the purposes for which the information is collected; and specify the length of time the authorization shall remain valid. [N.J. Stat. Ann. § 17:23A-6.] The length of time the authorization remains valid varies with the purpose of obtaining the requested information. An authorization signed in support of an application for health insurance remains valid for 30 months while an authorization signed for the purpose of collecting information in connection with a claim for health benefits is effective for the term of coverage of the policy. [*Id.*]

#### **b. Requirements and Exceptions for Authorizations To Disclose to Others**

Generally, an insurance entity may not disclose medical information about a person that it collected or received in connection with an insurance transaction without that person’s written authorization. [N.J. Stat. Ann. § 17-23A-13.] Authorizations submitted by those *other* than insurance entities must be in writing, signed and dated. [*Id.*] These authorizations are effective for one year. [*Id.*]



An insurance entity may not disclose information to another insurance entity pursuant to an authorization form unless the form meets the detailed requirements of the statute. [*Id.*] See “Authorizations for Obtaining Health Information from Others” above.

The Act specifically requires an insurance entity to obtain an individual’s authorization prior to disclosing medical-record information for marketing purposes. [N.J. Stat. Ann. § 17:23A-13(k).]

**Authorization Exceptions.** There are numerous circumstances under which an insurance entity can disclose information without the individual’s authorization including: for the purpose of verifying insurance coverage or benefits; to an insurance regulatory authority; to conduct business when the disclosure is reasonably necessary; to law enforcement agencies in order to prevent or prosecute fraud; in response to a facially valid search warrant or subpoena or other court order; as otherwise permitted or required by law; and others. [N.J. Stat. Ann. § 17-23A-13.]

### **c. Notice Requirements**

Some types of insurance entities (insurance institutions and insurance agents) must provide to all applicants and policyholders written notice of their information practices. [N.J. Stat. Ann. § 17:23A-4.] The notice must be in writing and must state:

- ∞ The categories of personal information that may be collected from persons other than the individual proposed for coverage;
- ∞ The type of disclosure permitted by the Act and the circumstances under which such disclosure may be made without prior authorization (to the extent that the disclosures occur with such frequency as to indicate a general business practice);
- ∞ A description of the rights to see, copy and amend personal information and how those rights may be exercised;
- ∞ Other specified items.

[*Id.*] The insurance entity has the option of providing an abbreviated notice. [*Id.*]

## **3. Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of these provisions has a statutory right to bring a civil action for actual damages sustained as a result of the disclosure within 2 years from the date that the alleged violation is or should have been discovered. [N.J. Stat. Ann. § 17:23A-20.] In such an action, the court may award costs and reasonable attorney’s fees to the prevailing party. [*Id.*]

**Fines and Penalties.** Additionally, the Insurance Commissioner may hold hearings and impose administrative remedies, including, in the case of knowing violations, monetary fines of not more than \$500 per violation but not to exceed \$10,000 in the aggregate for multiple violations. [N.J. Stat. Ann. § 17:23A-18.] The commissioner may also impose a cease and desist order. [N.J. Stat. Ann. § 17:23A-17.] A person who violates a cease and desist order may, after notice and hearing and upon order of the commissioner, be subject to a fine not more than \$10,000 per violation; a fine not more than \$50,000 for violations that have occurred with such frequency as to

constitute a general business practice; or suspension or revocation of the insurance institution's or agent's license. [N.J. Stat. Ann. § 17:23A-18.]

## **E. Nursing Homes**

A nursing home resident has the right to confidentiality and privacy concerning his medical condition and treatment. [N.J. Stat. Ann. § 30:13-5(g).] Medical records may only be disclosed to another nursing home or health care facility on transfer, or as required by law or third-party payment contracts. [*Id.*]

## **F. Prepaid Prescription Service Organizations**

Generally, all information relating to the diagnosis or treatment of an enrollee or prospective enrollee obtained by a prepaid prescription service organization is confidential and may not be disclosed without the consent of the enrollee or prospective enrollee. [N.J. Stat. § 17:48F-28.] Disclosure without the patient's consent is allowed to the extent it is necessary to carry out the statutory provisions governing these organizations; pursuant to statute or court order for the production of evidence; or for a claim or litigation between an enrollee or a prospective enrollee and the organization where the information is relevant. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** The commissioner may impose an administrative penalty not less than \$1,000 or more than \$30,000 per violation for unauthorized disclosures. [N.J. Stat. § 17:48F-26.] The commissioner may also suspend or revoke the prepaid prescription service organization's certificate of authority or impose a cease and desist order. [N.J. Stat. §§ 17:48F-27; 17:48F-18.]

## **III. PRIVILEGES**

New Jersey recognizes a number of health care provider-patient privileges that allow a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and the health care provider. [N.J. Stat. Ann. §§ 2A:84A-22.1; 2A:84A-22.2 (patient-physician); 45:14B-28 (psychologist-client); 45:8B-29 (marriage/family therapist-client).] HMOs, dental plan organizations, and prepaid prescription service organizations are entitled to claim any statutory privileges against disclosure that the provider of the information is entitled to claim. [N.J. Stat. Ann. §§ 17:48D-21; 17:48F-28; and 26-2J-27.]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Birth Defects**

The State Department of Health maintains a birth defects registry. [N.J. Stat. Ann. § 26:8-40.21.] Records of the registry are confidential, are to be used only by the Department of Health and other agencies designated by the Commissioner of Health, and may not otherwise be divulged or made public. [N.J. Stat. Ann. § 26:8-40.23.]

## **B. Cancer**

New Jersey maintains a cancer registry, with mandatory reporting requirements, for the purpose of recognizing, preventing, curing and controlling such diseases. [N.J. Stat. Ann. §§ 26:2-105; 26:2-106.] Reports made to the cancer registry are to be used only by the State Department of Health and other agencies designated by the Commissioner of Health, and may not be divulged or made public. [N.J. Stat. Ann. § 26:2-107.]

## **C. Genetic Information: In General**

The Genetic Privacy Act [N.J. Stat. §§ 10:5-43 through 10:5-49] generally governs the collection, retention and disclosure of genetic information.

### **1. Patient Access and Amendment**

An individual or an individual's representative, promptly upon request, may inspect, request correction of and obtain genetic information from the records of the individual. This provision does not apply in the case of a policy of life insurance or a disability income insurance contract, which is governed by the provisions of the insurance title. [N.J. Stat. § 10:5-46. *See* N.J. Stat. § 17:23A-1 et seq (for provisions governing amendment of insurance information and discussion below at "Genetic Information: Life and Disability Insurance").]

### **2. Collection**

In general, genetic information is personal information and may not be collected without the individual's informed consent. [N.J. Stat. § 10:5-45.] There are, however, a limited number of exceptions to this rule. Genetic information may be collected without the individual's consent:

- ∞ By a state, county, municipal or federal law enforcement agency for the purposes of establishing the identity of a person in the course of a criminal investigation or prosecution;
- ∞ To determine paternity;
- ∞ Pursuant to the provisions of the "DNA Database and Databank Act of 1994" (N.J. Stat. 53:1-20.17 et seq.);
- ∞ To determine the identity of deceased individuals;
- ∞ For anonymous research where the identity of the subject will not be released;
- ∞ Pursuant to newborn screening requirements established by State or federal law; or
- ∞ As authorized by federal law for the identification of persons.

[N.J. Stat. § 10:5-45.]

### **3. Retention**

Similarly, no person may retain an individual's genetic information without the individual's informed consent unless:

- ∞ Retention is necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding;
- ∞ Retention is necessary to determine paternity;
- ∞ Retention is authorized by order of a court of competent jurisdiction;
- ∞ Retention is made pursuant to the provisions of the "DNA Database and Databank Act of 1994" (N.J. Stat. 53:1-20.17 et seq.); or

- ∞ Retention of information is for anonymous research where the identity of the subject will not be released.

[N.J. Stat. § 10:5-46.]

#### **4. Destruction**

The DNA sample of an individual from which genetic information has been obtained must be destroyed promptly upon the specific request of that individual or the individual's representative, unless retention is necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding or is authorized by order of a court of competent jurisdiction. [N.J. Stat. § 10:5-46.] A DNA sample from an individual who is the subject of a research project must be destroyed promptly upon completion of the project or withdrawal of the individual from the project, whichever occurs first, unless the individual or the individual's representative directs otherwise by informed consent. [*Id.*] Similarly, a DNA sample from an individual for insurance or employment purposes must be destroyed promptly after the purpose for which the sample was obtained has been accomplished unless retention is authorized by order of a court of competent jurisdiction. [*Id.*]

#### **5. Disclosure**

In general, regardless of the source of genetic information, including information received from an individual, a person may not disclose or be compelled to disclose the identity of an individual upon whom a genetic test has been performed or individually identifiable genetic information. [N.J. Stat. § 10:5-47.] The information may be disclosed with the written, signed informed consent of the subject. [*Id.*] Furthermore, genetic information may be disclosed without the consent of the individual where disclosure is:

- ∞ Necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding;
- ∞ Necessary to determine paternity;
- ∞ Authorized by order of a court of competent jurisdiction;
- ∞ Made pursuant to the provisions of the "DNA Database and Databank Act of 1994;"
- ∞ For the purpose of furnishing genetic information relating to a decedent for medical diagnosis of blood relatives of the decedent;
- ∞ For the purpose of identifying bodies;
- ∞ Pursuant to newborn screening requirements established by State or federal law;
- ∞ Authorized by federal law for the identification of persons; or
- ∞ By an insurer pursuant to the requirements of the insurance laws (N.J. Stat. § 17:23A-1 et seq.).

[N.J. Stat. § 10:5-47.]

Recipients of this genetic information are bound by these provisions and may only disclose it with the individual's written consent or as otherwise permitted by the statute. [*Id.*]

#### **6. Notice**

A person who requires or requests genetic testing or who receives the results of a genetic test must provide the test subject with notice that the test was performed and

that the records, results or findings were received (unless the subject's consent indicates otherwise) [N.J. Stat. § 10:5-48.] The notice must state that the information may not be disclosed to any person without the written consent of the person tested, unless disclosure is made pursuant to one of the exceptions. [*Id.*]

## **7. Remedies and Penalties**

**Right to Sue.** Any person who discloses an individual's genetic information in violation of the Genetic Privacy Act is liable to the individual for actual damages, including damages for economic, bodily, or emotional harm. [N.J. Stat. § 10:5-49.]

**Fines and Penalties.** Any person who violates these provisions may be punished by a fine of \$1,000, a 6-month prison term, or both. [N.J. Stat. § 10:5-49.] A person who willfully discloses an individual's genetic information to any third party in violation of this Act may be punished by a fine of \$5,000, a 1-year prison term, or both. [*Id.*]

## **D. Genetic Information: Employers**

Employers may not discriminate against an individual on the basis of his genetic information or due to his refusal to submit to a genetic test or make available the results of a genetic test. [N.J. Stat. Ann. § 10:5-12.] Prohibited acts include: refusing to hire or employ, discharging, requiring to retire, or discriminating in compensation or in terms, conditions or privileges of employment. [*Id.*] For purposes of this provision, "genetic information" means the information about genes, gene products or inherited characteristics that may derive from an individual or family member. [N.J. Stat. Ann. § 10:5-5.] "Genetic test" means a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to identify a predisposing genetic characteristic. [*Id.*] And "genetic characteristic" is defined as any inherited gene or chromosome, or alteration thereof, that is scientifically or medically believed to predispose an individual to a disease, disorder or syndrome, or to be associated with a statistically significant increased risk of development of a disease, disorder or syndrome. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** A person claiming to be aggrieved by an unlawful employment practice may initiate suit in Superior Court to compel compliance with any of the provisions of this act, or to prevent violations or attempts to violate any such provisions. [N.J. Stat. Ann. §§ 10:5-13; 10:5-14.1.] Alternatively, the individual can file a complaint with the Division of Civil Rights. [N.J. Stat. Ann. § 10:5-5.]

**Fines and Penalties.** Violations are punishable by a fine not to exceed \$10,000 if the person has not committed any prior violation within the prior 5-year period. The fine may be increased to \$25,000 if the respondent committed one other violation within the prior 5-year period and may escalate to \$50,000 if the person has committed two or more violations within the prior 7-year period. [N.J. Stat. Ann. § 10:5-14.1a.]

## **E. Genetic Information: Limited Benefit, Life and Disability Insurance**

An insurer may not discriminate against any individual on the basis of genetic information or the refusal to submit to a genetic test or make available the results of a genetic test in the issuance, withholding, extension or renewal of any hospital confinement or other supplemental limited benefit insurance. [N.J. Stat. Ann. § 17B:30-12.]

Similarly, an insurer may not make or permit any unfair discrimination against an individual in the application of the results of a genetic test or genetic information in the issuance, withholding, extension or renewal of a policy of life insurance, an annuity, disability income insurance contract or credit accident insurance coverage. [*Id.*] For purposes of these provisions, “genetic test” means a test to determine the presence or absence of an inherited genetic characteristic, including tests of nucleic acids such as DNA, RNA, mitochondrial DNA, chromosomes or proteins in order to identify a genetic characteristic. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Violations are punishable by a fine not to exceed \$1,000 per violation. If the person knew or reasonably should have known he was in violation, he may be fined not more than \$5,000 per violation. The commissioner of insurance may also impose a cease and desist order. [N.J. Stat. Ann. § 17B:30-17.] A person who violates a cease and desist order is liable for a fine not to exceed \$5,000 for each violation. [N.J. Stat. Ann. § 17B:30-20.]

## **F. HIV/AIDS**

### **1. Scope**

The Aids Assistance Act is a comprehensive statutory scheme for identifying cases and preventing the spread of HIV/AIDS. [N.J. Stat. Ann. §§ 26:5C-1 through 26:5C-18.] Under the statute, a record containing identifying information about a person who has or is suspected of having AIDS/HIV is confidential and may not be disclosed without the prior written consent of the person except for the purposes authorized by the Act. [N.J. Stat. Ann. §§ 26:5C-7; 25:5C-8.] Records covered include those maintained by: state and local health departments; a provider of health care or a health care facility (including hospitals, outpatient clinics and others); a laboratory; a blood bank; a third-party payor (such as an insurance company); or any other institution or person. [N.J. Stat. Ann. §§ 26:5C-7; 26-2H-2 (defining “health care facility”).]

### **2. Requirements**

Disclosure *without* consent is allowed to: qualified scientific researchers who may not disclose an individual’s identity in any manner following review of the research protocol by an institutional review board pursuant to federal research regulations (45 C.F.R. § 46.101 et seq.); to qualified personnel for the purpose of conducting management or financial audits or program evaluation, but only if the identifying information is vital to the audit or evaluation; to personnel directly involved in medical education or in the diagnosis and treatment of the person; to the department of health

as required by state or federal law; and to others as authorized by state or federal law. [N.J. Stat. Ann. §§ 26:5C-8; 26:2H-2.]

Disclosure may also be allowed by court order pursuant to an application showing good cause, *i.e.*, when a court has determined that the public interest and need for disclosure outweighs the injury to the person who is the subject of the record, to the physician-patient relationship, and to the services offered by the Aids Assistance program. [N.J. Stat. Ann. § 26:5C-9.] Upon granting the order, the court must impose appropriate safeguards to prevent unauthorized disclosures. [*Id.*] A court may authorize disclosure of a person's record for the purpose of conducting an investigation of or a prosecution for a crime of which the person is suspected only if the crime is a first degree crime and there is a reasonable likelihood that the record in question will disclose material information or evidence of substantial value. Otherwise, a protected record may not be used to initiate or substantiate any criminal or civil charges against the person who is the subject of the record. [*Id.*]

Recipients of confidential AIDS/HIV records are expressly prohibited from redisclosing the information unless they have met the other provisions of the Act. [N.J. Stat. Ann. § 26:5C-11.]

## **G. Mental Health**

### **1. Psychologists: Disclosures to Third Party Payors**

A patient treated by a licensed, practicing psychologist may be requested to authorize the psychologist to disclose certain confidential information to obtain payment from the third-party payor. [N.J. Stat. Ann. § 45:14B-32.] The information to be disclosed must be limited to: administrative information; diagnostic information; the status of the patient (voluntary or involuntary; inpatient or outpatient); the reason for continuing psychological services, limited to an assessment of the patient's current level of functioning and level of distress (both described by the terms mild, moderate, severe or extreme); and a prognosis, limited to the estimated minimal time during which treatment might continue. [*Id.*]

The authorization must be in writing, specify the nature of information, specify to whom the information may be disclosed, specific purposes for which the information may be used, state that the consent is subject to revocation at any time and be signed by the patient or the patient's parent or legal guardian. [N.J. Stat. Ann. § 45:14B-36.] A patient may revoke the authorization at any time. [N.J. Stat. Ann. § 45:14B-41.] Such revocation is valid upon receipt. [*Id.*] Information disclosed to a third-party payor may not be further disclosed by the third-party payor without valid authorization. [N.J. Stat. Ann. § 45:14B-39.]

New Jersey has statutory provisions establishing a detailed independent review procedure should the third party payor question whether the treatment is usual or customary. [See N.J. Stat. Ann. §§ 45:14B-33 and 45:14B-34.]

## Remedies and Penalties

**Fines and Penalties.** A person who negligently violates these provisions is liable for actual damages sustained by the patient plus costs and reasonable attorney's fees. [N.J. Stat. Ann. § 45:14B-42.] Reckless or intentional violators are be liable for actual damages sustained in an amount not less than \$5,000, plus the costs and reasonable attorney's fees. [*Id.*]

## 2. Institutionalized Mentally Ill

All certificates, applications, records, and reports made in conjunction with any individual presently or formerly receiving services in a non-correctional institution and directly or indirectly identifies that individual must be kept confidential and may not be disclosed by any person without the consent of the patient (or his legal guardian), except in limited circumstances. [N.J. Stat. Ann. § 30:4-24.3.] For example, disclosure may be made without the consent of the patient:

- ∞ As necessary to carry out any of the statutory provisions related to institutionalization;
- ∞ Upon a court's determination that disclosure is necessary for the conduct of proceedings before it and that failure to make such disclosure would be contrary to the public interest; or
- ∞ When necessary to conduct an investigation into the financial ability to pay of any person receiving services from the State Department of Human Services or his chargeable relatives pursuant to N.J. Stat. Ann § 30:1-12.

[*Id.*]

Upon proper inquiry, disclosure of information as to a patient's current medical condition may be made to any relative or friend or to the patient's personal physician or attorney if it appears that the information is to be used directly or indirectly for the benefit of the patient. [*Id.*] Additionally, the professional staff of a community agency under contract with the Division of Mental Health Services in the Department of Human Services, or of a screening service, short-term care or psychiatric facility may disclose information that is relevant to a patient's current treatment to the staff of another such agency. [*Id.*]

## H. Venereal Disease

Under New Jersey law, no person may disclose the name or identity of another person known or suspected of having venereal disease except to the person's physician, to a health authority or, in limited circumstances, to a prosecuting officer or to the court. [N.J. Stat. Ann. § 26:4-41.] The affected person's physician or the health authority may disclose this information "when and only when" disclosure is necessary to protect the health or welfare of the person, his family, or the public. [*Id.*] Documents, records or reports that contain identifying information may not be open to inspection except to the Department of Health (and in limited circumstances a prosecuting officer and the court). Hospital records containing this information may be reviewed in connection with any claim for compensation or damages for personal injury or death. [N.J. Stat. Ann. § 26:4-41.]



## **I. Substance Abuse**

The treatment records of patients are confidential and may only be made available upon proper judicial order. [N.J. Stat. Ann. § 26:2B-20.]

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## **NEW MEXICO**

New Mexico statutorily grants individuals receiving services in a mental health or developmental disability facility the right of access to their medical records. New Mexico does not have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### **I. PATIENT ACCESS**

New Mexico generally does not statutorily grant individuals the right of access to their medical records. The exception to this rule is individuals who receive mental health or developmental disability services who have a statutory right to see and copy their records. For a full discussion of the rights of these individuals please see the discussion in Section III, Condition Specific Requirements, Mental Health below.

### **II. RESTRICTIONS ON DISCLOSURE**

#### **A. Counselors and Therapist Practitioners**

A counselor or therapist practitioner generally may not disclose any information acquired from a person who has consulted him in his professional capacity without the client's written consent. [N.M. Stat. Ann. § 61-9A-27 (repealed effective July 1, 2006).] Disclosure may be made without the client's consent: when the communication reveals the contemplation of a crime or act harmful to the client or another; when the information indicates that the person was the victim or subject of a crime required to be reported by law; or if the client initiates charges against the counselor or therapist. [*Id.*] Additionally, the counselor or therapist may disclose this information in a court hearing concerning adoption, child abuse, child neglect or other matters pertaining to the welfare of children. [*Id.*]

#### **B. HMOs**

Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from that person or a provider without the enrollee's/applicant's express consent. [N.M. Stat. Ann. § 59A-46-27.] Disclosure without the enrollee's/applicant's consent is permitted: to the extent necessary to carry out the purposes of the HMO Law; pursuant to statute or a court order for the discovery or production of evidence; or in order for the HMO to defend itself against claims or litigation by the enrollee/applicant, to the extent that the information is pertinent. [*Id.*]

## Remedies and Penalties

**Fines and Penalties.** The superintendent of insurance has a number of administrative remedies that are available, after proper procedure, for violations of the Health Maintenance Organization Act, including the confidentiality provisions. If the superintendent finds that the HMO has substantially failed to comply with the Act, he may revoke or suspend the HMO's certificate of authority. [N.M. Stat. Ann. § 59A-46-20.] In lieu of (or in addition to) suspension or revocation of the HMO's certificate of authority, the superintendent may impose administrative penalties not to exceed \$5,000 per violation. [*Id.*] The penalty may increase up to \$10,000 for each willful or intentional violation. [N.M. Stat. Ann. §§ 59A-46-20; 59A-46-25.] The fine may be increased by an amount equal to the sum that the superintendent calculates to be the damages suffered by enrollees and members of the public. [N.M. Stat. Ann. § 59A-46-25.]

The superintendent also may issue an order directing an HMO to cease and desist from engaging in any action or practice in violation of the HMO Act including the confidentiality provisions. [N.M. Stat. Ann. § 59A-46-25.] If he elects not to issue a cease and desist order, or in the event of noncompliance with an order, the superintendent may institute a proceeding to obtain injunctive relief or other appropriate relief in the Santa Fe county district court. [*Id.*]

## C. Insurers

### 1. Scope

The Insurance Division of the New Mexico Public Regulation Commission issued rules that govern the practices of insurance “licensees,” with respect to the disclosure of “nonpublic personal health information” of insurance consumers and customers. [N.M. Admin. Code tit. 13, § 13.1.3.7(Q) (defining “licensee”).] These rules are intended “to afford individuals greater privacy protections than those provided in the Gramm-Leach-Bliley Financial Modernization Act” (a federal statute codified at 15 U.S.C. 6716 et seq.) [N.M. Admin. Code tit. 13, § 13.1.3.6.]

“Nonpublic personal health information” is any individually identifiable information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [N.M. Admin. Code tit. 13, § 13.1.3.7(O) (defining “health information”) & (U) (defining “nonpublic personal health information”).] “Insurance “consumers” are individuals who seek to obtain, obtains, or has obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. “Customers” are generally consumers who have a continuing relationship with the licensee. [N.M. Admin. Code tit. 13, § 13.1.3.7(F), (I) & (J) (defining “consumer,” “customer” and “customer relationship”).]

Licensees must comply with the requirements of these rules with respect to health information, unless they meet the requirements of the federal privacy rule

promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [N.M. Admin. Code tit. 13, § 13.1.3.22.]

## 2. Requirements

The rules generally prohibit the disclosure of any nonpublic personal health information about a consumer or customer to any party, including affiliates, without authorization. [N.M. Admin. Code tit. 13, § 13.1.3.14.] A licensee may allow partial authorizations, *i.e.*, it may permit consumers to select specific information to be disclosed or to identify select recipients of information [*Id.*]

**Authorization Requirements.** A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); and notice that the consumer or customer may revoke the authorization at any time and the procedure for revocation. [N.M. Admin. Code tit. 13, § 13.1.3.20.]

**Authorization Exceptions.** The regulation permits disclosures *without* the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: account administration; claims processing; underwriting; quality assurance; case management; disease management; utilization review; fraud reporting and investigation; participation in research projects; any disclosure activity permitted without authorization under the federal Health Insurance Portability and Accountability Act Privacy Rules; and any other activity otherwise permitted by law, required pursuant to governmental reporting authority, or to comply with legal process. [N.M. Admin. Code tit. 13, § 13.1.3.18.]

**Restrictions on Redisclosure.** If a licensee receives nonpublic personal health information from an affiliate or nonaffiliated third party or vice versa under an authorization exception specified in the rule, the recipient of that information may use and disclose it pursuant to an exception under the rule in the ordinary course of business to carry out the activity covered by the exception. If a licensee does not receive the information under one of the rule's exceptions, then the licensee may only disclose that information if the disclosure would be lawful if made directly to that person by the individual from whom the licensee received the information. [N.M. Admin. Code tit. 13, § 13.1.3.15.] An affiliate or nonaffiliated third party who receives nonpublic personal health information from a licensee pursuant to an authorization may disclose that information to another person only if the disclosure would be lawful if the licensee made it directly to that person. [*Id.*]

This rule does not supercede existing New Mexico law related to medical records, health or insurance information privacy. [N.M. Admin. Code tit. 13, § 13.1.3.23.]

## D. Providers, Health Facilities, Government Agencies and Others

All patient-identifying health information is strictly confidential and is not to be a matter of public record or accessible to the public even though the information is in the custody of, or contained in, the records of a licensed health facility or staff committee of such a facility, a governmental agency or its agent, a state educational institution, or a duly organized state or county association of licensed physicians or dentists. [N.M. Stat. Ann. § 14-6-1.] A custodian of this patient-identifying information is permitted to furnish it upon request to any of these enumerated agencies or entities without any potential liability for damages. [*Id.*] Statistical studies and research reports based upon confidential information may be published or furnished to the public, but these studies and reports may not in any way identify individual patients nor in any way violate the privileged or confidential nature of the relationship and communications between practitioner and patient. [*Id.*] The statute states that this section does not affect the status of original medical records of individual patients or the rules of confidentiality and accessibility applicable to these records. [*Id.*]

## E. State Government

**In General.** Government-maintained records pertaining to physical or mental examinations and medical treatment of persons confined to any institution are not accessible to the general public under the state's Inspection of Public Records Act. [N.M. Stat. Ann. § 14-2-1.]

**Department of Health.** The files and records of the department of health that give identifying information about individuals who have received, or are receiving, treatment, diagnostic services, or preventive care for diseases, disabilities, or physical injuries from the department, are generally confidential and are not open to inspection. [N.M. Stat. Ann. § 24-1-20.] Disclosure of these records is permitted to the secretary of health and to authorized employees of the department of health for use in connection with a governmental function. [*Id.*] All information voluntarily provided to the department in connection with authorized medical research studies for the purpose of reducing the morbidity or mortality from any cause or condition of health is confidential and may be used only for the purposes of medical research. [*Id.*] This information is not admissible as evidence in any action of any kind in any court or before any administrative proceeding or other action. [*Id.*]

### Remedies and Penalties

**Fines and Penalties.** A person who discloses confidential information in violation of this section is guilty of a petty misdemeanor, punishable by a fine not to exceed \$100, imprisonment not to exceed 6 months, or both. [N.M. Stat. Ann. §§ 24-1-20; 24-1-21 (specifying penalties for petty misdemeanors).]

## II. PRIVILEGES

New Mexico recognizes a number of health care provider-patient privileges that allow a patient, in a legal proceeding, to refuse to disclose and to prevent others from disclosing confidential communications made with health care providers for the purpose of diagnosis and treatment. [N.M.R. of Evid. 11-504 (physician and

psychotherapist); R. 11-509 (social services worker); N.M. Stat. Ann. §§ 31-25-3 (victim counselor); 61-8-15 (repeal effective July 1, 2004) (podiatrist); 61-9-18 (repeal effective July 1, 2004) (psychologist).] The patient’s physician or psychotherapist may claim the privilege on behalf of the patient. [N.M.R. of Evid. 11-504.] An HMO is entitled to claim any statutory privilege against disclosure that the provider who furnished such information to the HMO can claim. [N.M. Stat. Ann. § 59A-46-27.]

### III. CONDITION-SPECIFIC REQUIREMENTS

#### A. Genetic Information

Under the Genetic Information Privacy Act, a person generally may not obtain genetic information or samples for genetic analysis from an individual, or collect, retain, transmit or use an individual’s genetic information without first obtaining the individual’s or his authorized representative’s informed and written consent. [N.M. Stat. Ann. § 24-21-3.] A person’s DNA, genetic information or genetic analysis results may be obtained, retained, transmitted or used without consent pursuant to federal or state law or regulations only:

- ∞ to identify a person in the course of criminal investigation by law enforcement;
- ∞ if the person has been convicted of a felony, for purposes of maintaining a DNA database for law enforcement purposes;
- ∞ to establish parental identity;
- ∞ to identify deceased persons;
- ∞ to screen newborns;
- ∞ if the DNA, genetic information or results are not identified with the person or his family members;
- ∞ by medical repositories or registries;
- ∞ for medical or scientific research and education if the identity of the individual or his family members is not disclosed;
- ∞ or for emergency medical treatment.

[*Id.*]

This section does not apply to the actions of insurers in the course of conducting and administering the business of life, disability income or long-term care insurance, if the use of genetic analysis or genetic information for underwriting purposes is based on sound actuarial principles or related to actual or reasonably anticipated experience.

[*Id.*]

For purposes of this act, “genetic analysis” means a test of a person’s DNA, gene products or chromosomes that: indicates a propensity for or a susceptibility to physical or mental illness, disease, impairment or other disorders; demonstrates genetic or chromosomal damage due to environmental factors; or indicates carrier status for a disease or disorder. It does not include routine physical measurements, chemical, blood and urine analysis, drug or HIV tests, or any other tests commonly accepted in clinical practice at the time they are ordered. [N.M. Stat. Ann. § 24-21-2 (defining “genetic analysis”).] “Genetic information” is information about a person’s or

family member's genetic makeup, including information from genetic analyses, DNA composition, participation in genetic research, or use of genetic services. [*Id.* (defining "genetic information").]

### **Remedies and Penalties**

**Right to Sue.** A person whose rights have been violated under this act may bring a civil action for damages or other relief. The attorney general or district attorney may also bring a civil action against a person for violating this act or to enforce this act. A court may order a person in violation to comply or order other appropriate relief, including actual damages; damages of up to \$5,000 in addition to any economic loss if the violation results from willful or grossly negligent conduct; and reasonable attorney fees and appropriate court costs. If an insurer violates the act's restrictions of disclosure of genetic information or provisions against genetic discrimination, the court may direct that insurer to provide a policy for hospital and medical expenses, including health insurance, group disability insurance or long-term care coverage, to the injured person. [N.M. Stat. Ann. § 24-21-6.]

## **B. HIV**

Generally, a person who requires or administers a test for HIV may not disclose the identity of any person upon whom a test was performed or the result of the test in such a manner as to permit the identification of the test subject without the subject's legally effective release. [N.M. Stat. Ann. § 24-2B-6.] Disclosure without the authorization of the test subject is permitted in a number of circumstances, including but not limited to: the department of health in accordance with reporting requirements; a health facility or health care provider that is involved in procedures for transplants or blood transfusions; authorized medical or epidemiological researchers who may not further disclose any identifying information; and an insurer or reinsurer that requested the test to be performed for purposes of application or reapplication for insurance coverage. [*Id.*] A person who has been tested for HIV may disclose his own test results. [N.M. Stat. Ann. § 24-2B-8.] A victim of an alleged criminal offense who receives HIV-related information may disclose the test results as necessary to protect his health and safety, or the health and safety of his family or sexual partner. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A person who makes an unauthorized disclosure of the results of a HIV test is guilty of a petty misdemeanor, punishable by a fine not to exceed \$500, imprisonment not to exceed 6 months, or both. [N.M. Stat. Ann. § 24-2B-9.]

## **C. Mental Health and Developmental Disabilities**

### **1. Patient Access**

A client, including a child, who is receiving mental health or developmental disability services in a mental health or developmental disability facility has a right of access to his confidential information and is entitled to make copies of this information. [N.M. Stat. Ann. § 43-1-19.] The client also has the right to submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the

confidential information. [*Id.*] The statements and other documentation must be kept with the relevant confidential information and accompany it in the event of disclosure. [*Id.*] Access to such records may be denied when a physician or other mental health or developmental disabilities professional believes and notes in the client's medical records that such disclosure would not be in the best interests of the client.

Similar provisions apply to a child's access to his confidential mental health information under the Children's Mental Health and Developmental Disabilities Act. [N.M. Stat. Ann. § 32A-6-15.]

### **Remedies and Penalties**

**Right to Sue.** If a client is denied access to records pertaining to his mental health or developmental disability, the client has the right to petition the court for an order granting access. [N.M. Stat. Ann. § 43-1-19.] A child who believes that his rights have been violated may petition the court for redress. [N.M. Stat. Ann. § 32A-6-19.]

## **2. Restrictions on Disclosure**

No person may, without the client's or child's authorization, disclose or transmit confidential information concerning the mental health or developmental disability of that client or child from which a person well acquainted with the client or child might recognize him. [N.M. Stat. Ann. §§ 43-1-19; 32A-6-15.] Nor may any one disclose or transcribe any code, number or other means that can be used to match the client with confidential information regarding him. [*Id.*]

The authorization must be in writing, signed by the client (or his guardian or parent) and specify the name or title of the proposed recipient of the information and a description of the use that may be made of the information. [N.M. Stat. Ann. §§ 43-1-19; 32A-6-15.] It must also inform the client that he is entitled to review and copy the information to be disclosed. [*Id.*]

Authorization from the client is not be required for the disclosure or transmission of confidential information in the following circumstances: to a health professional to the extent necessary to act on behalf of the client; when disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the client on himself or another; when the disclosure of such information is to the primary care-giver of the client and the disclosure is only of information necessary for the continuity of the client's treatment; or when the disclosure is to an insurer contractually obligated to pay part or all of the expenses related to the client's treatment, and the information disclosed is limited to data identifying the client, facility and treating or supervising physician and the dates and duration of the residential treatment. [*Id.*] An insurer is not relieved of its obligation to pay for the residential treatment of a client merely because it has received only this specific information. [*Id.*]

In addition to the above exceptions, an authorization from a child receiving mental health or developmental disabilities services is not required: when the disclosure to a parent, guardian or legal custodian is essential for the treatment of the child; or when



the disclosure is to a protection and advocacy representative pursuant to federal law. [N.M. Stat. Ann. § 32A-6-15.]

Information concerning a client disclosed under this section may not be released to any other person, agency or governmental entity, or placed in files or computerized data banks accessible to any persons not otherwise authorized to obtain information under this section. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** A child who believes that his rights have been violated may petition the court for redress. [N.M. Stat. Ann. § 32A-6-19.]

## **D. Sexually Transmitted Diseases**

Generally, a person who requires or administers a test for sexually transmitted diseases may not disclose the identity of any person upon whom a test was performed or the result of the test in a manner that permits the identification of the test subject without the subject's legally effective release. [N.M. Stat. Ann. § 24-1-9.4.] Disclosure without the authorization of the test subject is permitted in a number of circumstances, including but not limited to: the department of health and CDC in accordance with reporting requirements for STDs; a health facility or health care provider that is involved in procedures for transplants or blood transfusions; authorized medical or epidemiological researchers who may not further disclose any identifying information; and an insurer or reinsurer that requested the test to be performed for purposes of application or reapplication for insurance coverage. [*Id.*] Recipients of STD-related information generally may not redisclose it unless specifically authorized by law. [N.M. Stat. Ann. § 24-1-9.5.]

### **Remedies and Penalties**

**Fines and Penalties.** A person who makes an unauthorized disclosure of the results of a STD test is guilty of a petty misdemeanor, punishable by a fine not to exceed \$500, imprisonment not to exceed 6 months, or both. [N.M. Stat. Ann. §§ 24-1-9.5; 24-9.7.]

## **E. Substance Abuse**

Records of persons voluntarily admitted to a public alcohol treatment facility are confidential and may not be disclosed except on court order. [N.M. Stat. Ann. § 43-2-11.]

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# NEW YORK

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

## I. PATIENT ACCESS

### A. Health Care Providers

#### 1. Scope

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

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

#### 2. Requirements

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

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

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

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

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

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

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

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

### **Remedies and Penalties**

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

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

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

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

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

### **3. Remedies and Penalties**

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

### **B. Insurers**

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

## C. State Government

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

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

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

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

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

### Remedies and Penalties

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

## II. RESTRICTIONS ON DISCLOSURE

### A. Health Care Providers

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

### B. HMOs

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

Special rules apply to individuals protected because of their HIV status [N.Y. Pub. Health Law § 4410(2), citing N.Y. Pub. Health Law § 2780], and to information and reports about child abuse and maltreatment. [N.Y. Pub. Health Law § 4410(3).] The commissioner of health has access to patient-specific information, including encounter data, maintained by an HMO, for purposes of quality assurance and oversight [N.Y.

Pub. Health Law § 4410(4)(a) and (b)], but redisclosure by the commissioner or his agents is restricted. Health department employees are subject to penalties for unauthorized disclosures. [N.Y. Pub. Health Law § 4401.4(c).]

## **C. Insurers**

### **1. New York State Insurance Law**

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

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

### **2. New York State Insurance Department Regulations**

#### **Scope**

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

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

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

### **Requirements**

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

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

### **Remedies and Penalties**

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

## **D. Health and Hospital Service Corporations**

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

## **E. On-site Occupational Health Services Facilities**

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



## **F. State Government**

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

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

### **1. Notice Requirements**

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

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

[N.Y. Pub. Off. Law § 94.]

### **2. Other Requirements**

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

### **Remedies and Penalties**

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

## **G. Utilization Review Agents**

Utilization review agents must have written procedures assuring the confidentiality of patient-specific information obtained during the process of utilization review. [N.Y. Ins. Law § 4905(1).] The information may be shared only with the insured or his designee or health care provider, or those authorized by law to receive the information. [*Id.*]

Utilization review agents may collect only such information as is necessary to make a determination and may require medical records during prospective or concurrent review only when necessary to verify that the services are medically necessary. [N.Y. Ins. Law § 4905(7).] Only the necessary or relevant sections of the medical record may be required. [*Id.*] For retrospective review, the utilization review agent may request copies of partial or complete medical records. [*Id.*] Only health care professionals, medical record technologists or administrative personnel who have received appropriate training may obtain health information from health care providers for utilization review. [N.Y. Ins. Law § 4905(8).]

### **III. PRIVILEGES**

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

### **IV. CONDITION-SPECIFIC REQUIREMENTS**

#### **A. Birth Defects**

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

#### **B. Cancer**

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

## C. Genetic Information and Test Results<sup>2</sup>

### 1. General Rules

A genetic test generally cannot be performed on a biological sample taken from an individual without the prior written informed consent of the individual. [N.Y. Civ. R. Law § 79-1(2).] This provision does *not* apply to authorized insurers who are in compliance with section 2612 of the insurance law. [N.Y. Civ. R. Law § 79-1(6) and N.Y. Ins. Law § 107(a)(10) (defining “authorized insurer”).] “Genetic test” is defined as “any laboratory test of human DNA, chromosomes, genes, or gene products to diagnose the presence of a genetic variation linked to a predisposition to a genetic disease or disability in the individual or the individual’s offspring.” [N.Y. Civ. R. Law § 79-1(1)(a) (defining “genetic test”).] An informed consent must contain, among other things, the name of the person or categories of persons or organizations to whom the test results may be disclosed. [N.Y. Civ. R. Law § 79-1(2)(b).] Genetic testing may be performed on specimens from deceased persons if informed consent is provided by the next of kin. [N.Y. Civ. R. Law § 79-1(11).]

There are a few exceptions to this general rule. Genetic tests can be performed without the individual’s prior written consent pursuant to a court order and as required by N.Y. public health law or Article 49-B of New York’s Executive Law regarding the establishment of a state computerized DNA identification index of individuals convicted for certain felonies. [N.Y. Civ. R. Law § 79-1(2), (4), and (7).]

All records, findings and results of an individual’s genetic test are deemed confidential and may not be disclosed without the individual’s written informed consent. [N.Y. Civ. R. Law § 79-1(3)(a).] Disclosures of genetic test results to persons or organizations not named on the informed consent require the individual’s further informed consent. [N.Y. Civ. R. Law § 79-1(2)(d).] However, disclosures without consent are permitted if required by court order, N.Y. public health law (specifically N.Y. Pub. Health Law § 2500-a.) or Article 49-B of New York’s Executive Law (sections 995, 995-a to 995-f) [N.Y. Civ. R. Law § 79-1(4)(c).] Information derived from an individual’s genetic test may not be incorporated into the records of a non-consenting individual who may be genetically related to the tested individual. In addition, no inferences may be drawn, used or communicated regarding the possible genetic status of the non-consenting individual. [N.Y. Civ. R. Law § 79-1(3)(b).]

### Remedies and Penalties

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

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

## **2. Insurers**

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

## **3. Researchers**

Genetic tests may be performed on anonymous samples for research and statistical purposes, provided that the research protocol assures the anonymity of the sources of the samples and an institutional review board (IRB) has approved the protocol. [N.Y. Civ. R. Law § 79-1(4).] In addition, samples may be used for research purposes for other tests for which specific consent was not obtained, if pursuant to a research protocol approved by an IRB, the individuals gave prior written informed consent for the use of their samples for "general research purposes," and these individuals did not specify time limits or other factors restricting the use of their samples. Furthermore, these samples must be permanently stripped of identifying information or an IRB-approved coding system must be established to protect the identity of the individuals. [N.Y. Civ. R. Law § 79-1(9).] The consent for use of samples for general research purposes must include, among other things, a statement that the sample will be used for future genetic tests; a description of the policies and procedures to protect patient confidentiality; and a statement of the right to withdraw consent at any time. [*Id.*]

Information about an individual derived from genetic tests or information linking an individual with specific genetic test results may not be released to any person or organization without the individual's explicit written consent and only for the purposes set forth in the consent form. [N.Y. Civ. R. Law § 79-1(9).] The statute prohibits contacting family members of the individual who provided the sample for clinical, research, or other purposes without a specific consent form identifying the particular family members who will be contacted and the specific purpose of the contact. [*Id.*]

Biological samples may be kept for longer than 60 days and used for scientific research with the approval of an IRB and the written informed consent of the individual. [N.Y. Civ. R. Law § 79-1(2)(f).] Samples may be stored for up to 10 years in the absence of genetic testing, if authorized in writing by the individual. To perform genetic tests of these samples, the researcher must obtain the individual's informed consent. [N.Y. Civ. R. Law § 79-1(10).]

## Remedies and Penalties

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

## D. HIV/AIDS

### 1. General Rules

HIV testing generally requires the written informed consent of the subject of the test. The signed consent form must include an explanation of the protections afforded confidential HIV related information, including the circumstances under which, and the persons to whom, disclosure of information may be required, authorized, or permitted by law. [N.Y. Pub. Health Law § 2781(1).] The individual must be provided with the opportunity to remain anonymous and to provide written informed consent through a coded system that does not link individual identity to the test request or results. [N.Y. Pub. Health Law § 2781(4).] A health care provider who is not authorized by the commissioner of health to provide HIV related tests on an anonymous basis must refer a person who requests an anonymous test to a test site which does provide anonymous testing. [*Id.*] This rule does not apply to a health care provider ordering the performance of an HIV related test on an individual proposed for insurance coverage. [*Id.*]

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

Numerous provisions govern disclosure of confidential HIV related information. There are rules governing the issuance of a court order for the disclosure of confidential HIV related information. [N.Y. Pub. Health Law § 2785.] State agencies authorized to obtain such information must have rules prohibiting disclosure except as authorized by law. [N.Y. Pub. Health Law § 2786.] Civil servants may have access to confidential HIV related information only when reasonably necessary to perform their official duties [N.Y. Civ. Serv. Law § 83.4], may disclose it only in accordance with Article 27-F of New York public health law [N.Y. Civ. Serv. Law § 83.5], and may never disclose it in response to a subpoena or Freedom of Information request unless there is also a court

order requiring disclosure. [*Id.*] When victims of felony offenses involving sexual intercourse request that the defendant submit to HIV testing, the results are confidential, are not disclosed to the court, and are disclosed only as authorized by statute. [N.Y. Crim. Proc. § 390.15; N.Y. Crim. Proc. § 347.1.] All papers, proceedings, orders, and request made pursuant to a request for testing are sealed. [N.Y. Crim. Proc. § 390.15; N.Y. Crim. Proc. § 347.1.]

### **Remedies and Penalties**

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

## **2. Insurers**

Third-party reimbursers and insurance institutions are subject only to sections 2782(i) and (j) of Article 27-F, which authorize disclosure to them of HIV and AIDS related information for reimbursement purposes and other insurance functions under specified conditions, and to section 2785, which addresses disclosures pursuant to court order. However, health care providers associated with or under contract to an HMO or other medical services plan are subject to Article 27-F. [N.Y. Pub. Health Law § 2784.]

## **3. Public Health Reporting**

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

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

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

## E. Mental Illness

### 1. Patient Access

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

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

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

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

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

adult patient's records. [N.Y. Mental Hyg. Law § 33.16(b)4.]

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

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

The major differences between section 33.16 and N.Y. Pub. Health Law § 18 are: section 33.16 does not contain a general provision addressing disclosure to third parties; the definition of "clinical record" under section 33.16 does not contain an exemption for the practitioner's personal notes and observations; and the clinical records access review committees under section 33.16 are appointed by the commissioner of mental health, commissioner of mental retardation and developmental disabilities, and commissioner of alcoholism and substance abuse services, not by the health commissioner.

## **2. Restrictions on Disclosure**

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

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



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

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

## **F. Sexually Transmissible Diseases**

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

## **G. Substance Abuse**

Every attending and consulting practitioner is required to report to the state commissioner of health information about narcotic drug addicts or habitual users. Such information is kept confidential and may be used only for statistical, epidemiological or research purposes. [N.Y. Pub. Health Law § 3372.] Reports that originate in the course of a criminal proceeding may not be disclosed except: pursuant to a subpoena or court order; to an agency, department or official board authorized to regulate, license or supervise a person who is authorized to deal in controlled substances; to a central registry; or to another person employed by the health department for purposes of carrying out the provisions of New York state law on controlled substances. [N.Y. Pub. Health Law § 3371.]

## **NORTH CAROLINA**

North Carolina statutorily grants a patient the right of access to his medical records that are in the possession of an insurance entity, including an HMO, or a mental health facility. The state also restricts the disclosure of confidential medical information by these entities. Additionally, there are statutes restricting disclosure that govern other specified entities and medical conditions.

### **I. PATIENT ACCESS**

#### **A. Health Care Providers, including Health Care Facilities**

North Carolina does not have a statute granting patients a general right of access to their medical records maintained by health care providers.

However, the state does have a fee schedule for producing copies requested for personal injury liability claims and social security disability claims. [See N.C. Gen. Stat. § 90-411.] When medical records are requested for these purposes, a health care provider may charge a reasonable fee for costs incurred in searching, handling, copying and mailing the records to a patient or the patient's designated representative. [Id.]

"Medical records" are defined as personal information that relates to an individual's physical or mental condition, medical history or medical treatment, excluding X rays and fetal monitor records. [N.C. Gen. Stat. § 90-410 (defining "medical records").] The maximum fee for each request is: 75¢ per page for the first 25 pages; 50¢ per page for pages 26 through 100; and 25¢ per page for each page in excess of 100 pages. [N.C. Gen. Stat. § 90-411.] The provider may impose a minimum fee of up to \$10 including copying costs. [Id.]

Requests for records related to workers' compensation are not encompassed by this provision. [Id.]

#### **B. Insurance Entities, including HMOs**

##### **1. Scope**

The North Carolina Insurance Information and Privacy Protection Act applies to insurance institutions (including HMOs and medical, surgical, hospital, dental and optometric service plans), insurance agents and insurance support organizations. [N.C. Gen. Stat. § 58-39-15; 58-39-75 (defining "insurance institution" and detailing entities and persons covered).]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [N.C. Gen. Stat. § 58-39-15(19) (defining "personal information").] "Medical record information" is personal information that (1) relates to an individual's physical or mental condition, medical history or medical treatment, and (2) is obtained from a medical professional, medical

care institution (including public health agencies and HMOs) or an individual, the individual's spouse, parent or legal guardian. [N.C. Gen. Stat. § 58-39-15(18) (defining "medical record information").]

With respect to health insurance, the rights granted by the Act extend to North Carolina residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [N.C. Gen. Stat. § 58-39-10.]

## **2. Requirements**

An insurance institution, agent or support organization must permit the individual to inspect and copy his personal information in person or obtain a copy of it by mail, whichever the individual prefers, within 30 business days of receiving a written request and proper identification from an individual. [N.C. Gen. Stat. § 58-39-45.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [N.C. Gen. Stat. § 58-39-45(a).]

**Fees.** The insurance entity can impose a reasonable fee to cover copying costs. [N.C. Gen. Stat. § 58-39-45(d).]

In addition to giving the individual a copy of his personal information, the insurance entity must also give the individual a list of the persons to whom it has disclosed such personal information within two years prior to the request for access, if that information is recorded. If such an accounting of disclosures is not recorded, the entity must inform the individual of the names of those persons to whom it normally discloses personal information. [N.C. Gen. Stat. § 58-39-45(3).]

**Right to Amend.** A person has a statutory right to have factual errors corrected and misrepresented or misleading entries amended or deleted. [N.C. Gen. Stat. § 58-39-50.] Within 30 business days from the date of receipt of a written request, the insurance institution, agent or support organization must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) notify the individual of its refusal to make the correction, amendment or deletion, the reasons for the refusal, and the individual's right to file a statement of disagreement. [*Id.*]

If the insurance entity corrects, amends or deletes any of the individual's recorded personal information, it must notify the individual of its actions in writing and furnish the amendment, correction or fact of the deletion to: (1) any person designated by the individual, who may have received the individual's personal information within the preceding two years; (2) insurance support organizations that systematically receive the individual's personal information from the insurance institution within the preceding seven years, unless the organization no longer maintains information about the individual; and (3) insurance support organizations that furnished the personal information that was corrected, amended or deleted. [N.C. Gen. Stat. § 58-39-50.]

If the insurance entity refuses to make the requested change, the individual has the right to file a concise statement setting forth what the individual thinks is the correct,

relevant or fair information; and a statement of the reasons why the individual disagrees with the entity's refusal to correct, amend or delete recorded personal information. [*Id.*] The insurance entity must file the individual's statement with the disputed personal information and provide a means by which anyone reviewing the information will be made aware of the individual's statements and have access to them. Furthermore, in any subsequent disclosure of the personal information that is the subject of the disagreement, the entity must clearly identify the matter or matters in dispute and provide the individual's statements along with the recorded personal information being disclosed. [*Id.*] Insurers must furnish these statements of disagreement to third parties in the same manner they are required to furnish corrected information. [*Id.*]

**Notice.** The insurance entity must provide to all applicants and policyholders written notice of its information practices. [N.C. Gen. Stat. § 58-39-25.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that (1) personal information may be collected from persons other than the individual proposed for coverage, (2) such information as well as other personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization, (3) a right of access and correction exists with respect to all personal information collected, and (4) a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** A person whose rights under these provisions are violated has the right to file a civil action seeking equitable relief within two years from the date the alleged violation is or should have been discovered. [N.C. Gen. Stat. § 58-39-105.] The court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Fines and Penalties.** After a hearing, the Insurance Commissioner may issue an order requiring the insurance institution, agent or support organization to cease and desist from engaging in conduct or practices in violation of these provisions. [N.C. Gen. Stat. §§ 58-39-80; 58-39-90.] Additionally, the commissioner may impose a monetary penalty ranging from \$100 to \$1,000 for violations of these provisions. [N.C. Gen. Stat. §§ 58-2-70; 58-39-95.] Each day during which a violation occurs constitutes a separate violation. [N.C. Gen. Stat. § 58-2-70.]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Adult Care Homes**

Residents of adult care homes have a right to have their personal and medical records kept confidential and not disclosed without their written consent. Records may be disclosed without written consent to agencies, institutions or individuals providing emergency medical services to the individual. Disclosure of information must be limited to that which is necessary to meet the emergency. [N.C. Gen. Stat. § 131D-21.]

## **B. Health Care Facilities, including Hospitals**

Medical records compiled and maintained by health care facilities, including hospitals, in connection with the admission, treatment, and discharge of individual patients are not “public records” subject to inspection under the Public Records Act. [N.C. Gen. Stat. § 131E-97.] These protections extend to medical records maintained in electronic format. [N.C. Gen. Stat. § 90-412.]

## **C. HMOs**

Generally, HMOs may not disclose any information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from that person or from any provider without the enrollee’s or applicant’s express consent. [N.C. Gen. Stat. § 58-67-180.] Disclosure without the enrollee/applicant’s consent is allowed: to the extent it is necessary to carry out the purposes of the statutory provisions governing HMOs; pursuant to statute; pursuant to court order for the production of evidence or discovery; or in the event of claim or litigation between the person and the HMO, to the extent such information is pertinent. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who violates this provision is guilty of a Class 1 misdemeanor punishable by imprisonment up to 120 days (depending on the number of prior convictions), a fine determined by the court, or both. [N.C. Gen. Stat. §§ 58-67-165; 15A-1340.23 (specifying punishments for misdemeanors).] Additionally, the Commissioner of Insurance may, in the case of an HMO knowingly or repeatedly failing to comply with the law, suspend or revoke the HMO’s license. In addition to or in lieu of suspending or revoking a license, the commissioner may issue an order directing the HMO to cease and desist from engaging in any act or practice that violates this provision. [N.C. Gen. Stat. §§ 58-67-140; 58-67-165.]

## **D. Insurance Entities, including HMOs**

### **1. Scope**

The North Carolina Insurance Information and Privacy Protection Act (“IIPPA”) applies to insurance institutions (including HMOs and medical, surgical, hospital, dental and optometric service plans), insurance agents and insurance support organizations. [N.C. Gen. Stat. § 58-39-15; 58-39-75 (defining “insurance institution” and detailing entities and persons covered).]

The Act covers “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [N.C. Gen. Stat. § 58-39-15(19) (defining “personal information”).] “Medical record information” is personal information that (1) relates to an individual’s physical or mental condition, medical history or medical treatment, and (2) is obtained from a medical professional, medical care institution (including public health agencies and HMOs) or an individual, the individual’s spouse, parent or legal guardian. [N.C. Gen. Stat. § 58-39-15(18) (defining “medical record information”).]

With respect to health insurance, the rights granted by the Act extend to North Carolina residents who are the subject of the information collected, received or

maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [N.C. Gen. Stat. § 58-39-10.]

## 2. Requirements

### a. Authorizations for Obtaining Health Information from Others

If an insurance entity uses an authorization form to obtain health information in connection with an insurance transaction, the authorization form must conform to the requirements of the IIPPA. The authorization form must be written in plain language, specify the types of persons authorized to disclose information concerning the individual, specify the nature of the information authorized to be disclosed, identify who is authorized to receive the information and specify the purposes for which the information is collected. [N.C. Gen. Stat. § 58-39-35.] The length of time the authorization remains valid varies with the purpose of obtaining the requested information. An authorization signed in support of an application for health insurance remains valid for 30 months while an authorization signed for the purpose of collecting information in connection with a claim for health benefits is effective for the term of coverage of the policy. [*Id.*]

### b. Disclosure Authorization Requirements and Exceptions

Generally, an insurance entity may not disclose medical information about a person that it collected or received in connection with an insurance transaction without that person's written authorization. [N.C. Gen. Stat. § 58-39-75.] Authorizations submitted by those *other* than insurance entities must be signed and dated. [N.C. Gen. Stat. § 58-39-75.] These authorizations are effective for one year. [*Id.*]

An insurance entity may not disclose information to another insurance entity pursuant to an authorization form unless the form meets the detailed statutory requirements. [*Id.*] See Authorizations for Obtaining Health Information from Others, above.

The Act specifically prohibits insurance entities from disclosing medical record information to third parties and to affiliates for the marketing of a product or service without the prior written authorization of the subject of the information. [N.C. Gen. Stat. § 58-39-75.]

**Authorization Exceptions.** There are numerous circumstances under which an insurance entity can disclose information without the individual's authorization including: verifying insurance coverage benefits; for the purpose of conducting business when the disclosure is reasonably necessary; to law enforcement agencies in order to prevent or prosecute fraud; to a professional peer review organization for reviewing the service or conduct of a medical care institution or professional; for purposes of actuarial or research studies, provided certain conditions are met; in response to a facially valid search warrant or subpoena or other court order; and others. [N.C. Gen. Stat. § 58-39-75.]

**c. Notice Requirements**

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [N.C. Gen. Stat. § 58-39-25.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that (1) personal information may be collected from persons other than the individual proposed for coverage, (2) such information as well as other personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization, (3) a right of access and correction exists with respect to all personal information collected, and (4) a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

**Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of these provisions has a statutory right to bring a civil action for actual damages sustained as a result of the disclosure. [N.C. Gen. Stat. § 58-39-105.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Fines and Penalties.**

After a hearing, the Insurance Commissioner may issue an order requiring the insurance institution, agent or support organization to cease and desist from engaging in conduct or practices in violation of these provisions. [N.C. Gen. Stat. §§ 58-39-80; 58-39-90.] Additionally, the commissioner may impose a monetary penalty ranging from \$100 to \$1,000 for violations of these provisions. [N.C. Gen. Stat. §§ 58-2-70; 58-39-95.] Each day during which a violation occurs constitutes a separate violation. [N.C. Gen. Stat. § 58-2-70.]

Any person who knowingly *and* willfully obtains information concerning an individual from an insurance entity under false pretenses is guilty of a class 1 misdemeanor. [N.C. Gen. Stat. § 58-39-115.]

**E. Nursing Homes**

Under the Nursing Home Patients' Bill of Rights, residents of nursing home facilities have a right to privacy in their medical care program. Case discussions, consultations, examinations and treatments must be kept confidential. Personal and medical records must also be confidential. Written consent of the resident generally must be obtained prior to the release of information to any individual. There are a few exceptions to this rule. Information can be disclosed without the resident's written consent to family members, except as needed in the case of the resident's transfer to another health care institution or as required by law or third party payment contract. [N.C. Gen. Stat. § 131E-117.]

**Remedies and Penalties**

**Right To Sue.** Every patient has a right to institute a civil action for injunctive relief to enforce these provisions. The Department of Health and Human Services, a general guardian, or any person appointed as guardian ad litem may also institute a civil action for injunctive relief on behalf of the patient or patients. [N.C. Gen. Stat. § 131E-123.]

**Fines and Penalties.** The Department may impose administrative penalties on a nursing home facility for violating these provisions. The penalty to be imposed depends on the harm that results from the violation. [N.C. Gen. Stat. § 131E-129.]

## **F. Pharmacists and Pharmacies**

Pharmacists employed in health care facilities have access to patient records maintained by these facilities when necessary for the pharmacist to provide pharmaceutical services. [N.C. Gen. Stat. § 90-85.35.]

Written prescription orders on file in a pharmacy or other place where prescriptions are dispensed are not public records and the person having custody or access to these records generally may not disclose them without the written authorization of the patient. [N.C. Gen. Stat. § 90-85.36.] Disclosure may also be made to: the licensed practitioner who issued the prescription; the practitioner who is currently treating the patient; a person authorized by subpoena, court order or statute; the third party payor; researchers and surveyors who have approval from the North Carolina Board of Pharmacy; and specified others. [*Id.*] The pharmacist may disclose any information to any person when he reasonably determines that disclosure is necessary to protect the life or health of any person. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A violation of these provisions is considered a class 1 misdemeanor. [N.C. Gen. Stat. § 90-85.40.] The Board may also issue a letter of reprimand or suspend, restrict, revoke or refuse to grant or renew a license to a pharmacy in violation of these provisions, or apply to a court for an injunction. [N.C. Gen. Stat. §§ 90-85.38 and 90-85.39.]

## **G. State Government**

**In General.** Information that is designated as “confidential” at the time of its initial disclosure to a public agency is exempt from disclosure under the Public Records Act. [N.C. Gen. Stat. § 132-1.2.]

**Department of Insurance.** All patient medical records in the possession of the Department of Insurance are confidential and are not “public records” subject to inspection under the Public Records Act. [N.C. Gen. Stat. § 58-2-105.] This restriction encompasses personal information that relates to an individual’s physical or mental condition, medical history, or medical treatment, and that has been obtained from the individual patient, a health care provider or from the patient’s spouse, parent, or legal guardian. [*Id.*] The Department may disclose such medical records to an independent review organization, and the organization must maintain the confidentiality of the records as required by North Carolina’s Insurance Information Privacy Protection Act. [*Id.*]

**Department of Health and Human Services.** All records containing privileged patient medical information that are in the possession of the Department of Health and Human Services or local health departments are confidential and are not “public records” subject to inspection under the Public Records Act. [N.C. Gen. Stat. §§ 130A-12; 143B-139.6.] Additionally, all medical records compiled and maintained by public



health authorities in connection with the admission, treatment, and discharge of individual patients are not public records. [N.C. Gen. Stat. § 130A-45.8.]

**Medical Care Database.** North Carolina requires that hospitals and other medical facilities submit information on charges, utilization patterns and quality of medical services to a statewide database for purposes of understanding the patterns and trends in the use and cost of medical services. [N.C. Gen. Stat. § 131E-214.] The patient data submitted to and maintained by the statewide data processor are not “public records” subject to inspection under the Public Records Act. [N.C. Gen. Stat. § 131E-214.3.] The state may not allow patient data that it receives from the statewide data processor to be used by a person for commercial purposes. [*Id.*]

**State Health Plans.** Any information in the possession of state employee medical plans or their claims processors is confidential and exempt from disclosure under the Public Records Act. This provision applies to all information concerning individuals, including medical information, the fact of coverage or noncoverage, whether a claim has been filed or paid, and any other information concerning a plan participant. [N.C. Gen. Stat. § 135-37.]

### III. PRIVILEGES

North Carolina recognizes a number of health care provider-patient privileges that prevent disclosures of confidential communications made between the provider and a patient for the purpose of diagnosis and treatment. [N.C. Gen. Stat. §§ 8-53 (physician-patient); 8-53.3 (psychologist-client); 8-53.4 (school counselor-student); 8-53.5 (marital and family therapist-client); 8-53.7 (social worker-client); 8-53.8 (professional counselor-client); 8-53.9 (optometrist-patient).] HMOs are entitled to claim any statutory privileges against disclosure that the provider of the information is entitled to claim. [N.C. Gen. Stat. § 58-67-180.]

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Birth Defects

North Carolina maintains a birth defects registry to monitor any physical, functional, or chemical abnormality present at birth that may be of genetic or prenatal origin. [N.C. Gen. Stat. § 130A-131.16 (defining “birth defect”).] All patient identifying information in the registry is confidential and is not considered to be public record open to inspection. [N.C. Gen. Stat. § 130A-131.17.] Access to this information is limited to the Birth Defects Monitoring Program staff authorized by the Director of the State Center for Health and Environmental Statistics. The Director may also authorize access to this information to persons engaged in demographic, epidemiological or other similar scientific studies related to health. Persons given access must agree, in writing, to maintain confidentiality. [*Id.*]

## **B. Cancer**

North Carolina maintains a central cancer registry and requires health care facilities and health care providers to report diagnoses of cancer. [N.C. Gen. Stat. §§ 130A-208; 130A-209.] The clinical records or reports of individual patients are confidential and are not public records open to inspection. [N.C. Gen. Stat. § 130A-212.] Researchers may have access to this information in accordance with the rules established by the Health Services Commission. [*Id.*]

## **C. Communicable Diseases, including HIV**

Physicians, laboratories and others are required to report to the health authorities persons that they have reason to suspect have a communicable disease, including HIV. [N.C. Gen. Stat. §§ 130A-135 through 130A-140.] All information and records that identify a person who is infected with HIV, AIDS, or another reportable condition or illness are “strictly confidential” and may not be released without the identified person’s written consent except as specified in the statute. [N.C. Gen. Stat. § 130A-143.] Release of this information may be made without the subject’s consent: when necessary to protect the public health pursuant to rules regarding control measures for communicable diseases; to health care personnel providing medical care to the patient; pursuant to a subpoena or court order; for bona fide research purposes; and in other specified circumstances. [*Id.*]

## **D. Genetic Test Results**

### **1. Employers**

Employers, including state agencies, may not deny or refuse to employ or discharge any person based on the person’s request for genetic testing or on the basis of genetic information obtained concerning the person or a family member. [N.C. Gen. Stat. § 95-28.1A.] “Genetic test” means a test to determine the presence or absence of genetic characteristics in order to diagnose a genetic condition or characteristic or ascertain susceptibility to a genetic condition. [*Id.*]

### **2. Insurers**

Insurers may not raise the premiums paid by a group, refuse to issue or deliver a health benefit plan, or charge a higher premium rate for a health benefit plan on the basis of genetic information obtained about an individual. [N.C. Gen. Stat. § 58-3-215.] “Genetic information” is information about genes, gene products or inherited characteristics that may derive from an individual or a family member. It does not include results of routine physicals measurements, blood chemistries, blood counts, urine analyses, tests for drug abuse, or HIV tests. [*Id.* (defining “genetic information”).]

## **E. Mental Health, Developmental Disabilities and Substance Abuse Treatment Facilities**

**Patient Access.** Upon request, facilities providing services for the care of the mentally ill, the developmentally disabled or substance abusers must give clients access to the confidential information in their client records. [N.C. Gen. Stat. §§ 122C-3 (defining

“client” and “facility”); 122C-53.] The facility may deny access to information that would be injurious to the client’s physical or mental well being as determined by the attending physician or by the facility director. [N.C. Gen. Stat. § 122C-53.] In this circumstance, the information is to be provided to the physician or psychologist of the client’s choice. [*Id.*]

**Restrictions on Disclosure.** A client of a facility providing services for the care of the mentally ill, the developmentally disabled or substance abusers have a statutory right of privacy. [N.C. Gen. Stat. § 122C-51.] Generally, the confidential information these facilities acquire in attending or treating a patient may not be disclosed by the facility or any individual having access to the information without the client’s consent. [N.C. Gen. Stat. § 122C-52.] Moreover, this information is not considered to be a “public record” open to inspection under the Public Records Act. [*Id.*]

**Authorization Exceptions.** Confidential client information may be disclosed without the client’s authorization: to the Secretary of the Department of Health and Human Services during the course of an inspection of the facility; to the client’s next of kin, but limited to the fact of admission or discharge; to other facilities when necessary to coordinate appropriate and effective care, treatment or habitation of the client and when failure to share the information would be detrimental to the client; when in the opinion of a responsible professional there is imminent danger to the health or safety of the client or other individual; to a client advocate; pursuant to a court order; to an attorney who represents either the facility or an employee of the facility; to researchers if there is a justifiable documented need for the information; and to others. [N.C. Gen. Stat. §§ 122C-53 through 122C-56.] In general, disclosure of confidential information is limited to the information that is necessary for the purpose of disclosure, and the entities authorized to receive this information are prohibited from further disclosure unless specifically permitted by law. [*Id.*]

These exceptions to the authorization requirement do not apply to client records when federal statutes or regulations applicable to the client prohibit disclosure. [N.C. Gen. Stat. § 122C-52.]

### **Remedies and Penalties**

**Fines and Penalties.** A person or entity that discloses this confidential information to someone not authorized to receive it is guilty of a Class 3 misdemeanor punishable by a fine not to exceed \$500 for each violation. [N.C. Gen. Stat. § 122C-52.]

## **F. Substance Abuse**

A health care practitioner may not disclose the name of any person who requests treatment and rehabilitation for drug dependence to any law-enforcement officer or agency. [N.C. Gen. Stat. § 90-109.1.] This information is not admissible as evidence in any court or other proceeding unless authorized by the person seeking treatment. [*Id.*] See “Mental Health, Developmental Disabilities and Substance Abuse Treatment Facilities” above for discussion of patient access to medical records (including client records of a substance abuser) and restrictions on disclosures of patient information.

# NORTH DAKOTA

North Dakota statutorily grants a patient the right of access to his medical records that are maintained by medical providers. The state also restricts the manner in which different types of insurers may disclose medical information.

## I. PATIENT ACCESS

### A. Medical Providers

North Dakota statutorily requires medical providers (licensed individuals and licensed facilities providing health care services) to provide a copy of a patient's medical records upon written request of the patient or any person authorized by the patient. [N.D. Cent. Code § 23-12-14.] A copy of the records must be provided free of charge to a medical provider designated by the patient when the records are requested for the purpose of transferring the patient's care to another provider. [N.D. Cent. Code § 23-12-14.] When a copy of the patient's records is requested for any other purpose, the provider may charge a maximum of \$20 for the first 25 pages and 75¢ for each additional page. [N.D. Cent. Code § 23-12-14.] This charge includes any administrative fee, retrieval fee, and postage expense. [*Id.*]

## II. RESTRICTIONS ON DISCLOSURES

### A. Hospitals

Hospitals and other institutions providing maternity care may not disclose the contents of their case records except: in a judicial proceeding; to health or social agencies specifically interested in the patients; and to persons having direct interest in the well-being of the patient or her infant. [N.D. Cent. Code § 23-16-09.]

#### **Remedies and Penalties**

**Fines and Penalties.** A person who violates this provision is guilty of an infraction, punishable by a fine. [N.D. Cent. Code §§ 23-16-11; 12.1-32-01 (specifying penalties for infractions).] Additionally, a person maintaining or operating a licensed nursing facility who is found guilty of knowingly violating this provision may be assessed a civil penalty. [N.D. Cent. Code § 23-16-11.]

### B. HMOs

North Dakota statutorily restricts the disclosure of health information by health maintenance organizations (HMOs), defined as any person that undertakes to provide or arrange for the delivery of basic health care services to an enrollee on a prepaid basis. [N.D. Cent. Code §§ 26.1-18.1-01 (defining "health maintenance organization") and 26.1-18.1-23.] Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant without that person's express consent. [N.D. Cent. Code §§ 26.1-18.1-23.]

There are limited exceptions to this general rule. [*Id.*] Information may be disclosed without patient authorization in the following circumstances:

- ∞ To the extent necessary to carry out the purposes of the statutes governing HMOs;
- ∞ Pursuant to a statute or court order for the production of evidence or discovery;
- ∞ In the event of claim or litigation between the person and HMO, the HMO may disclose data or information that is relevant.

[*Id.*]

## **C. Insurance Companies, HMOs and Other Health Insurance Entities**

### **1. North Dakota State Insurance Law**

Generally, an insurance company, an HMO or any other entity providing a plan of health insurance may not deliver, issue, execute or renew a health insurance policy or health service contract unless confidentiality of medical information is assured. [N.D. Cent. Code §§ 26.1-36-03.1; 26.1-36-12.4.] The insurer must adopt and maintain procedures to ensure that all identifiable information maintained by the insurer regarding the health, diagnosis and treatment of a covered person is adequately protected and remains confidential in compliance with federal and state law and professional ethical standards. [N.D. Cent. Code § 26.1-36-12.4.] Specifically, the insurer may not disclose any identifiable data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from the person or a health care provider without the person's written, dated consent, unless otherwise provided by law. [N.D. Cent. Code § 26.1-36-12.4.]

There are a number of circumstances under which an insurer or HMO may disclose identifiable information *without* the enrollee/applicant's consent including: pursuant to a statute or court order for the discovery or production of evidence; or to defend itself against claims or litigation by that person. [N.D. Cent. Code § 26.1-36-12.4] Additionally, the statute does not require consent for disclosures that are necessary to: conduct utilization review or management; facilitate payment of a claim; analyze claims or health care data; conduct disease management programs with health care providers; or reconcile or verify claims under a shared risk or capitation agreement. [N.D. Cent. Code § 26.1-36-12.4.] Neither does the statute apply to disclosures for biomedical research approved by an institutional review board. [N.D. Cent. Code § 26.1-36-12.4.] Additionally, this statute does not limit the insurance commissioner's access to records of an insurer for compliance and enforcement purposes. Once acquired by the commissioner, such records must be kept confidential. [N.D. Cent. Code § 26.1-36-12.4.]

### **2. North Dakota State Insurance Regulations**

#### **a. Scope**

The North Dakota Insurance Department has adopted a privacy regulation (Privacy of Consumer Financial and Health Information) to prevent the unauthorized disclosure of consumers' health information. These rules govern the practices of "licensees," (*i.e.*, all

licensed insurers, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under North Dakota insurance law) with respect to the disclosure of “nonpublic personal health information” of insurance consumers and customers. [N.D. Admin. Code § 45-14-01-04(17) (defining “licensee”).] “Nonpublic personal health information” is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [N.D. Admin. Code § 45-14-01-04(21) (defining “nonpublic personal health information”).] “Health information” is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [N.D. Admin. Code § 45-14-01-04(15) (defining “health information”).] Insurance “consumers” are individuals who seek to obtain, obtain, or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. “Customers” are generally consumers who have a continuing relationship with the licensee. [N.D. Admin. Code § 45-14-01-04(6), (9) & (10) (defining “consumer,” “customer” and “customer relationship”).]

Licenses are required to comply with the requirements of the state regulation with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [N.D. Admin. Code § 45-14-01-20.]

**b. Requirements**

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [N.D. Admin. Code § 45-14-01-17.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [N.D. Admin. Code § 45-14-01-18.]

The regulation permits disclosures *without* the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; actuarial, scientific, medical or public policy research; any disclosure permitted without authorization under the privacy regulation promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996; and any activity that is otherwise permitted by law, required pursuant to a governmental reporting authority or required to comply with legal process. [N.D. Admin. Code § 45-14-01-17.]

This regulation does not supercede existing North Dakota law related to medical records, health or insurance information privacy. [N.D. Admin. Code § 45-14-01-21.]

## **D. State Government**

**Public health authorities.** A public health authority may disclose protected health information only as authorized by law. [N.D. Cent. Code § 23-01.3-02; 23-01.3-08.] A public health authority may disclose protected health information to the patient, the patient's physician, or the patient's legal or designated agent or guardian. [N.D. Cent. Code § 23-01.3-02.] A signed consent from the patient may be required prior to disclosure. [*Id.*] A public health authority may disclose protected health information for use in a biomedical research project approved by an institutional review board, or public health information that has been transformed to protect the identity of the patient through coding or encryption for use in an epidemiological or statistical study. [N.D. Cent. Code § 23-01.3-02.] A public health authority may also disclose protected health information in emergency circumstances to avert or remedy a threat of imminent harm; and for law enforcement purposes in certain circumstances provided specific safeguards are in place. [N.D. Cent. Code §§ 23-01.3-05; 23-01.3-06.] The state health officer may disclose protected health information to a health care provider or to the public if the officer determines that disclosure is required to prevent the spread of disease, to identify the cause or source of the disease, or to allay fear and aid the public in understanding the risk of its exposure to disease. [N.D. Cent. Code § 23-01.3-07.]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who knowingly discloses protection health information in violation of these statutes is guilty of a class A misdemeanor. A class A misdemeanor is punishable by a maximum of 1 year's imprisonment, a \$2,000 fine, or both. [N.D. Cent. Code §§ 23-01.3-09; 12.1-32-01.]

## **III. PRIVILEGES**

North Dakota recognizes a number of health care provider-patient privileges, which allow a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications with the health care provider made for the purpose of diagnosis or treatment of a physical, mental or emotional condition. [N.D. Rules of Evidence, Rule 503 (physician and psychotherapist-patient); N.D. Cent. Code §§ 31-01-06.1 (qualified school counselor-student); 31-01-06.3 (addiction counselor-client); 43-47-09 (licensed professional counselor-client).] HMOs and insurers are entitled to claim any statutory privilege against disclosure that the provider who furnished such information to the HMO or insurer could claim. [N.D. Cent. Code § 26.1-18.1-23 (HMOs) and § 26.1-36-12.4 (insurer).]



## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Birth Defects

North Dakota maintains a birth defects registry requiring the reporting of visible congenital deformities within three days of a crippled child's birth. [N.D. Cent. Code § 50-10-07.] The information contained in a congenital deformity report to the state agency is confidential, not open to public inspection and not considered a public record. [N.D. Cent. Code § 50-10-08.]

### B. HIV/AIDS

The results of a test for HIV are confidential and generally may not be released without the authorization of the person tested. [N.D. Cent. Code § 23-07.5-05.] Disclosure *without* the individual's authorization to the following persons:

- ∞ The subject of the test. If the subject is a minor, to the minor's parent, legal guardian or custodian.
- ∞ The test subject's health care provider, including those instances in which a health care provider provides emergency care to the subject.
- ∞ An agent or employee of the test subject's health care provider who provides patient care or handles or processes specimens of body fluids or tissues.
- ∞ A blood bank, blood center, or plasma center, in certain circumstances.
- ∞ The state health officer or the state health officer's designee, for the purpose of providing epidemiologic surveillance or investigation or control of communicable disease.
- ∞ A health care facility staff committee or accreditation or health care services review organization for the purposes of conducting program monitoring and evaluation and health care services reviews.
- ∞ A person who conducts research, for the purpose of research, if the researcher meets certain specified requirements, including having obtained permission to perform the research from an institutional review board.
- ∞ Others.

[*Id.*]

#### Remedies and Penalties

**Right to Sue.** Any person who violates section 23-07.5-05 is liable to the subject of the test for actual damages and costs plus exemplary damages. [N.D. Cent. Code §§ 23-07.5-07.]

**Fines and Penalties.** Any person who intentionally discloses the results of a blood test in violation of section 23-07.5-05 and thereby causes bodily or psychological harm to the test subject is guilty of a class C felony, punishable by a maximum penalty of 5 years' imprisonment, a \$5,000 fine, or both. [N.D. Cent. Code §§ 23-07.5-08; 12.1-32-01.]

Physicians must report to the state department of health the name, date of birth, sex and address of every individual diagnosed as having HIV/AIDS or a related illness. [N.D. Cent. Code §§ 23-07-02.1.] These reports are strictly confidential, and the information contained in them may not be released, shared with any agency or institution, or made public, upon subpoena, search warrant, discovery proceedings or

otherwise except in limited circumstances. [N.D. Cent. Code § 23-07-02.2.] Release of this data is permissible for purposes of treating, controlling and investigating incidents of HIV and to medical personnel to the extent necessary to protect the health or life of any individual. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any person required to report HIV to the health department and who releases or makes public confidential information or otherwise breaches these confidentiality requirements is guilty of a class C felony, punishable by a maximum penalty of 5 years' imprisonment, a \$5,000 fine, or both. [N.D. Cent. Code §§ 23-07-21; 12.1-32-01.]

Proceedings initiated by public health officials against a person who has HIV and who has been determined to be a danger to the public are closed and all reports, transcripts, records or other information relating to the actions taken are confidential. [N.D. Cent. Code §§ 23-07.4-01 through 23-07.4-03.]

## **C. Mental Health**

Information and records obtained in the course of an investigation, examination, or treatment of a patient committed to mental health facility must be kept confidential and are not public records. [N.D. Cent. Code § 25-03.1-43.] The presence or past presence of a patient in a treatment facility is similarly afforded confidential treatment. [*Id.*]

Confidential information may only be disclosed to:

- ∞ physicians and providers of health, mental health, or social and welfare services involved in caring for, treating, or rehabilitating the patient to whom the patient has given written consent to have information disclosed;
- ∞ other individuals to whom the patient has given written consent to have the information the disclosed;
- ∞ persons legally representing the patient;
- ∞ persons authorized by a court order;
- ∞ persons conducting research where the patient's anonymity is assured;
- ∞ department of corrections where prisoners are patients in the state hospital on transfers by voluntary admissions or court order;
- ∞ law enforcement agencies;
- ∞ victims and witnesses of a crime to the extent necessary to comply with notification requirements;
- ∞ governmental or law enforcement agencies when necessary to secure the return of a patient who is absent without authorization from the facility; or
- ∞ qualified service organizations and third-party payers to the extent necessary to perform their functions.

[*Id.*]

The treating physician or facility director must record the date and circumstances under which the disclosure was made, including the names of the persons or agencies to which the disclosure was made, and the information disclosed. [N.D. Cent. Code § 25-03.1-44.]

## **D. Sexually Transmitted Diseases**

Physicians, nurses and all other persons treating, nursing, lodging, caring for or having knowledge of the existence of any reportable disease must report incidents of sexually transmitted diseases to health officials. [N.D. Cent. Code § 23-07-02; N.D. Admin. Code § 33-06-01-01 (including sexually transmitted diseases in the list of reportable diseases).] In addition, the superintendent of a hospital, dispensary, or charitable or penal institution must report all cases of sexually transmitted diseases to the nearest health officers. [N.D. Cent. Code § 23-07-03.] These reports may not be disclosed or inspected except as authorized by rules. [N.D. Cent. Code § 23-07-20.1.]

**Remedies and Penalties**

**Fines and Penalties.** Any person who violates this provision is guilty of an infraction, punishable by a maximum fine of \$500. [N.D. Cent. Code §§ 23-07-21; 12.1-32-01.]

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## OHIO

Under the Ohio Revised Code, a patient has a statutory right of access to his medical records maintained by hospitals, health care providers, and insurance entities. Ohio does not have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### I. PATIENT ACCESS

#### A. Employers

An employer or physician, health care professional, hospital or laboratory that contracts with the employer to provide medical information pertaining to employees must furnish to the employee or former employee a copy of his medical report upon the employee's written request. [Oh. Rev. Code § 4113.23.] The information to be provided to the employee includes medical reports arising out of any physical examination or laboratory tests required by the employer as a condition of employment or arising out of any injury or disease related to the employee's employment. [*Id.*]

If the physician concludes that providing all or part of the record directly to the employee would result in serious medical harm to the employee, the physician must record this determination in the medical record and provide the copy of the medical record to a physician designated by the employee. [Oh. Rev. Code § 4113.23.]

**Fees.** The employer may require the employee to pay the cost of furnishing copies of the employee's medical records, but it may not charge more than 25¢ per page. [Oh. Rev. Code § 4113.23.]

#### **Remedies and Penalties**

**Fines and Penalties.** An employer who refuses to furnish to an employee copies of his reports is guilty of a minor misdemeanor for each violation. The bureau of workers' compensation is responsible for enforcing this section. [*Id.*]

### B. Health Care Providers, Hospitals, and Practitioners

#### 1. Background

In 2001, the Ohio legislature passed two amendments to Section 3701.74 of the Ohio Revised Code, which had provided patients a right of access to their hospital records. [See 2001 HB 506 and HB 508.] Because the two amendments contain substantively different terms and do not refer to each other, the amendments are subject to "harmonization" under Section 1.52 of the Code. Generally, Section 1.52 provides that if amendments to the same statute are enacted at the same or different sessions of the legislature, without reference to another, the amendments are to be harmonized, if

possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The following summary attempts to harmonize these two amendments.

## **2. Scope**

Under Section 3701.74 of the Ohio Revised Code, a patient has the right to examine and receive a copy of his medical record. This right attaches to records maintained by health care practitioners (including medical doctors and surgeons, osteopaths, podiatrists, and chiropractors) and hospitals. [Oh. Rev. Code § 3701.74(5) HB 506 version (defining “practitioner”) and combined versions.] The “medical record” to which the patient has access includes any data pertaining to a patient’s medical history, diagnosis, prognosis, or medical condition that is generated and maintained in the process of health care treatment. [Oh. Rev. Code § 3701.74 (combined versions).]

The persons who have a right of access under this provision include the individual who has received health care treatment and the patient’s representative, generally a person to whom a patient has given written authorization to act on his behalf with respect to the patient’s medical records. [Oh. Rev. Code § 3701.74(A)(6) HB 508 version.] With respect to deceased patients, the personal representative means the executor or the administrator of the patient’s estate or the person responsible for the patient’s estate if it is not probated. [*Id.*]

The attorney in fact has the same right as the individual to review the individual’s health care records, unless the right is limited in a durable power of attorney for health care. [Oh. Rev. Code § 1337.13.]

## **3. Procedures for Providing Access**

In order to examine or obtain a copy of his medical records, a patient (or his personal representative) must submit a signed written request that has been dated no more than 60 days before the submission date. A request to receive a copy of a medical record must specify whether the copy is to be sent to the patient’s residence, physician or chiropractor, or representative, or held at the provider’s office. Within a “reasonable” amount of time after receiving a written request from a patient, a health care provider, hospital or practitioner must permit a patient to examine his medical records during regular business hours or provide a copy of the records to the patient. [Oh. Rev. Code § 3701.74.]

If the treating physician or practitioner determines that disclosure of the record is likely to have an adverse effect on the patient, the provider, hospital or practitioner must provide the record to a physician designated by the patient. [Oh. Rev. Code § 3701.74.] The provider, hospital or practitioner must take reasonable steps to establish the identity of the person making a request to examine or obtain a copy of the patient’s record. [*Id.*]

**Fees.** A patient must be permitted to examine his record without charge. [Oh. Rev. Code 3701.74(B) (HB 508 version).] In contrast, a fee may be charged for providing a copy of a medical record. For furnishing a copy of a medical record, a health care provider or medical records company (*i.e.*, a person who stores, locates or copies

medical records for a provider) may charge a fee not exceeding the sum of: an initial fee of \$15 for records search; \$1 per page for the first 10 pages; 50¢ per page for pages 11 through 50; 25¢ per page for pages 51 and higher; the actual cost of copying for data recorded in a form other than on paper; and the actual cost of postage. [Oh. Rev. Code §§ 3701.741; 3701.74 (defining “medical records company”).] This fee schedule is effective through 2003. [Oh. Rev. Code §§ 3701.741.] A health care provider and the patient or his representative may also enter into a contract to charge a different fee for the copying of medical records. However, the health care provider may not charge a patient or his representative if the medical record is necessary to support a claim under Title II or Title XVI of the Social Security Act. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** If a health care provider, hospital or practitioner fails to furnish the requested records, the patient may bring a civil action to enforce his right of access. [Oh. Rev. Code § 3701.74(D).]

## **C. Insurance Entities, including Health Insuring Corporations**

### **1. Scope**

Ohio statutorily grants individuals access to personal medical information maintained by insurers. [See Oh. Rev. Code § 3904.08.] These access provisions apply to insurance agents and support organizations and “insurance institutions,” a term defined as any person, corporation, partnership, fraternal benefit society or association engaged in the business of life, health, or disability insurance. [Oh. Rev. Code §§ 3904.01(K) (defining “insurance institution”); 3904.02.]

The provisions cover “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [Oh. Rev. Code §§ 3904.01(R) (defining “personal information”); 3904.02 (application of provisions).] “Medical record information” is personal information that (1) relates to the physical or mental health condition, medical history, or medical treatment of an individual, and (2) is obtained from a medical professional (including pharmacists), medical care institution, or an individual, the individual’s spouse, parent or legal guardian. [Oh. Rev. Code § 3904.01(P) & (Q) (defining “medical professional” and “medical record information”).]

With respect to health insurance, the rights granted by these provisions extend to Ohio residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Oh. Rev. Code § 3904.02.]

### **2. Requirements**

An insurance institution, agent or insurance support organization must permit the individual to inspect and copy his personal information in person or obtain a copy of it by mail, whichever the individual prefers, within 30 business days of receiving a written request and proper identification from an individual. [Oh. Rev. Code § 3904.08(A).] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Oh. Rev. Code § 3904.08(A)(2).]

In addition to giving the individual a copy of his personal information, the insurance entity must also give the individual a list of the persons to whom it has disclosed such personal information within two years prior to the request for access, if that information is recorded. If such an accounting of disclosures is not recorded, the entity must inform the individual of the names of those persons to whom it normally discloses personal information. [Oh. Rev. Code § 3904.08(A)(3).]

Medical record information provided to the insurance entity by a medical professional or medical care institution that is requested may be supplied either directly to the requesting individual or to a medical professional designated by the individual, at the option of the insurance entity. [Oh. Rev. Code § 3904.08(4)(C).]

**Fees.** The insurance entity can impose a reasonable fee to cover copying costs. [Oh. Rev. Code § 3904.08(D).] No fee may be charged, however, when the information is requested as the result of an adverse underwriting decision. [*Id.* and Oh. Rev. Code § 3904.10.]

**Right to Amend.** A person has a statutory right to have factual errors corrected and misrepresented or misleading entries amended or deleted. [Oh. Rev. Code § 3904.09.] Within 30 business days from the date of receipt of a written request, the insurance institution, agent or support organization must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) notify the individual of its refusal to make the correction, amendment or deletion, the reasons for the refusal, and the individual's right to file a statement of disagreement. [*Id.*]

If the insurance entity corrects, amends or deletes any of the individual's recorded personal information, it must notify the individual of its actions in writing and furnish the amendment, correction or fact of the deletion to: (1) any person designated by the individual, who may have received the individual's personal information within the preceding two years; (2) to insurance support organizations that systematically receive the individual's personal information from the insurance institution within the preceding seven years, unless the organization no longer maintain information about the individual; and (3) insurance support organizations that furnished the personal information that was corrected, amended or deleted. [Oh. Rev. Code § 3904.09(B).]

If the insurance entity refuses to make the requested change, the individual has the right to file a concise statement setting forth what the individual thinks is the correct, relevant or fair information; and a statement of the reasons why the individual disagrees with the entity's refusal to correct, amend or delete recorded personal information. [Oh. Rev. Code § 3904.09(C).] The insurance entity must file the individual's statement with the disputed personal information and provide a means by which anyone reviewing the information will be made aware of the individual's statements and have access to them. Furthermore, in any subsequent disclosure of the personal information that is the subject of the disagreement, the entity must clearly identify the matter or matters in dispute and provide the individual's statements along with the recorded personal information being disclosed. [Oh. Rev. Code § 3904.09(D).] Insurers must furnish these statements of disagreement to third parties in the same manner they are required to furnish corrected information. [*Id.*]

**Notice.** The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Oh. Rev. Code § 3904.04.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that (1) personal information may be collected from persons other than the individual proposed for coverage, (2) such information as well as other personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization, (3) a right of access and correction exists with respect to all personal information collected, and (4) that a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose rights under this statute are violated has the right to file a civil action seeking equitable relief within two years of the violation. [Oh. Rev. Code § 3904.21.] The court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Fines and Penalties.** Additionally, the Insurance Commissioner may hold hearings and impose administrative remedies, including, in the case of knowing violations, monetary fines not to exceed \$500 per violation or \$10,000 in the aggregate for multiple violations. [Oh. Rev. Code §§ 3904.16; 3904.19.] A cease and desist order and fine may also be imposed. [Oh. Rev. Code § 3904.18.]

## **D. Nursing Homes**

Nursing home residents have a right to obtain from the attending physician complete and current information concerning their medical condition, prognosis, and treatment plan in terms that the residents can reasonably be expected to understand. Residents also have a right of access to all information in their medical record. When the attending physician finds that it is not medically advisable to give the information to the resident, he may make it available to the resident's sponsor on the resident's behalf, if the sponsor has a legal interest or is authorized by the resident to receive the information. [Oh. Rev. Code § 3721.13.]

## **E. Optometrists**

A licensed optometrist must provide each patient for whom the optometrist prescribes any vision correcting item, device or procedure, a copy of the prescription, without additional charge to the patient. [Oh. Rev. Code § 4725.28.]

## **F. State Government**

A state or local agency must provide medical, psychiatric, or psychological information to a person who is the subject of the information or his legal guardian upon request, unless a physician, psychiatrist, or psychologist determines for the agency that the disclosure of the information is likely to have an adverse effect on the patient, in which case the information shall be released to a physician, psychiatrist, or psychologist designated by the patient or legal guardian. [Oh. Rev. Code § 1347.08.]



## II. RESTRICTIONS ON DISCLOSURE

### A. Health Insuring Corporation

Data or information pertaining to an enrollee's or applicant's diagnosis, treatment, or health obtained by a health insuring corporation from the enrollee or applicant, or from any health care facility or provider must be held in confidence and may not be disclosed without the express consent of the enrollee or applicant, except: to the extent necessary to carry out the provisions governing health insuring corporations; pursuant to statute or court order for the production of evidence; or in the event of claim litigation between the individual and the health insuring corporation when such information is pertinent. [Oh. Rev. Code § 1751.52.]

A "health insuring corporation" is a corporation that pursuant to a policy, contract, certificate or agreement pays for, reimburses or provides, delivers, arranges for or otherwise makes available basic, supplemental or specialty health care services or a combination of such services. [Oh. Rev. Code § 1751.01 (defining "health insuring corporation").]

A medical information release signed by an enrollee upon the request of a health insuring corporation must clearly explain what information may be disclosed under the terms of the release. If the health insuring corporation uses this release to request medical information from a health care facility or provider, it must provide a copy of the release to the facility or provider, upon request. [Oh. Rev. Code § 1751.521.]

### B. Insurance Entities, including Health Insuring Corporations

#### 1. Scope

Ohio maintains privacy provisions that apply to insurance agents and support organizations and "insurance institutions," a term defined as any person, corporation, partnership, fraternal benefit society or association engaged in the business of life, health, or disability insurance. [Oh. Rev. Code §§ 3904.01(K) (defining "insurance institution"); 3904.02.]

These provisions cover "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [Oh. Rev. Code §§ 3904.01(R) (defining "personal information"); 3904.02 (application of provisions).] "Medical record information" is personal information that (1) relates to the physical or mental health condition, medical history, or medical treatment of an individual, and (2) is obtained from a medical professional (including pharmacists), medical care institution, or an individual, the individual's spouse, parent or legal guardian. [Oh. Rev. Code § 3904.01(Q) (defining "medical record information" and "medical professional").]

With respect to health insurance, the rights granted by these provisions extend to Ohio residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Oh. Rev. Code § 3904.02.]

## 2. Requirements

### a. Authorizations for Obtaining Health Information from Others

If an insurance entity uses an authorization form to obtain health information in connection with an insurance transaction, the authorization form must conform to specific statutory requirements. The authorization form must be dated, written in plain language, specify the types of persons authorized to disclose information concerning the individual, specify the nature of the information authorized to be disclosed, identifies by generic reference representatives of the insurance institution who is authorized to receive the information and specify the purposes for which the information is collected. [Oh. Rev. Code § 3904.06.] The length of time the authorization remains valid varies with the purpose of obtaining the requested information. An authorization signed in support of an application for health insurance remains valid for 30 months while an authorization signed for the purpose of collecting information in connection with a claim for health benefits is effective for the term of coverage of the policy. [*Id.*]

### b. Disclosure Authorization Requirements and Exceptions

Generally, an insurance entity may not disclose medical information about a person that it collected or received in connection with an insurance transaction without that person's written authorization. [Oh. Rev. Code § 3904.13.] Authorizations submitted by those *other* than insurance entities must be signed and dated by the individual. [Oh. Rev. Code § 3904.13.] These authorizations are effective for one year. [*Id.*]

An insurance entity may not disclose information to another insurance entity pursuant to an authorization form unless the form meets the detailed requirements of the statute. [*Id.*] See Authorizations for Obtaining Health Information from Others, above.

**Authorization Exceptions.** There are numerous circumstances under which an insurance entity can disclose information without the individual's authorization including: to medical care institutions or professionals for verifying insurance coverage benefits; for the purpose of conducting business when the disclosure is reasonably necessary; to law enforcement agencies in order to prevent or prosecute fraud; to a professional peer review organization for reviewing the service or conduct of a medical care institution or professional; for purposes of actuarial or research studies, provided certain conditions are met; for marketing purposes, subject to certain restrictions; in response to a facially valid search warrant or subpoena or other court order; and others. [Oh. Rev. Code § 3904.13.]

An insurer may not disclose a person's medical record information to a third party for that party's marketing purposes. [*Id.*] However, the insurer may disclose this information to an affiliate for the marketing of an insurance product or service so long as the affiliate agrees not to disclose the information for any other purpose or to unaffiliated persons. [*Id.*]

### c. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of

its information practices. [Oh. Rev. Code § 3904.04.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that (1) personal information may be collected from persons other than the individual proposed for coverage, (2) such information as well as other personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization, (3) a right of access and correction exists with respect to all personal information collected, and (4) a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of these provisions has a statutory right to bring a civil action for actual damages sustained as a result of the disclosure. [Oh. Rev. Code § 3904.21.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Fines and Penalties.** The Insurance Commissioner may hold hearings and if it is found that the insurance entity has violated these provisions, may enter a cease and desist order. [Oh. Rev. Code § 3904.18.] Where it is determined that there has been a knowing violation the Commissioner may also impose monetary fines not to exceed \$500 per violation or \$10,000 in the aggregate for multiple violations. [Oh. Rev. Code §§ 3904.16; 3904.19.] Any person who knowingly *and* willfully obtains information concerning an individual from an insurance entity under false pretenses is guilty of a felony in the fourth degree. [Oh. Rev. Code § 3904.14.]

## **C. Nursing Homes**

Nursing home residents have a right to the confidential treatment of personal and medical records, and the right to approve or refuse the release of their records to any individual outside the home, except: in the case of transfer to another home, hospital or health care system; as required by law or rule; or as required by a third-party payment contract. [Oh. Rev. Code § 3721.13.]

## **D. Physicians and Physician Assistants**

A physician or physician assistant who willfully betrays a professional confidence can be brought before the State Medical Board for disciplinary action. [Oh. Rev. Code §§ 4730.25(B)(7); 4731.22(B)(4).]

## **E. Quality Assurance and Utilization Review Committees**

Records and information made available to a hospital's quality assurance or utilization review committee retain their confidentiality and may be used by the members of the committee only in the exercise of the proper functions of the committee. [Oh. Rev. Code § 2305.24.]

### **Remedies and Penalties**

**Right to Sue.** A civil suit may be brought against a member of a quality assurance or utilization review committee for misuse of any information, data, records or reports furnished to the committee by a physician. [Oh. Rev. Code § 2305.24.]

## F. State Government

Any information maintained by any public office that directly or indirectly identifies a present or former patient or client or his diagnosis, prognosis, or medical treatment are specifically excluded from “public records” which are available to the public under Ohio’s open records law. [Oh. Rev. Code §§ 149.43(A)(1) and (3); 149.431(A)(1).]

**Programs for Medically Handicapped Children.** In addition, records pertaining to the medical history, diagnosis, treatment or medical condition of a medically handicapped child in programs funded by the “Maternal and Child Health Block Grant” (Title V of the Social Security Act) are confidential and are not public records under Ohio’s open records law. [Oh. Rev. Code § 3701.028.] These records may not be released without the subject’s consent or the consent of his parent or guardian if the subject is a minor, except as necessary to: administer programs for medically handicapped children; coordinate provision of services under these programs with other state agencies and city health districts; or coordinate payment of providers. [*Id.*]

**State Employee Assistance Programs.** Records of the identity, diagnosis, prognosis or treatment of any person maintained in connection with a state employee assistance program for medical, social or other services are not public records under Ohio’s open records law. [Oh. Rev. Code § 3701.041.] These records may not be disclosed without the prior written consent of the subject of the records, except: to medical personnel to the extent necessary in a bona fide medical emergency; to qualified personnel conducting scientific research, management audits, financial audits or program evaluation, provided that individuals are not directly or indirectly identified in any resulting reports; or if authorized by an appropriate court order upon a showing of good cause. [*Id.*]

## III. PRIVILEGES

Ohio recognizes a number of health care provider-patient privileges that allow a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications made between himself and the health care provider. The privilege extends to a patient and his physician or dentist [Oh. Rev. Code § 2317.02(B)(1)], chiropractors [Oh. Rev. Code § 2317.02(J)(1)], school guidance counselors, professional counselors, licensed social workers [Oh. Rev. Code § 2317.02(G)(1)], and psychologists [Oh. Rev. Code § 4732.19.]. A health insuring corporation may claim any statutory privileges against disclosure that a facility or provider who furnished the information to the corporation is entitled to claim. [Oh. Rev. Code § 1751.52(C).]

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Birth Defects

Ohio maintains a birth defects information system to identify and detect trends and epidemics in congenital anomalies, stillbirths, and abnormal conditions of newborns. [Oh. Rev. Code § 3705.30; 3705.31.] The director of health may use the information to

notify parents, guardians and custodians of children with congenital anomalies or abnormal conditions of medical care and other services available for the child or family. [Oh. Rev. Code § 3705.32.]

All records and information received or assembled by the birth defects information system are confidential and may not be disclosed without the written consent of the child's parent or legal guardian, except: to the director of health, employees of the department of health, and qualified persons or government entities engaged in demographic, epidemiological, or similar studies related to health and health care provision. The recipients must sign an agreement to maintain the system's confidentiality. [Oh. Rev. Code § 3705.32.] The director of health also must maintain a record of all persons and government entities given access to the information in the system. [*Id.*] A parent or legal guardian may have any information that identifies the child removed from the birth defects information system by utilizing a form that may be obtained from the local health department or the child's physician. [Oh. Rev. Code § 3705.33.]

## **B. Cancer**

Ohio maintains a cancer incidence surveillance system with mandatory reporting requirements. [Oh. Rev. Code §§ 3701.261; 3701.262.] Every physician, dentist, hospital or person providing diagnostic or treatment services to patients with cancer must report each case to the department of health. All data regarding individual patients is confidential and may be used only for statistical, scientific and medical research for the purpose of reducing morbidity or mortality. [Oh. Rev. Code § 3701.263.] The information may be released to researchers if specific conditions meant to maintain the patient's privacy are met. For instance, the researcher must provide written information about the safeguards that will be used to protect the patient's identity. [*Id.*]

The department of health may release confidential information to physicians for diagnostic and treatment purposes if the patient's attending physician gives oral or written consent and the patient completes a release of confidential information form. The information may also be released to cancer registries of another state if certain conditions are met. [*Id.*]

## **C. Genetic Test Results**

Ohio prohibits health insuring corporations, insurers of sickness and accident insurance and self-insurers from requiring, considering, or inquiring into the results of genetic screening or testing in processing an application for coverage for health care services under an individual or group policy, or in determining insurability under such policy. [Ohio Rev. Code Ann. §§ 1751.64; 3901.49; 3901.50.] They also may not ask for the results of genetic screening or testing in developing or asking questions regarding applicants' medical histories for coverage under an individual or group policy. [*Id.*]

"Genetic screening or testing" is a laboratory test of a person's genes or chromosomes for abnormalities, defects, or deficiencies, including carrier status, linked to physical or mental disorders or impairments, susceptibility to illness, disease, or other disorders. [*Id.*]

## **Remedies and Penalties**

**Fines and Penalties.** A violation of this section is an unfair and deceptive act or practice of insurance subject to administrative procedures designated in sections 3901.19 to 3901.26. [*Id.*] The superintendent of insurance may conduct hearings and impose various remedies including: suspension or revocation of a license to engage in the business of insurance, issue an order not to employ the person in violation of the statute, to return any payments received by such person as a result of the violation and cease and desist orders. [Ohio Rev. Code Ann. §§ 3901.22; 3901.221.]

**Note:** Modified statutory requirements become effective February 2004. [Ohio Rev. Code Ann. §§ 1751.65; 3901.491; 3901.501.] Health insuring corporations, insurers of sickness and accident insurance and self-insurers may not: consider any information obtained from genetic screening or testing in processing an application, or in determining insurability; or inquire, directly or indirectly, into the results of genetic screening or testing or use such information, in whole or in part, to cancel, refuse to issue or renew, or limit benefits. [*Id.*]

## **Remedies and Penalties**

**Fines and Penalties.** Whenever it appears to the superintendent of insurance that a person has engaged in, is engaged in, or is about to engage in any illegal or prohibited act or practice relating to insurance, he may investigate the matter and administer oaths, summon or compel attendance of witnesses to testify and the production of evidence pertaining to the matter. [Ohio Rev. Code Ann. § 3901.04.] The superintendent may also initiate criminal proceedings by presenting evidence of the commission of a criminal offense to a prosecuting attorney. At the request of the prosecuting attorney, the attorney general may assist in the prosecution of the violation. [*Id.*]

## **D. HIV/AIDS**

Attending health care providers, designated agents of health care facilities, and others designated by the public health council must promptly report every case of AIDS, AIDS-related condition and every confirmed positive test of HIV to the state department of health. Reported information that identifies an individual is confidential. It may be released only with the written consent of the individual, except as the director of health determines necessary to ensure the accuracy of the information; as necessary to provide treatment to the individual; pursuant to court order; or pursuant to a search warrant or subpoena in connection with a criminal investigation. [Oh. Rev. Code § 3701.24; Oh. Admin. Code § 3701-3-12.]

Generally, no person or state or local agency that acquires HIV-related information while providing any health care service or while employed by a health care provider or facility may disclose the identity of any individual on whom an HIV test is performed, the results of the test, or the identity of any person diagnosed as having AIDS or an AIDS-related condition without the written authorization of the individual. [Oh. Rev. Code § 3701.243(A).] The written authorization must be signed, specify to whom disclosure is authorized, and provide a time period during which the authorization is valid. [Oh. Rev. Code § 3701.243(B).] There are a number of circumstances where

disclosure without authorization is allowed, such as: to the individual's physician; to the individual's spouse or any sexual partner; to organ donor facilities; and to law enforcement pursuant to a search warrant or subpoena. [Oh. Rev. Code § 3701.243(B).] Although the statute allows the disclosure of an HIV test or diagnosis to a health care provider based on a need to know, the provision makes clear that disclosure may not be made or requested solely for the purpose of identifying an HIV-afflicted person in order to refuse treatment. [Oh. Rev. Code § 3701.243(B)(2).]

### **Remedies and Penalties**

**Right to Sue.** An individual whose rights are violated under these provisions may bring a civil action for compensatory damages and any equitable relief, including injunctive relief, within one year after the cause of action accrued. [Oh. Rev. Code § 3701.244.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Community Alternative Homes.** Residents of community alternative homes have a right to the confidential treatment of their personal and medical records, and the right to approve or refuse the release of these records to any individual except as authorized by law or rule and except in the case of a transfer to another home or health care facility. [Oh. Rev. Code § 3724.07.] "Community alternative homes" are residences or facilities that provide accommodations, personal assistance and supervision for three to five unrelated individuals with AIDS or a condition related to AIDS. [Oh. Rev. Code § 3724.01 (defining "community alternative home").] They do not include nursing homes, hospice care programs, and other facilities and programs specified in the statute. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** At the request of the director of health, the attorney general must bring an action for appropriate relief, including civil penalties, for violations of these provisions. The court may impose on the violator a civil penalty not more than \$1,000 for each day a violation continues. [Oh. Rev. Code § 3724.13.]

## **E. Mental Health**

### **1. Patient Access**

**Hospitalized Mentally Ill Patients.** A mental health patient who has been institutionalized pursuant to court order has a statutory right of access to his own psychiatric and medical records unless access specifically is restricted in a patient's treatment plan for clear treatment reasons. [Oh. Rev. Code § 5122.31(E).]

### **2. Restrictions on Disclosure**

**Hospitalized Mental Ill Patients.** The records, reports and applications pertaining to a mentally ill person subject to institutionalization by court order are confidential except when disclosure is expressly authorized, such as to insurers to obtain payment. [Oh. Rev. Code § 5122.31(C).] Disclosure of the patient's diagnosis, medication and prognosis may be made to a family member involved in the provision, planning and monitoring of services to the patient if the patient's treating physician determines that

the disclosure is in the best interest of the patient, and only if the patient is first notified and does not object to the disclosure. [Oh. Rev. Code § 5122.31(G).]

The custodian of patient records must attempt to obtain the patient's consent before records are disclosed to (1) insurers or third-party payers to obtain payment for services provided to the patient, (2) the board of alcohol, drug addiction and mental health services and other agencies to provide services to a person involuntarily committed, and (3) other hospitals, institutions and facilities of the department of health, community mental health agencies, or boards of alcohol, drug addiction and mental health services for patient care or services. [Oh. Rev. Code § 5122.31(O).]

**Persons with Mental Retardation or a Developmental Disability.** Persons with mental retardation or a developmental disability have a right to privacy, and the right to confidential treatment of all information in their personal and medical records, except to the extent that disclosure or release of records is permitted by Oh. Rev. Code §§ 5123.89 and 5126.044. [Oh. Rev. Code § 5123.62.] Oh. Rev. Code § 5123.89 governs disclosures by the managing officer for institution records and reports of residents or former residents of institutions for the mentally retarded. Oh. Rev. Code § 5126.044 governs disclosures of an individual's identity by the county board of mental retardation and developmental disabilities related to services provided by the board.

**Psychologists.** The willful unauthorized disclosure of information received in professional confidence may be grounds for a reprimand, suspension or revocation of a license. [Oh. Rev. Code § 4732.17(A)(4).]

## **F. Substance Abuse**

Records or information, other than court entries, pertaining to the identity, diagnosis, or treatment of any patient that are maintained by any drug treatment program licensed by, or certified by, the director of alcohol and drug addiction services, are confidential and may only be disclosed with the patient's written consent or as expressly authorized by this provision. [Oh. Rev. Code § 3793.13.] They may not be divulged in any civil, criminal, administrative or legislative proceeding. Disclosure may be made without the patient's consent to qualified personnel for the purpose of conducting scientific research, management, financial audits, or program evaluation, but personnel may not identify, directly or indirectly, any individual patient in any report of the research, audit, or evaluation, or otherwise disclose a patient's identity. [*Id.*] Disclosure is also permitted pursuant to court order if a court has reason to believe that a treatment program or facility is being operated or used in a manner contrary to law. [*Id.*]



**Remedies and Penalties**

**Fines and Penalties.** A person who violates this section is guilty of a felony of the fifth degree. [Oh. Rev. Code § 3793.99.]

In addition, a person treated for substance abuse under the alcohol and drug addiction services provisions retains his civil rights and liberties, including the right as a patient to maintain the confidentiality of health and medical records. [Oh. Rev. Code § 3793.14.]

## OKLAHOMA

Oklahoma statutorily grants a patient the right of access to his medical records maintained by a doctor, hospital or other medical institution. The state does not have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### I. PATIENT ACCESS

#### A. Health Care Practitioner, including Doctors and Hospitals

A patient is entitled to obtain access to and a copy of the information contained in his medical records maintained by a doctor, hospital, or other medical institution upon request and payment of copying costs, not to exceed 25¢ per page. [Okla. Stat. tit. 76, § 19.] No fee for retrieving the record may be imposed. [*Id.*] Medical records include x-rays and other photographs or images pertaining to the patient's case. [*Id.*] The cost of each x-ray or other photograph may not exceed \$5 or the actual cost of reproduction whichever is less. [*Id.*]

Psychological and psychiatric records are not accessible to the patient under this provision, unless access is provided pursuant to the consent of a treating physician or practitioner or ordered by a court upon a finding that it is in the best interests of the patient. Moreover, although the mental health patient may authorize release of his records to his attorney, a third party payor or other governmental entity, the patient's execution of such a consent does not authorize the patient personal access to the records. [*Id.*; see Section IV for further discussion of access to mental health records.]

#### Remedies and Penalties

**Fines and Penalties.** A person refusing to furnish records or information required in this provision is guilty of a misdemeanor. [Okla. Stat. tit. 76, § 20.]

**Telemedicine.** Prior to the delivery of health care via telemedicine, a health care practitioner must obtain an informed consent from the patient that includes a statement that the patient has access to all medical information transmitted during a telemedicine interaction. Copies of the information are available at a stated cost not to exceed the direct cost of providing the copies. [Okla. Stat. tit. 36, § 6804.]

#### Remedies and Penalties

**Fines and Penalties.** Failure of a health care practitioner to comply with these provisions on telemedicine constitutes unprofessional conduct. [*Id.*]

## II. RESTRICTIONS ON DISCLOSURES

### A. Chiropractors

Under Oklahoma’s Chiropractic Code of Ethics, a chiropractor is directed to preserve and protect the patient’s confidences and records, except as the patient directs or consents, or if the law requires otherwise. [Okla. Stat. tit. 59, §161.18(6).] Chiropractors are also directed to comply with a patient’s request for records, and may impose a reasonable copying charge. [Okla. Stat. tit. 59, § 161.18(5).]

### B. Dentists

Under the State Dental Act, dentists may be disciplined for willfully disclosing confidential information. [Okla. Stat. tit. 59, § 328.32(A)(24).]

### C. Health Care Practitioners

**Telemedicine.** Prior to the delivery of health care, a health care practitioner must obtain informed consent from the patient that includes: a statement that all confidentiality protections apply; and a statement that dissemination of patient identifiable images or other information from the telemedicine interaction to researchers or other entities outside the patient-practitioner relationship may not occur without the written consent of the patient. [Okla. Stat. tit. 36, § 6804.] The written consent statement signed by the patient shall become part of the patient’s medical record. [*Id.*]

#### Remedies and Penalties

**Fines and Penalties.** Failure of a health care practitioner to comply with these provisions constitutes unprofessional conduct. [*Id.*]

### D. Insurers

#### 1. Scope

The Oklahoma Insurance Department adopted a privacy regulation (Privacy of Consumer Financial and Health Information Regulation) to prevent the unauthorized disclosure of consumers’ health information. These rules govern the practices of “licensees,” (*i.e.*, all licensed insurers, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under Oklahoma Insurance Law) with respect to the disclosure of “nonpublic personal health information” of insurance consumers and customers. [Okla. Admin. Code § 365:35-1-4(17) (defining “licensee”).] “Nonpublic personal health information” is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [Okla. Admin. Code § 365:35-1-4(21) (defining “nonpublic personal health information”).] “Health information” is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [Okla. Admin. Code § 365:35-1-4(15) (defining “health information”).] Insurance “consumers” are individuals who seek to obtain, obtain, or have obtained an insurance product or

service from a licensee to be used primarily for personal, family or household purposes. “Customers” are generally consumers who have a continuing relationship with the licensee. [Okla. Admin. Code § 365:35-1-4(6) and (9) (defining “consumer” and “customer”).]

Licensees are required to comply with the requirements of the state regulation with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [Okla. Admin. Code § 365:35-1-43.]

## **2. Requirements**

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Okla. Admin. Code § 365:35-1-40.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [Okla. Admin. Code § 365:35-1-41.]

The regulation permits disclosures without the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; communications with a licensee’s consumers or customers regarding a licensee’s own products, services or activities; and actuarial, scientific, medical or public policy research. [*Id.*]

## **3. Remedies and Penalties**

**Fines and Penalties.** Any violation of these rules is a violation of article 12 of title 36 of Oklahoma law governing unfair practices and frauds. [Okla. Admin. Code § 365:35-1-52; see Okla. Stat. tit. 36, § 1201 et seq.]

## **E. Managed Care Plans**

Managed care plans may not disclose any medical information of an enrollee to an employer without specific prior authorization from the enrollee. [Okla. Stat. tit. 63, § 2525.5(B)(5).]

## **F. Nursing Homes**

Residents of nursing homes have a right to privacy in their medical, personal and bodily care programs. [Okla. Stat. tit. 63, § 1-1918.] Residents’ case discussions, consultations, examinations and treatments are confidential and are to be conducted discreetly. [*Id.*] Medical records are also confidential. [*Id.*]

**Remedies and Penalties**

**Right to Sue.** A resident who is injured by a violation of these provisions may sue the person who violated his rights and can recover actual damages. If it is proved that the conduct was willful or or in reckless disregard of the rights provided by this section, punitive damages may be assessed. Additionally, a resident has the right to bring an action seeking to prevent or restrain a violation. If the resident is successful, he may be awarded costs and reasonable attorney fees. [Okla. Stat. tit. 63, § 1-1918(F).]

**Fines and Penalties.** Any person convicted of violating these provisions is guilty of a misdemeanor, punishable by a fine ranging from \$100 to \$300, imprisonment in the county jail for not more than 30 days, or both. [Okla. Stat. tit. 63, § 1-1918(F).]

**G. Private Review Agents**

A private review agent may not disclose or publish individual medical records or any other confidential medical information in the course of performing utilization review activities without appropriate procedures for protecting patient confidentiality. [Okla. Stat. tit. 63, § 6562.]

**H. State Government**

The Oklahoma Open Records Act prohibits the disclosure of confidential medical information held by public bodies or public officials. [Okla. Stat. tit. 51, § 24A.5. See also Okla. Stat. tit.12, § 2503.]

**Remedies and Penalties**

**Fines and Penalties.** A public official who willfully violates the Open Records Act is guilty of a misdemeanor, punishable by a fine not exceeding \$500 or by imprisonment not to exceed 1 year, or both. [Okla. Stat. tit. 51, § 24A.17.]

**III. PRIVILEGES**

Oklahoma recognizes a number of health care provider-patient privileges, under which, in legal proceedings, a patient can refuse to disclose and can prevent others from disclosing confidential communications made with professionals for the purpose of treatment and diagnosis. [Okla. Stat. tit.12, § 2503 (physician and psychotherapist-patient); Okla. Stat. tit. 59, § 1272.1 (social worker-client); Okla. Stat. tit. 59, § 1376 (psychologist-client); Okla. Stat. tit. 59, § 1910 (licensed professional counselor-client); Okla. Stat. tit. 59, § 1925.11 (family therapist-patient).] The physician or psychotherapist at the time of the communication is presumed to have the authority to claim the privilege on behalf of the patient. [Okla. Stat. tit.12, § 2503.]

**IV. CONDITION-SPECIFIC REQUIREMENTS****A. Birth Defects**

Under the birth defects surveillance program, the Commissioner of Health may establish a system for the collection of information concerning birth defects. [Okla.

Stat. tit. 63, § 1-550.2.] All information collected and analyzed is confidential, and must be used only for the purposes provided in these provisions. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who in violation of a written agreement of confidentiality, willfully discloses any information provided pursuant to these provisions will be denied further access to any confidential information maintained by the state department of health. The person is also guilty of a misdemeanor, punishable by a fine not exceeding \$200, imprisonment not exceeding 30 days, or both. [*Id.*]

## **B. Cancer**

Oklahoma maintains a tumor registry to ensure an accurate and continuing source of data concerning cancerous, precancerous, and tumorous diseases. [Okla. Stat. tit. 63, § 1-551.1.] The identity of patients reported to the registry may not be released without their written consent except: to researchers who meet specified criteria; by researchers for the purpose of obtaining additional information, but only after first obtaining the consent of the attending physician; and with other registries, private or governmental, within or outside the state, provided that a reciprocal data sharing agreement is implemented. [*Id.*] Any confidential information released by the commissioner is deemed a confidential communication within the meaning of the physician-patient and the psychotherapist-patient privilege. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who, in violation of a written agreement to maintain confidentiality, willfully discloses any information provided to the tumor registry must be denied further access to any confidential information maintained by the department of health. [Okla. Stat. tit. 63, § 1-551.1.] Additionally, that person is guilty of a misdemeanor, punishable by a fine not exceeding \$200, imprisonment not exceeding 30 days, or both. [*Id.*]

## **C. Communicable Diseases including Sexually Transmitted Diseases and HIV**

All information and records that identify any person who has or may have any communicable or venereal disease, including HIV, that is required to be reported shall be confidential, and generally may not be disclosed without that person's written consent. [Okla. Stat. tit. 63, § 1-502.2.] This confidentiality requirement applies to information held or maintained by a wide range of persons and entities including: any state agency, health care provider or facility, physician, health professional, third party payor and other persons. There are a number of exceptions to the general rule, including: notification to those who have had risk exposures; disclosures pursuant to a court order; and disclosures among health care providers for treatment purposes. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** Any person who negligently, knowingly, or intentionally discloses or fails to protect confidential information is civilly liable to the individual who is the subject of the information. The violator may be liable for actual damages (including economic,

bodily or psychological harm), exemplary damages, court costs, and attorney's fees. [Okla. Stat. tit. 63, § 1-502.2(H).]

**Fines and Penalties.** Any person who negligently, knowingly, or intentionally discloses or fails to protect confidential information can be found guilty of a misdemeanor, subject to a fine not exceeding \$1,000, imprisonment not exceeding 30 days, or both. [Okla. Stat. tit.63, § 1-502.2(G).]

## D. Genetic Test Results

**General Rule.** No person who maintains genetic information may be compelled to disclose the information pursuant to a request for compulsory disclosure in any judicial, legislative or administrative proceeding. There are a few exceptions under which genetic information may be compelled to be disclosed including: when the request is for a court-ordered paternity test; and where the genetic information is for use in a law enforcement proceeding or investigation. [Okla. Stat. tit. 36, § 3614.3.]

**Employers.** The Genetic Nondiscrimination in Employment Act prohibits employers from seeking to obtain, using, requesting or requiring a genetic test or genetic information of the employee or the prospective employee for purposes of distinguishing between or discriminating against or restricting any right or benefit otherwise due or available to an employee or respective employee. [Okla. Stat. tit. 36, § 3614.2.] These restrictions do not apply with respect to an employer's actions taken in connection with the determination of insurance coverage or benefits. [*Id.*] A "genetic test" is a laboratory test of the DNA, RNA, or chromosomes of an individual for the purpose of identifying the presence or absence of inherited alterations in the DNA, RNA, or chromosomes that cause a predisposition for a clinically recognized disease or disorder. [*Id.* (defining "genetic test").] The term does not include routine physical examinations or tests; chemical, blood or urine analysis; test to determine drug use; an HIV test; or any other test commonly accepted in clinical practice at the time it is ordered by the insurer. [*Id.*]

### Remedies and Penalties

**Fines and Penalties.** Any employer violating these provisions shall be guilty of a misdemeanor, punishable by a fine of not more than \$25,000 or by imprisonment not to exceed 1 year, or both. [Okla. Stat. tit. 36, § 3614.2(D).]

**Insurers.** The Genetic Nondiscrimination in Insurance Act generally provides that an insurer may not, for the purpose of determining eligibility of any individual for insurance coverage, establishing premiums, or determining coverage require, request or condition the provision of the policy upon a requirement that an individual or a member of the individual's family take a genetic test. [Okla. Stat. tit. 36, § 3614.1.] However, the insurer may engage in this behavior to the extent and in the same fashion as it limits coverage, or increases premiums for loss caused or contributed to by other medical conditions presenting an increased degree of risk. [*Id.*] A "genetic test" is a laboratory test of the DNA, RNA, or chromosomes of an individual for the purpose of identifying the presence or absence of inherited alterations in the DNA, RNA, or chromosomes that cause a predisposition for a clinically recognized disease or disorder. [*Id.* (defining "genetic test").] It does not include routine physical examinations or tests; chemical, blood or urine analysis; test to determine drug use;

an HIV test; or any other test commonly accepted in clinical practice at the time it is ordered by the insurer. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** An individual who is injured by an insurer's violation may recover in a court equitable relief, including a retroactive order, directing the insurer to provide insurance coverage to the damaged individual under the same terms and conditions as would have applied had the violation not occurred. [Okla. Stat. tit. 36, § 3614.1(E).]

**Fines and Penalties.** A violation of these provisions constitutes an unfair practice pursuant to section 1201 et seq. of title 36 of the Oklahoma Statutes governing unfair practices and frauds. [Okla. Stat. tit. 36, § 3614.1(E); see Okla. Stat. tit. 36, § 1201 et seq.]

**Researchers.** Under the Genetic Research Studies Nondisclosure Act, all research records of individuals in genetic research studies shall be confidential, meaning the records may not be subject to subpoena or discovery in civil suits, except in cases where the information in the records is the basis of the suit. [Okla. Stat. tit. 36, § 3614.4.] Records may not be disclosed to employers or health insurers without informed consent. Stored tissues that arise from surgery, other diagnostic or therapeutic steps, or an autopsy may be disclosed for genetic or other research studies provided informed consent has been obtained. [*Id.*]

## **E. Mental Health Records**

**Patient Access.** A mental health patient is not entitled to personal access to the information contained in his psychiatric or psychological records unless the treating practitioner consents or a court orders access. [Okla. Stat. tit. 43A, § 1-109(B).] This provision encompasses the psychiatric and psychological records maintained by psychotherapists, mental health institutions, drug or alcohol abuse treatment facilities and others. [*Id.*] The treating practitioner is to determine not only what information is to be released, but also the manner in which it is to be disclosed to the patient. [*Id.*]

**Restrictions on Disclosure.** All medical records and all communications between a physician or a psychotherapist and her mental health client are confidential and may not be disclosed without a written release by the patient (or his representative) or an order of the court. [Okla. Stat. tit. 43A, § 1-109.] Disclosure without the patient's consent is permitted to other persons or agencies actively engaged in the patient's treatment or in related administrative work. [*Id.*] With the patient's consent, a limited disclosure of information may be made to responsible family members. [*Id.*] If the patient is a minor, then written consent of the parent or child care agency with legal custody is required. [*Id.*]



## **F. Substance Abuse**

All patient records, including registration records, of a treatment facility are privileged and confidential. [Okla. Stat. tit. 43A, § 3-423.] The administrator of the facility may make available information from patient records for research into the causes and treatment of alcoholism or drug abuse. [*Id.*] However, patient-identifying information may not be published. [*Id.*]

# OREGON

Oregon statutorily grants a patient the right of access to his medical records that are maintained by insurers, public health care providers and public health care facilities. The state also restricts the disclosures these entities may make of confidential medical information. Additionally, privacy protections are addressed in statutes governing other specific entities and medical conditions.

## **I. PATIENT ACCESS**

### **A. Insurance Entities, Including HMOs**

#### **1. Scope**

The Oregon Use and Disclosure of Insurance Information provisions apply to insurers, including all persons engaged in the business of entering into policies of insurance, insurance agents and insurance support organizations. [Or. Rev. Stat. § 746.610(1) (detailing entities and persons covered); 746.600(15) (defining “insurers”).]

The Act covers “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [Or. Rev. Stat. § 746.600(22) (defining “personal information”).] “Medical record information” is personal information, except age or gender, that is oral or recorded in any form or medium, created by or derived from a health care provider or consumer, and relates to (1) the past, present or future physical, mental or behavioral health condition of an individual, (2) the provision of health care to an individual; or (3) payment for health care services to an individual. [Or. Rev. Stat. § 746.600(20) (defining “medical record information”).] The Act does not apply to medical information that has had all personal identifiers removed. [Or. Rev. Stat. § 746.600(22).]

With respect to health insurance, the rights granted by the Act extend to Oregon residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Or. Rev. Stat. § 746.610(2)(a).]

#### **2. Access Requirements**

An insurance company, HMO or other insurance entity must permit an individual to inspect and copy his personal information in person or obtain a copy of it by mail, whichever the individual prefers within 30 business days of receiving a written request and proper identification from an individual. [Or. Rev. Stat. § 746.640(1).] If the

personal information is in coded form, an accurate translation in plain language must be provided in writing. [Or. Rev. Stat. § 746.640(1)(b).]

**Fees.** The insurance entity can impose a reasonable fee to cover copying costs. [Or. Rev. Stat. § 746.640(d)(4).] No fee may be charged if the individual is requesting the information as a result of an adverse underwriting decision. [*Id.*]

In addition to giving the individual a copy of his personal information, the insurance entity must also give the individual a list of the of the persons to whom it has disclosed personal information within two years prior to the request for access, if that information is recorded. If such an accounting of disclosures is not recorded, the entity must inform the individual of the names of insurers, agents, insurance support organizations and other persons to whom it normally discloses personal information. [Or. Rev. Stat. § 746.640(1)(c).]

Medical record information provided to the insurance entity by a medical professional or medical care institution that is requested may be supplied either directly to the requesting individual or to a medical professional designated by the individual, at the option of the insurance entity. [Or. Rev. Stat. § 746.640(3).]

**Right to Amend.** A person has a statutory right to have any factual error corrected and any misrepresented or misleading entry amended or deleted, in accordance with stated procedures. [Or. Rev. Stat. § 746.645.] Within 30 business days from the date of receipt of a written request, the insurance institution, agent or support organization must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) notify the individual of its refusal to make the correction, amendment or deletion, the reasons for the refusal, and the individual's right to file a statement of disagreement. [*Id.*]

If the insurance entity corrects, amends or deletes any of the individual's recorded personal information, the entity must notify in writing and furnish the amendment, correction or fact of the deletion to: (1) any person designated by the individual, who may have received the individual's personal information within the preceding two years; (2) to insurance support organizations that systematically receive the individual's personal information from the insurance institution within the preceding seven years, unless the organization no longer maintains information about the individual; and (3) insurance support organizations that furnished the personal information that was corrected, amended or deleted. [Or. Rev. Stat. § 746.645.]

If the insurance entity refuses to make the requested change, the individual has the right to file a concise statement setting forth what the individual thinks is the correct, relevant or fair information; and a statement of the reasons why the individual disagrees with the insurance entity's refusal to correct, amend or delete recorded personal information. [*Id.*] The insurance entity must file the individual's statement and provide a means by which anyone reviewing the disputed personal information will be made aware of the individual's statements and have access to them. Furthermore, in any subsequent disclosure of the personal information that is the subject of the disagreement, the insurance entity must clearly identify the matter or

matters in dispute and provide the individual's statements along with the recorded personal information being disclosed. [*Id.*] Insurance entities must furnish these statements of disagreement to third parties in the same manner they are required to furnish corrected information. [*Id.*]

### **3. Notice Requirements**

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Or. Rev. Stat. § 746.620.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that: (1) personal information may be collected from persons other than the individual proposed for coverage; (2) such information as well as other personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization; (3) a right of access and correction exists with respect to all personal information collected; and (4) that a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

### **4. Remedies and Penalties**

**Right to Sue.** A person whose rights under these provisions are violated has the right to file a civil action seeking equitable relief within two years from the date the alleged violation is or should have been discovered. [Or. Rev. Stat. § 746.680.] The court may award costs and reasonable attorney fees to the prevailing party. [*Id.*]

## **B. Public Health Care Providers and Health Care Facilities**

Upon receiving a written, signed authorization, a public provider of health care must disclose to a patient his medical records. [Or. Rev. Stat. § 192.525(2).] This directive applies to physicians, dentists, pharmacists, chiropractors, psychologists, nurses, hospitals, long-term care facilities, and other public providers of health care. [Or. Rev. Stat. §§ 192.525(9); 192.525(10); 442.015(14) (describing "health care facilities").] It does not apply to private health care providers who are encouraged, but not required, to adopt voluntary guidelines that will grant health care recipients access to their own records. [Or. Rev. Stat. §§ 192.525(1); 192.530.]

Pursuant to this provision, a patient is entitled access to chart notes, reports, laboratory reports, and any other record concerning the patient's care, diagnosis or treatment, but does not have a right of access to the provider's personal office notes. [Or. Rev. Stat. § 192.525(8).] A patient's authorization for the disclosure of his medical records must be in writing, dated and signed by the patient, and conform substantially to the format specified by statute. [Or. Rev. Stat. § 192.525(3).] The provider may charge a reasonable fee for responding to the patient's request. [Or. Rev. Stat. § 192.525(6).] If, in the professional judgment of a licensed physician or mental health care provider, the disclosure of a medical record would be injurious to a patient, the provider may withhold the record or provide a summary of the factual information it contains. [Or. Rev. Stat. § 192.525(5).] In this circumstance, the provider must notify the patient of his actions. [*Id.*]

## II. RESTRICTIONS ON DISCLOSURE

### A. Insurance Entities, Including HMOs

#### 1. Scope

The Oregon Use and Disclosure of Insurance Information provisions apply to insurers including all persons engaged in the business of entering into policies of insurance, insurance agents and insurance support organizations. [Or. Rev. Stat. § 746.610(1) (detailing entities and persons covered); 746.600(15) (defining “insurers”).]

The Act covers “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [Or. Rev. Stat. § 746.600(22) (defining “personal information”).] “Medical record information” is personal information, except age or gender, that is oral or recorded in any form or medium, created by or derived from a health care provider or consumer, and relates to (1) the past, present or future physical, mental or behavioral health condition of an individual, and (2) the provision of health care to an individual; or (c) payment for health care services to an individual. [Or. Rev. Stat. § 746.600(20) (defining “medical record information”).] The Act does not apply to medical information that has had all personal identifiers removed. [Or. Rev. Stat. § 746.600(22).]

With respect to health insurance, the rights granted by the Act extend to Oregon residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Or. Rev. Stat. § 746.610(2)(a).]

#### 2. Requirements

##### a. Authorizations for Obtaining Health Information from Others

If an insurance entity uses an authorization form to obtain health information in connection with an insurance transaction, the authorization form must conform to the requirements of the state’s use and disclosure of insurance information provisions. The authorization form must be clear and conspicuous, signed and dated by the individual, and include the following: the identity of the individual who is the subject of the personal information; a general description of the categories of personal information to be disclosed, general description of the parties to whom the information will be disclosed, the purpose of the disclosure and how it will be used; and notice of the length of time for which the authorization is valid, that the individual may revoke the authorization at any time and the procedures for revocation. [Or. Rev. Stat. § 746.630.] The authorization may not remain valid for more than 24 months. [*Id.*]

**Marketing and Research.** An insurer or agent must clearly identify any question that is designed to obtain information solely for marketing or research purposes from an individual in connection with an insurance transaction. [Or. Rev. Stat. § 746.625.]

##### b. Disclosure Authorization Requirements and Exceptions

Generally, an insurance entity may not disclose medical information about a person

that it collected or received in connection with an insurance transaction without that person's written authorization. [Or. Rev. Stat. § 746.665(1).] Authorizations submitted by those *other* than insurance entities must be in writing, signed and dated. [Or. Rev. Stat. § 746.665.] These authorizations are effective for one year. [*Id.*]

An insurance entity may not disclose information to another insurance entity pursuant to an authorization form unless the form meets the detailed requirements of the statute. [*Id.*] See Authorizations for Obtaining Health Information from Others, above. No person may knowingly and willfully obtain information about an individual from an insurer, agent or insurance support organization under false pretenses. [Or. Rev. Stat. § 746.690.]

The Act specifically prohibits insurance entities from disclosing medical record information for marketing purposes without the prior written consent of the subject of the information. [Or. Rev. Stat. § 746.665(k).]

**Authorization Exceptions.** There are numerous circumstances under which an insurance entity can disclose information without the individual's authorization including: verifying insurance coverage benefits; for the purpose of conducting business when the disclosure is reasonably necessary; to law enforcement agencies in order to prevent or prosecute fraud; in response to a facially valid search warrant or subpoena or other court order; for the purpose of conducting actuarial or research studies, provided certain conditions are met; and others. [Or. Rev. Stat. § 746.665(1)(b) through (q).]

### **c. Notice Requirements**

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Or. Rev. Stat. § 746.620.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that (1) personal information may be collected from persons other than the individual proposed for coverage, (2) such information as well as other personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization, (3) a right of access and correction exists with respect to all personal information collected, and (4) that a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

In addition, all insurers offering a health insurance policy in Oregon must include a provision in the policy that all subscribers or enrollees, by acceptance of the benefits of the policy, are deemed to have consented to the examination of medical records for purposes of utilization review, quality assurance and peer review by the insurer or its designee. [Or. Rev. Stat. § 743.809.]

## **3. Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of these provisions has a statutory right to bring a civil action for actual damages sustained as a result of the disclosure. [Or. Rev. Stat. § 746.680.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

## **B. Long Term Care Facilities**

Residents of long term care facilities have a right to be assured that their medical and personal records are kept confidential. Unless a resident is transferred or the examination of records is required by a third party payment contractor, a resident's records may not be released outside the facility. [Or. Rev. Stat. § 441.605.]

## **C. Public Health Care Providers and Facilities**

With respect to public providers of health care, the state of Oregon has committed itself to “protect[ing] ... the right of an individual to have the medical history of the individual protected from disclosure to persons other than the health care provider and insurer of the individual who needs such information.” [Or. Rev. Stat. § 192.525(1).] Except as otherwise provided by law, a public health care provider must disclose a patient's medical records after receiving a written release authorization that directs the provider to produce the patient's records. [Or. Rev. Stat. § 192.525(2).] This directive applies to physicians, dentists, pharmacists, chiropractors, psychologists, hospitals, long-term care facilities, and other public providers of health care. [Or. Rev. Stat. §§ 192.525(9); 192.525(10); 442.015(14) (describing “health care facilities”).] It does not apply to private health care providers, who are encouraged, but not required, to adopt voluntary guidelines limiting the disclosure of medical records, without the patient's consent, to persons other than the health care provider and insurer of the patient who need such information. [Or. Rev. Stat. §§ 192.525(1); 192.530.]

A patient's authorization for the disclosure of his medical records must be in writing, dated and signed by the patient, and conform substantially to the format specified by statute, including specifying to whom and for what purpose the records may be disclosed. [Or. Rev. Stat. § 192.525(3).] Information concerning certain conditions, such as HIV/AIDS, mental health, and genetic testing may not be released unless it is specifically designated. [*Id.*] The authorization may be revoked at any time, except when action has been taken in reliance on it. [*Id.*]

## **D. State Government**

In general, information of a personal nature such as that kept in a medical file that is maintained by a government agency is exempt from public inspection if the disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest, by clear and convincing evidence, requires disclosure. [Or. Rev. Stat. § 192.502(2).] The party seeking disclosure has the burden of showing that disclosure would not constitute an unreasonable invasion of privacy. [*Id.*] Similarly, information that is made confidential or privileged under other laws of the state is exempt from disclosure. [Or. Rev. Stat. § 192.502(9).]

## **III. PRIVILEGES**

Oregon recognizes a number of health care provider-patient privileges that allow a patient in a legal proceeding to refuse to disclose and to prevent others from disclosing communications made with the provider for the purposes of treatment and diagnosis. [Or. Rev. Stat. §§ 40.230 (psychotherapist-patient); 40.235 (physician-patient); 40.240 (nurse-patient); 40.250 (clinical social worker-client); 40.262 (counselor-client).] The

person who was the patient's psychotherapist or physician may claim the privilege on behalf of the patient. [Or. Rev. Stat. §§ 40.230; 430.235.]

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Cancer

Oregon requires health care practitioners and facilities to report all cases of cancer to the Department of Human Services. [Or. Rev. Stat. § 432.520.] All identifying information in these reports is confidential and privileged. [Or. Rev. Stat. § 432.530.] No public health official, employee or agent may be examined in an administrative or judicial proceeding as to the existence or contents of data in the cancer registry, except as required for the administration or enforcement of public health laws or rules. Confidential data may, however, be used by third parties to conduct research and studies for the public good, subject to the approval of the Committee for the Protection of Human Research Subjects. [Or. Rev. Stat. § 432.540.] This information may also be exchanged with other state registries provided that the receiving registry has comparable confidentiality provisions. [*Id.*]

#### Remedies and Penalties

**Right to Sue.** An action for damages for the unauthorized disclosure of this privileged or confidential information may only be maintained where the disclosure is due to gross negligence or willful misconduct. [Or. Rev. Stat. § 432.550.]

### B. Communicable Diseases

Public health authorities are prohibited from disclosing the name and address of, or otherwise disclosing the identity of, any person who is reported as having a disease whose reporting is mandated by law without that person's written consent. [Or. Rev. Stat. §§ 433.004; 433.008.] Disclosure of this information may be made to other public health authorities as necessary for the administration or enforcement of public health laws or rules. [Or. Rev. Stat. § 433.008.] If the public health authority has determined that a reported person's disease is in a contagious state and that the person is not adhering to the Department of Human Services' rules pertaining to the control of that disease, it may disclose that person's name and address to other persons when there is clear and convincing evidence that disclosure is required to avoid a clear and immediate danger to other individuals or to the public generally. [*Id.*] No public health official or employee may be examined in an administrative or judicial proceeding as to the existence or contents of a report, except as required for the administration or enforcement of public health laws or rules. [*Id.*]

#### Remedies and Penalties

**Fines and Penalties.** Violation of these provisions is a Class A misdemeanor. [Or. Rev. Stat. § 433.990.]

### C. Genetic Test Results

For purposes of the following provisions, "genetic test" is defined as a test to determine the presence or absence of genetic characteristics in an individual or his blood



relatives, including tests of DNA, RNA and mitochondrial DNA, chromosomes or proteins. [Or. Rev. Stat. §§ 192.531 (defining “genetic test”); 659A.303.] “Genetic information” is information about an individual or his blood relatives obtained from a genetic test. [*Id.* (defining “genetic information”).]

## **1. In General**

### **a. Patient Access**

An individual or his representative, promptly upon request, may inspect, request correction of or obtain genetic information from the individual’s records, unless the information has been made anonymous by destruction of all information that could allow disclosure of the individual’s identity or the identity of his blood relatives. [Or. Rev. Stat. § 192.537.]

### **b. Restrictions on Disclosure**

A person may not obtain genetic information from an individual or from an individual’s DNA sample, without first obtaining the individual’s informed consent. [Or. Rev. Stat. § 192.535.] In addition, a person may not disclose or be compelled to disclose, by subpoena or any other means, the identity of an individual upon whom a genetic test has been performed or to disclose genetic information about the individual in a manner that permits identification of the individual without that person’s signed, specific consent. [Or. Rev. Stat. § 192.539.] The authorization must be on a consent form prescribed by the rules of the Department of Human Services. [*Id.*] Any person authorized by law or by an individual to obtain, retain, or use the individual’s genetic information or DNA sample must maintain the confidentiality of the information or sample and protect it from unauthorized disclosure or misuse. [Or. Rev. Stat. § 192.537.] Recipients of genetic information are subject to the same restrictions and may only redisclose in accordance with the statute. [*Id.*]

Disclosure without an individual’s consent is permitted: when authorized by state or federal criminal laws for identification of persons or as necessary for the purpose of a criminal or death investigation; pursuant to a court order entered in accordance with rules adopted for civil actions; for anonymous research if the individual was notified that his sample or genetic information may be used for anonymous research and the individual did not at the time of notification, request that his sample not be used; as permitted by the Department of Human Services for identification of deceased individuals or for newborn screening procedures; as authorized by statute for establishing paternity; or for furnishing genetic information relating to a decedent for medical diagnosis of the decedent’s blood relatives; and for the purpose of identifying bodies. [Or. Rev. Stat. §§ 192.535; 192.537; 192.539.] A person may not retain another individual’s genetic information or DNA sample without first obtaining the individual or his representative’s authorization, with a few exceptions, including when authorized by state or federal criminal laws for identification of persons or as necessary for the purpose of a criminal or death investigation; and as permitted by the Department of Human Services for identification of deceased individuals or for newborn screening procedures. [Or. Rev. Stat. § 192.537.]

An individual's DNA sample must be destroyed promptly upon an individual's specific request unless retention is authorized by criminal laws for identification of persons or for purposes of a criminal or death investigation; pursuant to court order; or for anonymous research provided certain conditions are met. [*Id.*] DNA samples that are the subject of a research project, other than anonymous research, must be destroyed promptly upon the completion of the project or withdrawal of the individual from the project, unless the individual directs otherwise by informed consent. [*Id.*] Similarly, samples used for insurance or employment purposes must be promptly destroyed after the purpose for which they were obtained has been accomplished. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** An individual or his blood relative may bring a civil action against any person who violates these provisions. For a violation of Or. Rev. Stat. § 192.537 (individual's rights in genetic information; retention and destruction of genetic information), the court must award the greater of actual damages or: \$100 for an inadvertent violation that does not arise out of negligence; \$500 for a negligent violation; \$10,000 for a knowing or reckless violation; \$15,000 for a knowing violation based on fraudulent misrepresentation; or \$25,000 for a knowing violation committed with intent to sell, transfer or use for commercial advantage, personal gain or malicious harm. [Or. Rev. Stat. § 192.541.]

For violations of Or. Rev. Stat. §§ 192.535 and 192.539 (informed consent requirements and disclosure restrictions), the court must award the greater of actual damages or: \$1,000 for an inadvertent violation that does not arise out of negligence; \$5,000 for a negligent violation; \$100,000 for a knowing or reckless violation; \$150,000 for a knowing violation based on fraudulent misrepresentation; or \$250,000 for a knowing violation committed with intent to sell, transfer or use for commercial advantage, personal gain or malicious harm. [*Id.*]

**Fines and Penalties.** A person who knowingly, recklessly or with criminal negligence obtains, retains or discloses genetic information commits a Class A misdemeanor. [Or. Rev. Stat. § 192.543.] The attorney general or district attorney may also bring an action against a person who violates these provisions. [Or. Rev. Stat. § 192.545.]

## **2. Employers**

Employers may not seek to obtain, obtain or use an employees' or prospective employees' genetic information or the genetic information of their blood relatives to distinguish between, discriminate against or restrict any right or benefit otherwise due or available to such employees or prospective employees. [Or. Rev. Stat. § 659A.303.]

### **Remedies and Penalties**

**Right to Sue.** An employee or prospective employee may bring a civil action for violation of Or. Rev. Stat. § 659A.303. [Or. Rev. Stat. §§ 659A.303; 659A.885.] The court may order injunctive relief and other appropriate equitable relief, including but not limited to reinstatement or the hiring of employees with or without back pay. [Or. Rev. Stat. § 659A.885.]

## D. HIV

A health care provider, health care facility, clinical laboratory, insurer, research organization, and specified others may not disclose, or be compelled to disclose, the identity of any individual upon whom an HIV-related test is performed, or the results of such a test in a manner which permits the identification of the test subject without the authorization of the test subject. [Or. Rev. Stat. §§ 433.045; 433.075.] Disclosure without the test subject's authorization may be made in accordance with other federal or state laws. [*Id.*] For instance, disclosure may be made to police officers and emergency medical technicians who have had significant exposure to the person. [Or. Rev. Stat. § 433.009.]

## E. Mental Health

### 1. In General

**Patient Access.** Public institutions, private organizations that operate as community mental health providers, and contractors of the Department of Human Services must release their "written accounts" (*i.e.*, case histories, clinical records, X-rays, treatment charts, progress reports and other similar written accounts) to a patient within 5 working days of receiving a written release. [Or. Rev. Stat. § 179.505(9).] The provider may charge the patient the reasonable costs incurred in searching files, abstracting, and copying. [Or. Rev. Stat. § 179.505(10).] However, a patient may not be denied access to written accounts because of his inability to pay. [Or. Rev. Stat. § 179.505(9).] If the release of psychiatric or psychological information contained in the written account would constitute an immediate and grave detriment to the treatment of the patient, disclosure may be denied if medically contraindicated by the attending physician in the medical record of the patient. [*Id.*]

**Restrictions on Disclosure.** Patient records maintained by public institutions, private organizations that operate as community mental health providers, or any contractor of the Mental Health and Developmental Disability Services Division or the Alcohol and Drug Abuse Programs may not be disclosed without the written, signed consent of the patient (or, in the case of incompetence, his legal guardian). [Or. Rev. Stat. § 179.505.] The written consent must be signed, dated, and must specify: the name of the provider authorized to make the disclosure; the persons or organizations to which the information is to be disclosed or that information may be released to the public; name of the patient; extent or nature of the information to be disclosed; and include a statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance thereon. [*Id.*]

Disclosure of identifying information without the patient's consent may be made in a number of circumstances including: to any person to meet a medical emergency; to persons engaged in scientific research, program evaluation, peer review and fiscal audits, provided that the disclosure of identifying information is essential to the specified purpose or benefits the patient; and to government agencies when necessary to secure compensation for services rendered in treating the patient. [Or. Rev. Stat. § 179.505(4).] When disclosures are made for these purposes, the provider must prepare and include in his permanent records, a written statement indicating the reasons for the disclosure, the information disclosed and the recipients of the disclosure. [Or. Rev.

Stat. § 179.505(5).] In addition, nothing in this section may prevent the transfer of the patient's identifying information among providers of the Department of Human Services, community mental health and disabilities program, and specified others when the transfer is necessary or beneficial to the patient's treatment. [Or. Rev. Stat. § 179.505(6).]

### **Remedies and Penalties**

**Right to Sue.** A patient whose rights are violated under Or. Rev. Stat. § 179.505 may file an action for equitable relief in the circuit court. [Or. Rev. Stat. § 179.507.] The patient may recover actual damages or \$500, whichever is greater, and punitive damages if the violation is found to be intentional. [*Id.*] The court must order payment of reasonable attorney fees and costs and disbursements to the prevailing party.

## **2. Rights of Minors**

A minor 14 years or older may obtain, without parental knowledge or consent, outpatient diagnosis or treatment of a mental or emotional disorder or chemical dependency. However, the person providing treatment must have the parents involved before the end of treatment unless the parents refuse or there is clear clinical indications to the contrary that must be documented in the treatment record. This requirement does not apply to minors who have been sexually abused by a parent or an emancipated minor. [Or. Rev. Stat. § 109.675.] A physician, psychologist, nurse practitioner, licensed clinical social worker or community mental health and developmental disabilities program may advise the parent(s) or legal guardian of a minor of the minor's diagnosis or treatment when disclosure is clinically appropriate and will serve the best interests of the minor's treatment because: the minor's condition has deteriorated or the risk of suicide has made inpatient treatment necessary; or the minor's condition requires detoxification in a residential or acute care facility. [Or. Rev. Stat. § 109.680.]

## **F. Substance Abuse**

The records of a person at an alcohol or drug abuse treatment facility may not be revealed to any person other than the director and staff of the treatment facility without the consent of the patient. [Or. Rev. Stat. § 430.399.] A patient's request that no disclosure be made of admission to a treatment facility must be honored unless the patient is incapacitated. [*Id.*] If the person is incompetent or under the age of 18, the director of the treatment facility must notify the person's parent or guardian of the admission or referral to a treatment facility. [Or. Rev. Stat. § 430.397.]

## PENNSYLVANIA

Pennsylvania statutorily grants a patient the right of access to his medical records that are maintained by health care providers, health care facilities and managed care plans. The state does not have a general, comprehensive statute protecting the privacy of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### I. PATIENT ACCESS

#### A. Health Care Providers and Health Care Facilities

A patient or his designee, including his attorney, has the right to access and copy his medical charts and records maintained by a health care provider or a health care facility, without the use of a subpoena duces tecum, for his own use. [42 Pa. Cons. Stat. Ann. § 6155.\*] As of 2002, copying fees may not exceed \$16.24 for searching for and retrieving the records, \$1.09 per page for paper copies for the first 20 pages, 82¢ per page for pages 21 through 60 and 28¢ per page for pages 61 and thereafter; \$1.62 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. [42 Pa. Cons. Stat. Ann. §§ 6152 and 6155; 31 Pa. Bulletin Doc. No. 01-2142 (where, in accordance with statutory authority, the Secretary of Health adjusted copying costs to reflect changes in the consumer price index).] No other charges for the retrieval, copying and shipping or delivery are permitted without prior approval of the requestor. [*Id.*]

A health care provider or facility may only charge a flat fee of \$20.57 for the expense of reproducing medical charts or records, plus the actual cost of postage, shipping or delivery, if the charts or records are requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act or any Federal or State financial needs-based benefit program. [42 Pa. Cons. Stat. Ann. §§ 6152.1 and 31 Pa. Bulletin Doc. No. 01-2142.]

#### B. Managed Care Plans, Including HMOs

To the extent a managed care plan, including an HMO, maintains medical records, the plan is required to adopt and maintain procedures to ensure that enrollees have timely access to their medical records, unless prohibited by federal or state law or regulation. [Pa. Stat. Ann. tit. 40, §§ 991.2102 (defining managed care plans as including HMOs); § 991.2131(b).] Information regarding an enrollee's health or treatment must be available to the enrollee and the enrollee's designee. [Pa. Stat. Ann. tit. 40, § 991.2131(c).]

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\* Pennsylvania is undertaking the first official codification of its statutes, Pa. Cons. Stat. We have cited to the new codification when such citations are available. Otherwise, citations are to the old unofficial compilation which uses a different numbering system.

## II. RESTRICTIONS ON DISCLOSURE

### **Managed Care Plans, Including HMOs, and Utilization Review Entities**

Managed care plans, including HMOs, and utilization review entities must adopt and maintain procedures to ensure that all identifiable information regarding enrollee health, diagnosis and treatment is adequately protected and remains confidential in compliance with all applicable federal and state laws and regulations and professional ethical standards. [Pa. Stat. Ann. tit. 40, §§ 991.2102 (defining managed care plans as including HMOs); 991.2131(a); 991.2152(a)(2).] Disclosure is permitted to determine coverage, review complaints or grievances, conduct utilization review or facilitate payment of a claim. [Pa. Stat. Ann. tit. 40, § 991.2131.] Employees and agents of the Department of Health, the Insurance Department and the Department of Public Welfare who have direct responsibility for overseeing quality assurance, investigation of complaints, and enforcing compliance with the laws governing managed care plans and utilization review entities may have access to identifiable information for the purpose of their duties. [*Id.*] A managed care plan may use identifiable data for internal quality review, including reviews conducted as part of the plan's quality oversight process. During such reviews, enrollees must remain anonymous to the greatest extent possible. [*Id.*] Managed care plans, health care providers, and their designees are also allowed access to identifiable information for the purpose of providing patient care management, outcomes improvement, and research. [*Id.*] For this purpose, an enrollee must provide consent and is to remain anonymous to the greatest extent possible. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** The Department of Health or the Insurance Department, as appropriate, may impose a civil penalty of up to \$5,000 for a violation of the article governing quality health care accountability and protection. [Pa. Stat. Ann. tit. 40, § 991.2182.] These departments are also authorized to maintain an action in the name of the commonwealth for an injunction to prohibit any activity that violates these provisions. [*Id.*]

## III. PRIVILEGES

Pennsylvania recognizes a number of mental health care-client privileges, under which the health care professional is prohibited from disclosing in any civil or criminal matter any confidential information acquired from the client in the course of professional services. [42 Pa. Cons. Stat. Ann. §§ 5944 (psychiatrist/psychologist-client); 5945 (guidance counselor, school nurse, home and school visitor, and school psychologist-student).] The state also recognizes a narrower physician-patient privilege that prohibits a physician from disclosing in a civil proceeding information he acquired in attending the patient in a professional capacity that tends to blacken the character of the patient. [42 Pa. Cons. Stat. Ann. § 5929.]

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Cancer

Hospitals and laboratories are required to report cases of cancer to the Department of Health. [Pa. Stat. Ann. tit. 35, § 5636.] These reports are confidential and are not open to public inspection or dissemination. [*Id.*] The information may be collected and analyzed by the Department and its contractors, as well as researchers, who are subject to strict supervision to ensure that the use of the reports is limited to specific research purposes. [*Id.*]

### B. Communicable Diseases

Physicians must report persons who have or who are suspected of having a communicable disease to the local board or department of health. [Pa. Stat. Ann. tit. 35, § 521.4.] By regulation, clinical laboratories, health care practitioners, health care facilities, orphanages, child care group settings, and institutions maintaining dormitories and living rooms also must promptly report cases of disease or infection to the health department. [See 28 Pa. Code §§ 27.21a; 27.22; 27.23.]

State and local health authorities may not disclose these reports or any records maintained as a result of any action taken in response to the report to anyone outside the department except where necessary to control or prevent communicable disease. [Pa. Stat. Ann. tit. 35, § 521.15.] The records and reports may be used by researchers, subject to strict supervision to ensure that the use of the reports is limited to the specific research purposes. [*Id.*]

#### Remedies and Penalties

**Fines and Penalties.** Violations of these provisions are punishable by a fine not less than \$25 and not more than \$300. Failure to pay fines and costs is punishable by imprisonment not to exceed 30 days. [Pa. Stat. Ann. tit. 35, § 521.20.] Prosecutions may be instituted by the state health department, a local board or department of health, or any person having knowledge of a violation of these provisions. [*Id.*]

### C. HIV/AIDS

Pennsylvania's Confidentiality of HIV-Related Information Act governs the confidentiality of HIV-related information. [Pa. Stat. Ann. tit. 35, § 7601, et seq.] Generally, no person who obtains confidential HIV-related information in the course of providing any health or social service or pursuant to the patient's authorization may disclose or be compelled to disclose that information without the patient's written consent. [Pa. Stat. Ann. tit. 35, § 7607.] A written consent authorizing disclosure of HIV-related information must be signed and dated by the patient; specify the name or title of the individual or organization to which the disclosure is to be made; the patient's name; purpose for the disclosure; how much and what kind of information is to be disclosed and a statement that consent may be revoked at any time except to the extent that the person who is to make the disclosure has already acted in reliance on it. [Pa. Stat. Ann. tit. 35, § 7607(c).]

Disclosure without the patient's consent is allowed to a number of persons including: the patient; the physician who ordered the test; a peer review organization or

committee; individual health care providers involved in the care of the patient when knowledge of the condition or test result is necessary to provide emergency care or appropriate treatment; an insurer to the extent necessary to reimburse health care providers; and others. [Pa. Stat. Ann. tit. 35, §§ 7607(a)(1) through (12).] A person to whom disclosure is made under this provision may not disclose the information to another person except as authorized by statute. [Pa. Stat. Ann. tit. 35, § 7607(b).]

No court may issue an order to allow access to confidential HIV-related information unless the court finds that: (1) the person seeking the information has demonstrated a compelling need for the information that cannot be accommodated by other means; or (2) the person seeking to disclose the information has a compelling need to do so. In assessing compelling need, the court must weigh the need for disclosure against the privacy interest of the individual and the public interests which may be harmed by disclosure. [Pa. Stat. Ann. tit. 35, § 7608.]

### **Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of this provision has a civil cause of action against the person who committed the violation and may recover compensatory damages. [Pa. Stat. Ann. tit. 35, § 7610.]

## **D. Mental Health**

All documents concerning persons receiving inpatient mental health treatment and those receiving involuntary outpatient treatment are confidential and may not be released without the patient's written consent except in very limited circumstances. [Pa. Cons. Stat. Ann. tit. 50, §§ 7103; 7111.] Disclosure without the patient's consent is allowed to: those engaged in providing treatment for the patient; the county administrator; the court in the course of legal proceedings for involuntary treatment or evaluation; and pursuant to federal rules where treatment is undertaken in a federal agency. [Pa. Cons. Stat. Ann. tit. 50, § 7111.] Disclosure is also permitted for the collection of clinical and statistical data so long as the dissemination of such data does not identify individual patients. [*Id.*]

In addition, if an individual who is receiving services or benefits at one facility is transferred to another facility, a copy of all pertinent records must accompany the transfer. If the individual had previously received services at a facility and later is given services or benefits at another facility, the first facility must furnish a copy of all pertinent records upon request from the subsequent facility. [Pa. Cons. Stat. Ann. tit. 50, § 4602.]

## **E. Substance Abuse**

The Pennsylvania Drug and Alcohol Abuse Control Act requires that all patient records prepared or obtained pursuant to state and local programs for the treatment of drug and alcohol abuse, and the information contained therein, are confidential and may not be disclosed without the patient's consent. [Pa. Stat. Ann. tit. 71, § 1690.108.] Even with the patient's consent, this information may only be released to medical personnel for purposes of diagnosis and treatment of the patient or to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his alcohol or drug dependency. [*Id.*]



In emergency medical situations where the patient's life is in immediate jeopardy, disclosure of patient records may be made without the patient's consent to the proper medical authorities solely for the purpose of treating the patient. [*Id.*] Other disclosures may be made only pursuant to court order upon a showing of good cause. [*Id.*] In determining whether there is good cause, the court must weigh the need for the disclosure against the possible harm of disclosure to the patient and may condition the disclosure upon any appropriate safeguards. [*Id.*] Patient records prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center are subject to the same restrictions. [*Id.*] However, there is no provision allowing disclosure of records maintained by these private entities pursuant to court order. [*Id.*]

## **RHODE ISLAND**

Rhode Island statutorily grants a patient the right of access to his medical information that is maintained by physicians. Under the Confidentiality of Health Care Communications and Information Act, the state also provides general, comprehensive prohibitions against the disclosure of confidential health care information. Additionally, privacy protections are addressed in other statutes governing specific entities or medical conditions.

### **I. PATIENT ACCESS**

#### **A. Home Care**

A home-care patient or client has the right to receive information necessary to make decisions about his care and to have access to his records. [R.I. Gen. Laws § 23-17.16-2(10).]

#### **B. Insurers and Other Third Parties**

A patient has the right to request review and revision of his confidential health care information in the possession of a “third party” when the third party has taken an adverse action based on that information (such as denying an application for an insurance policy or denying an employment application for health reasons). [R.I. Gen. Laws § 5-37.3-5.] If the patient is deceased, then his heir or beneficiary or their authorized representative, or his estate has the right to request such a review. [*Id.*] A “third party” is any person other than a health care provider and the patient to whom the confidential health care information relates. [R.I. Gen. Laws § 5-37.3-3 (defining “third party”).] “Confidential health care information” is information relating to a patient’s health care history, diagnosis, condition, treatment or evaluation obtained from a health care provider. [R.I. Gen. Laws § 5-37.3-3 (defining “confidential health care information”).]

The patient does not have the right to personally review his records, rather he must designate a physician to receive and review them. [R.I. Gen. Laws § 5-37.3-5.] The third party may require advance payment of the actual cost of retrieval, duplication, and forwarding of the information. [*Id.*]

The physician may reveal to the patient as much of the information as, in his professional judgment, is appropriate. [*Id.*]

**Right to Amend.** After reviewing his confidential health care information, a patient may request the third party to amend or expunge any part he believes is in error, or request the addition of any recent relevant information. [R.I. Gen. Laws § 5-37.3-5(c).] Except upon court order, the third party may not modify the information itself. [*Id.*] It must notify the health care provider who originally provided the information of the request. [*Id.*] If the provider agrees to make the change, the information is forwarded to

the provider for modification. [*Id.*] The third party can impose a charge for the cost of notice, duplication, and return of information. [*Id.*]

Whether or not a change is made to the patient's confidential health care information, the patient has a right to place into the file at his own cost, a statement of reasonable length of his view as to the correctness or relevance of existing information or the addition of new information. [*Id.*] That statement must accompany the part of the information in contention. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** If there is an unreasonable refusal to change the records, the patient has the right to apply to the district court to amend or expunge any part of his confidential health care information that he believes to be erroneous. [R.I. Gen. Laws § 5-37.3-5(d).]

## **C. Physicians**

### **1. Requirements for Requesting and Providing Access**

A patient has the right to examine and copy his confidential health information that is maintained by a physician. [R.I. Gen. Laws § 5-37-22(d).] This right can also be exercised by an authorized representative of the patient. [*Id.*] An "authorized representative" includes:

- ∞ a person who is explicitly authorized to consent to the disclosure of confidential information;
- ∞ a guardian or conservator, if the patient is incompetent to assert or waive that right; or
- ∞ if the patient/client is deceased, his personal representative or, in the absence of that representative, his heirs-at-law.

[R.I. Gen. Laws § 5-37-3-3 (defining "authorized representative").]

Upon receipt of a written request to review medical information, a physician must, at his option, either permit a patient (or his authorized representative) to examine and copy his confidential health care information or provide him a summary of the information. [R.I. Gen. Laws § 5-37-22(d).] If a summary is provided and the patient is not satisfied with it, he may request, and the physician must provide, a copy of the entire record. [*Id.*] At the time of the examination, copying or provision of summary information, the patient is to reimburse the physician for reasonable expenses in connection with copying the information. [*Id.*]

A patient's access to his health care information can be denied if, in the professional judgment of the physician, it would be injurious to the mental or physical health of the patient to disclose or provide a summary of the information. [*Id.*] In such a circumstance, the physician must disclose the information to another physician designated by the patient. [*Id.*]

### **2. Other Requirements**

When a patient requests in writing that his medical records be transferred to another

physician, the original physician must promptly honor that request. The physician must be reimbursed for the reasonable expenses (as defined by the director of the department of health) incurred in connection with copying of the medical records. [R.I. Gen. Laws § 5-37-22(c).]

A physician must, at least 90 days before closing his practice, give public notice as to the disposition of patients' medical records in a newspaper with a statewide circulation, and notify the Rhode Island Medical Society and the Rhode Island Board of Medical Licensure and Discipline of the location of the records. The notice must include the date of the physician's retirement and where and how patients may obtain their records prior to or after closure of the practice. The physician must dispose of his patient records in a location and manner so that the records are maintained and accessible to patients. Any person, corporation, or other legal entity receiving the medical records from the physician must comply with and is subject to R.I. Gen. Laws § 5-37-22(c) and (d) and the Confidentiality of Health Care Information Act, even if the person, corporation or legal entity is not a physician. [R.I. Gen. Laws § 5-37-30.]

### **Remedies and Penalties**

**Fines and Penalties.** A physician who violates this provision, upon conviction, is subject to a fine of not more than \$1,000, not more than 1-year imprisonment, or both. [R.I. Gen. Laws § 5-37-25.] In addition, if it appears to the Rhode Island Board of Medical Licensure and Discipline or the director of the Rhode Island department of health that any person is violating this provision, the board or the director may institute an action in court to enjoin the violation. [R.I. Gen. Laws § 5-37-25.1.]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Health Care Providers, Managed Care Entities and Others**

Rhode Island's Confidentiality of Health Care Information Act governs the disclosure of confidential health care information. [See R.I. Gen. Laws §§ 5-37.3-1 through 5-37.3-11.]

#### **1. Scope**

The Confidentiality of Health Care Information Act applies to persons having "information relating to a patient's health care history, diagnosis, condition, treatment or evaluation obtained from a health care provider who has treated the patient." [R.I. Gen. Laws §§ 5-37.3-4 and 5-37.3-3 (defining "confidential health care information").] The information encompassed includes that obtained directly from any person licensed to provide health care services, including, but not limited to, a physician, hospital, dentist, nurse, optometrist, pharmacist, social worker, and psychologist. [R.I. Gen. Laws § 5-37.3-3 (defining "health care provider").] The disclosure of confidential health information is generally controlled by the patient or his authorized representative. [R.I. Gen. Laws § 5-37.3-4.] An "authorized representative" includes:

- ∞ a person who is explicitly authorized to consent to the disclosure of confidential information;

- ∞ a guardian or conservator, if the patient is incompetent to assert or waive that right; or
- ∞ if the patient/client is deceased, his personal representative or, in the absence of that representative, his heirs-at-law.

[R.I. Gen. Laws § 5-37.3-3 (defining “authorized representative”).]

## 2. Consent Requirements and Exceptions

Generally, a patient’s confidential health care information may not be released or transferred without his written consent, except as provided by law. [R.I. Gen. Laws § 5-37.3-4(a).] The consent form for the release or transfer of confidential health care information must contain a statement of the need for and proposed uses of that information; a statement indicating the extent of the information to be released; and a statement that the consent may be revoked. [R.I. Gen. Laws § 5-37.3-4(d).] With the exception of consents signed for insurance purposes, a consent may be revoked at any time. [*Id.*] Consents executed in connection with an application for life or health insurance expire automatically within two years from the issue date of the insurance policy. Those signed in connection with a claim for benefits under any insurance policy remain in effect during the pendency of the claim. [*Id.*]

Except as specifically provided by law, a person’s confidential health care information may not be given, sold, transferred, or in any way relayed to any other person not specified in the consent form without first obtaining the subject’s additional consent. [R.I. Gen. Laws § 5-37.3-4(d).]

**Exceptions.** Confidential health care information may be released without the consent of the patient in numerous situations including, but not limited to:

- ∞ A physician, dentist, or other medical personnel who believes in good faith that the information is necessary for diagnosis or treatment of that individual in a medical emergency;
- ∞ Medical peer review boards;
- ∞ Health care providers within the health care system for purposes of coordinating health care services given to the patient and for purposes of education and training within the same health care facility;
- ∞ School authorities (limited to disease, health screening and/or immunization information);
- ∞ The central cancer registry;
- ∞ Malpractice insurance carriers or lawyers if the health care provider has reason to anticipate a medical liability action;
- ∞ Appropriate law enforcement personnel, or to a person if the health care provider believes that person or his family to be in danger from a patient;
- ∞ Appropriate law enforcement personnel if the patient has or is attempting to obtain narcotic drugs from the health care provider illegally;
- ∞ Qualified personnel for the purpose of conducting scientific research, management and financial audits, program evaluations, and actuarial, insurance underwriting or similar studies, provided that they not identify, directly or indirectly, any individual patient in any report or otherwise;
- ∞ A representative of the news media, in the case of a hospital, (limited to the fact of a patient’s admission and a general description of his condition);

- ∞ Public health authorities to carry out their legally required functions; and
- ∞ The health care provider's own lawyer if the patient whose information is at issue brings a medical liability action against the provider.

[R.I. Gen. Laws § 5-37.3-4(b).]

Although patient consent is not required to release health information in a civil action brought by the patient against persons other than the health care provider, the provider may only produce this information in accordance with the applicable rules of civil procedure (federal or state). This disclosure may not be through ex parte contacts and not through informal ex parte contacts with the provider by persons other than the patient or his or her legal representative. [R.I. Gen. Laws § 5-37.3-4(b).]

### **3. Other Disclosure Requirements**

Upon the written request of the patient, his authorized representative or treating physicians, health care providers must transfer a copy of diagnostic test results to any subsequent health care provider. [R.I. Gen. Laws § 5-37.3-5.1.]

Managed care entities (including HMOs) and managed care contractors are expressly prohibited from providing any identifying information related to enrollees to any medical information data base unless that information is essential for the compilation of statistical data related to enrollees. [R.I. Gen. Laws § 5-37.3-4(a).]

### **4. Security Requirements for Third-party Recipients of Health Care Information**

Third parties receiving and retaining patients' confidential health care information generally are required to establish at least the following security procedures:

- ∞ limit authorized access to personally identifiable confidential health care information to persons with a "need to know"; other employees and agents may have access to information that does not contain information that can identify an individual;
- ∞ identify an individual or individuals with responsibility for maintaining security procedures;
- ∞ provide a written statement to each employee or agent as to the necessity of maintaining the security and confidentiality of confidential health care information and of the penalties for unauthorized release, use or disclosure of this information;
- ∞ take no disciplinary or punitive action against an employee or agent solely for bringing evidence of violation of this act to the attention of any person.

[R.I. Gen. Laws § 5-37.3-4(c).]

### **5. Remedies and Penalties**

**Right to Sue.** Any person who violates these confidentiality provisions may be liable for actual and punitive damages. [R.I. Gen. Laws §§ 5-37.3-4(a)(1); 5-37.3-9(a).] The court may award reasonable attorney's fees to the prevailing party. [R.I. Gen. Laws §§ 5-37.3-4(a)(2); 5-37.3-9(d).]

**Fines and Penalties.** A person who knowingly and intentionally violates R.I. Gen. Laws § 5-37.3-4 may be fined not more than \$5,000, imprisoned not more than 6 months

per violation, or both. [R.I. Gen. Laws § 5-37.3-4(a)(3).] A person who intentionally and knowingly violates other provisions of the Confidentiality of Health Care Information Act may be fined not more than \$1,000, imprisoned not more than 6 months, or both. [R.I. Gen. Laws § 5-37.4-9(b).]

## **B. Health Care Facilities**

A patient in a health care facility, including a hospital, has the right to privacy and confidentiality of all records pertaining to his treatment except as otherwise provided by law. [R.I. § 23-17-19.1(6).]

## **C. HMOs**

HMOs are required to treat all information relating to a subscriber's health care history, diagnosis, condition, treatment or evaluation as confidential health care information and may not release or transfer that information except under safeguards established by the Confidentiality of Health Care Information Act. [R.I. Gen. Laws § 27-41-22.]

## **D. Home-care Providers**

A home-care patient or client has the right to have his personal and clinical records treated and maintained in a confidential manner and to be advised by the home care agency of its policies and procedures regarding disclosure of clinical records. [R.I. Gen. Laws § 23-17.16-2(12).]

## **E. State Government**

Under the Access to Public Records Act, records received or maintained by a government agency that are identifiable to an individual, including, but not limited to, medical treatment and records relating to a doctor/patient relationship, and all personal or medical information relating to medical or psychological facts are exempt from public inspection. [R.I. Gen. Laws § 38-2-2.]

## **F. Utilization Review Agents**

Utilization review agents may only review information or data relevant to the utilization review process. They may not disclose or publish individual medical records or any confidential medical information obtained in the performance of utilization review activities. [R.I. Gen. Laws § 3-17.12-9.] Utilization review agents must maintain security procedures mandated by the Confidentiality of Health Care Information Act, discussed above. [*Id.*]

# **III. PRIVILEGES**

Rhode Island recognizes the health care provider-patient privilege. [See R.I. Gen. Laws §§ 5-37.3-6; §5-37.3-6.2; § 5-37.3-6.1(exceptions).] Generally, confidential health care communications are not subject to compulsory legal process in any type of judicial proceeding, and a patient or his authorized representative has the right to refuse to disclose, and to prevent a witness from disclosing, his confidential health care

communications in any such proceedings. [R.I. Gen. Laws §§ 5-37.3-6; §5-37.3-6.2; § 5-37.3-6.1 (exceptions).] Confidential health care communications are defined as communications of health care information by an individual to a health care provider, including a transcription of any information, not intended to be disclosed to third persons.

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Alcohol Abuse**

Registration and other records of alcohol treatment facilities are confidential. Information from patients' records, however, may be made available for purposes of research into the causes and treatment of alcoholism. This information may not be published in a way that discloses patients' names or other identifying information. [R.I. Gen. Laws § 23-1.10-13.]

### **B. Cancer**

Rhode Island maintains a central cancer registry that records malignant diseases that occur in residents of the state in order to conduct epidemiologic surveys of cancer and to apply appropriate preventive and control measures. [R.I. Gen. Laws § 23-12-4.] Reports submitted to the registry are confidential in accordance with Rhode Island's Confidentiality of Health Care Information Act (discussed above under "Restrictions on Disclosure—Confidential Health Care Information"). [*Id.*]

### **C. Genetic Test Results**

#### **1. Employers**

An employer, employment agency, or licensing agency may not directly or indirectly: request, require or administer a genetic test to any person as a condition of employment or licensure. [R.I. Gen. Laws § 28-6.7-1.] Neither may these entities affect the terms, conditions, or privileges of employment or licensure or terminate the employment or licensure of any person who obtains a genetic test. [*Id.*] Additionally, no person may sell to or interpret a genetic test of a current or prospective employee or licensee for an employer, employment agency, or licensing agency. [*Id.*]

#### **2. Health Plans and Providers**

Except as provided in the Confidentiality of Health Care Information Act, insurance administrators, health plans and providers are prohibited from releasing genetic information without an individual's written prior authorization unless individual identifiers are removed, encrypted or encoded. [R.I. Gen. Laws §27-18-52 (health insurer); § 27-19-44 (nonprofit hospital service corporation); § 27-20-39 (nonprofit medical service corporation); § 27-41-53 (HMO). See discussion above under "Restrictions on Disclosure—Confidential Health Care Information).] Authorization is required for each disclosure and must include to whom the disclosure is being made. There is an exception to this authorization requirement for those participating in research governed by federal regulation (known as "The Common Rule"). [*Id.*]



A health insurer, nonprofit hospital service corporation, nonprofit medical service corporation or HMO may not:

- ∞ Use a genetic test or request or require a genetic test to reject, deny, limit, cancel, refuse to renew, increase the rates of, affect the terms or conditions of, or otherwise affect a health insurance plan;
- ∞ Request or require a genetic test for the purpose of determining whether or not to issue or renew an individual's health benefits coverage, to set reimbursement/co-pay levels or determine covered benefits and services;
- ∞ Release the results of a genetic test without the prior written authorization unless individual identifiers are removed, encrypted or encoded; or
- ∞ Request or require information as to whether an individual has ever participated in genetic testing of any kind.

[R.I. Gen. Laws §§ 27-18-52; 27-19-44; 27-20-39; 27-41-53.]

These restrictions do not apply to disability income, long term care and insurance supplemental policies which only provide coverage for specified diseases or other supplemental policies. [R.I. Gen. Laws §§ 27-18-52.]

A written authorization is required for each disclosure and redisclosure and such authorization must include to whom the disclosure is being made. [*Id.*] A recipient of genetic information may use or disclose the information solely to carry out the purpose for which the information was obtained. [*Id.*]

For purposes of these provisions, "genetic testing" is the analysis of an individual's DNA, RNA, chromosomes, proteins and certain metabolites in order to detect heritable disease-related genotypes, mutations, phenotypes or karyotypes to predict the risk of disease, identify carriers, establish prenatal and clinical diagnosis or prognosis. [*Id.* (defining "genetic testing").] Genetic testing does not include routine chemical, blood, or urine analysis or tests for drugs or HIV infections. [R.I. Gen. Laws §§ 27-18-52; 27-19-44; 27-20-39; 27-41-53.]

#### **D. HIV/AIDS**

It is unlawful for any person to disclose to a third party the results of an individual's AIDS test without the prior written consent of that individual or the individual's parent, guardian or agent, if the individual is a minor. [R.I. Gen. Laws § 23-6-17.] Disclosure without authorization is permitted to: the licensed physician who requested the test; the department of health; other health professionals directly involved in the care of the test subject; and specified others. [*Id.*] Disclosure without consent is also permitted under some, but not all, of the subsections listed in the Confidentiality of Health Care Information Act. [R. I. Gen. Laws § 23-6-17(3).] For instance, although confidential health care information generally may be disclosed pursuant to subpoena to the state board of elections for purposes of determining a person's eligibility to vote by mail under the Confidentiality of Health Care Information Act [R.I. Gen. Laws § 5-37.3-4(16)], AIDS-related information may not be disclosed for this purpose. [R.I. Gen. Laws § 23-6-17(3).]

Health care providers, public health officials and any other person who maintains

records with information on HIV test results are responsible for maintaining full confidentiality, as provided above. They are required to take appropriate steps to protect this information, including: keeping records secure at all times and establishing adequate confidentiality safeguards for electronic records; establishing and enforcing reasonable rules to limit access to the records; and training persons who handle records in security objectives and technique. [R.I. Gen. Laws § 23-6-18.]

## **E. Mental Health**

**In General.** The fact of admission to a state mental health facility and all information and records related to state-authorized services to the mentally disabled are confidential and generally may not be disclosed without the patient's consent. [R.I. Gen. Laws § 40.1-5-26.] Disclosure without the patient's consent is allowed among qualified medical or mental health professionals in the provision of services or appropriate referrals, or in the course of court proceedings. The consent of the patient must be obtained before information may be disclosed to a professional person not employed by the facility who does not have the medical responsibility for the patient's care. [*Id.*] Disclosure without the patient's consent may also be made in other specified circumstances including: to the extent necessary to make a request for aid, insurance, or medical assistance to which the patient may be entitled; to medical authorities providing emergency treatment where the person's life or health are in immediate jeopardy; to researchers, provided they sign an oath of confidentiality agreeing not to redisclose identifiable information; to the courts in accordance with applicable rules of procedure; and to select others. [*Id.*]

The fact that a person has been admitted to a state mental hospital, or that a person so admitted is seriously physically ill, may be disclosed to the patient's attorney or family if the official in charge of the facility determines that disclosure is in the patient's best interest. [R.I. Gen. Laws § 40.1-5-27.] Additional information may be provided to a family member (or other person) who lives with and provides direct care to an adult mentally disabled person. [R.I. Gen. Laws § 40.1-5-27.1] When without such direct care there would be significant deterioration in the mentally disabled person's daily functioning, a mental health professional, at the written request of the family member, may disclose information that would directly assist in the care of the mentally disabled person. [*Id.*] Prior to the disclosure, the mentally disabled person must be informed in writing of the request, the name of the person requesting the information, the reason for the request, and the specific information being provided. The mentally disabled person must be given the opportunity to give or withhold consent. [*Id.*] If the mentally disabled person withholds consent, the information may not be disclosed and the family member or other person has the opportunity to appeal. Disclosures are limited to information regarding diagnosis, admission to or discharge from a treatment facility, the name of the medication prescribed, and side effects of such prescribed medication. [*Id.*]

When disclosure is necessary to protect the patient or others due to the patient's unauthorized disappearance, and his whereabouts are not known, notice of the disappearance and other relevant information may be made to relatives and law

enforcement agencies by the physician in charge of the patient or the professional in charge of the facility. [R.I. Gen. Laws § 40.1-5-28.]

The physician or person in charge of the facility must record any disclosure of information or records into the patient's medical record noting the date and circumstances under which the disclosure was made, the names, and relationships to the patient, if any, of the person or agencies to whom the disclosure was made, and the information disclosure. [R.I. Gen. Laws § 40.1-5-29.]

In addition, mental health advocates and their assistants and employees are also bound by the above restrictions concerning confidential information. [R.I. Gen. Laws §§ 40.1-5-18; 40.1-5-25.]

**Community Residences.** The fact of admission and all information and records compiled, obtained or maintained in the course of providing services to persons in community residences are confidential and in general may not be released without the resident's written consent. Consent is not required for the release of confidential information: to proper medical or psychiatric authorities for providing emergency treatment when the resident's life or health is in immediate jeopardy; between or among residence staff within the same community residence for coordinating services for a resident; pursuant to court order; or for program evaluation and/or research, provided that rules are adopted to ensure the anonymity of the resident's identity. [R.I. Gen. Laws § 40.1-24.5-11.]

## **F. Sexually Transmitted Diseases**

Physicians, public or private institutions (such as hospitals, clinics, and asylums) and public or private laboratories are required to report cases of sexually transmitted diseases to the state department of health. [R.I. Gen. Laws §§ 23-11-6; 23-11-5; 23-11-14.] Any and every person, body or committee whose duty it is to obtain, make, transmit and receive information and reports related to persons suffering from or suspected to be suffering from a sexually transmitted disease must treat this information as absolutely confidential. [R.I. Gen. Laws § 23-11-9.]

### **Remedies and Penalties**

**Fines and Penalties.** A person who knowingly, outside the requirements of state law governing sexually transmitted diseases, divulges the name of or gives any information related to a person suffering or suspected to be suffering from sexually transmitted diseases may be imprisoned not more than 6 months or fined not more than \$250. [Id.]

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## **South Carolina**

South Carolina statutorily grants a patient the right of access to his medical records maintained by health care facilities and physicians. The state does not have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, this privacy protection is addressed in statutes governing specific entities or medical conditions.

### **I. PATIENT ACCESS**

#### **A. Health Care Facilities and Health Care Providers**

A health care facility or health care provider must comply with a patient's request for copies of his medical record no later than 45 days after the patient has been discharged or 45 days after the request is received, whichever is later. [S.C. Code Ann. § 44-7-325.] "Health care facility" includes acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, rehabilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law. [S.C. Code Ann. § 44-7-130.] A health care provider is any provider licensed pursuant to title 40 of the South Carolina Code, including chiropractors, dentists, nurses, optometrists, opticians, pharmacists, physical therapists, physicians, surgeons, osteopaths, podiatrists, psychologists, social workers, and speech pathologists. [S.C. Code Ann. § 44-7-325; *see* Title 40.]

**Fees.** The health care facility or provider may charge a fee for the search and duplication of a medical record, not to exceed 65¢ per page for the first 30 pages and 50¢ cents per page for all other pages. [S.C. Code Ann. § 44-7-325.] They may also charge a clerical fee for searching and handling not to exceed \$15 per request as well as actual postage and applicable sales tax. [*Id.*] With respect to X-rays, the facility may charge no more than the actual cost of reproduction. [*Id.*] The facility or provider may not charge a fee for records copied at the request of a health care provider or for records sent to a health care provider at the request of a patient for the purpose of continuing medical care. [*Id.*]

#### **Remedies and Penalties**

**Fines and Penalties.** Any person or facility violating this provision is guilty of a misdemeanor and, upon conviction, must be fined not more than \$100 for the first offense and not more than \$5,000 for a subsequent offense. [S.C. Code Ann. § 44-7-340.] Each day's violation after a first conviction constitutes a subsequent offense. [*Id.*] Moreover, the Department of Health and Environmental Control may maintain an action for injunctive relief in the name of the State against any person or facility for

violation of this provision, and need not make a showing of irreparable harm. [S.C. Code Ann. § 44-7-330.]

## **B. Physicians**

Under the Physicians' Patient Records Act the physician is the owner of the medical record. [S.C. Code Ann. §§ 44-115-20.] However, the patient has the right to receive a copy of his medical record from a physician upon submitting a written authorization. [S.C. Code Ann. §§ 44-115-10; 44-115-30.]

The physician may charge a fee for the search and duplication of a medical record, not to exceed 65¢ per page for the first 30 pages and 50¢ cents per page for all other pages. [S.C. Code Ann. § 44-115-80.] They may also charge a clerical fee for searching and handling not to exceed \$15 per request as well as actual postage and applicable sales tax. [*Id.*] With respect to X-rays, the physician may charge no more than the actual cost of reproduction. [*Id.*] When the request for medical information involves more than making copies of existing documents, the physician may charge an additional fee for providing this service. [S.C. Code Ann. § 44-115-90.] The physician may require that all fees related to duplication be paid in advance. [S.C. Code Ann. § 44-115-110.]

The physician may *not* charge a fee for records when the patient is referred by the physician, health care provider, or an employee, agent, or contractor of the owner of the record to another physician or health care provider for continuation of treatment for a specific condition or conditions. [*Id.*] Neither may the physician charge a fee for responding to requests for medical information necessary to process a health insurance claim made by a patient (or on behalf of the patient by a health insurance carrier or administrator) for services rendered by the physician from whom the information is requested. [S.C. Code Ann. § 44-115-100.]

Medical records may not be withheld because of an unpaid bill for medical services. [S.C. Code Ann. § 44-115-70.] A physician may refuse to release a copy of the entire medical record and may furnish instead a summary or portion of the record when he has a reasonable belief that release of the information contained in the entire record would cause harm to the patient's emotional or physical well-being, the emotional or physical well-being of another person who has given information about the patient to the physician, or where release of the information is otherwise prohibited by law. [S.C. Code Ann. § 44-115-60.] A physician, however, must provide the entire requested record to a licensed attorney who is representing the patient and who has his written authorization to receive the information requested. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Except as otherwise provided by law, unreasonable refusal to release the entire medical record constitutes unprofessional conduct and subjects the physician to disciplinary action of the South Carolina State Board of Medical Examiners. [S.C. Code Ann. § 44-115-60.]

## II. RESTRICTIONS ON DISCLOSURE

### A. HMOs

Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from that person or a provider without the enrollee's/applicant's express consent. [S.C. Code Ann. § 38-33-260.] Disclosure may be made without the consent of the enrollee/applicant: to the extent necessary to carry out the purposes of the HMO Law; pursuant to a statute or court order for the discovery or production of evidence; or when the data or information is pertinent for the organization to defend itself against claims or litigation by the enrollee/applicant. [*Id.*]

#### Remedies and Penalties

**Fines and Penalties.** The director of insurance may suspend or revoke the certificate of authority of an HMO that fails to comply with the statutory and regulatory provisions governing HMOs, including this confidentiality provision. [S.C. Code Ann. § 38-33-180.]

### B. Insurers

#### 1. Scope

The South Carolina Insurance Department has adopted regulations (Privacy of Consumer Financial and Health Information) to prevent the unauthorized disclosure of consumers' health information. These regulations govern the practices of "licensees" (*i.e.*, all licensed insurers, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under South Carolina insurance law) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [S.C. Code of Regulations R. 69-58 § 4(Q) (defining "licensee").] "Nonpublic personal health information" is health information that identifies an individual or with respect to which there is a reasonable basis to believe that the information could be used to identify an individual. [S.C. Code of Regulations R. 69-58 § 4(U) (defining "nonpublic personal health information").] "Health information" is any information (except age or gender), recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment for the provision of health care. [S.C. Code of Regulations R. 69-58 § 4(O) (defining "health information").] Insurance "consumers" are individuals who seek to obtain, obtain or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. "Customers" are generally consumers who have a continuing relationship with the licensee. [S.C. Code of Regulations R. 69-58 § 4(E), (H) & (I) (defining "consumer," "customer" and "customer relationship").]

Licensees are required to comply with this regulation unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance

Portability and Accountability Act of 1996. [S.C. Code of Regulations R. 69-58 § 20.]

## **2. Requirements**

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [S.C. Code of Regulations R. 69-58 § 17.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee will make the disclosure; the purpose of the disclosure; how the information will be used; the signature of the consumer or customer and the date signed; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [S.C. Code of Regulations R. 69-58 § 18.]

The regulation permits disclosures without the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee, including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; actuarial, scientific, medical or public policy research; any activity that permits disclosure without authorization under the privacy regulation promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance and Portability Act of 1996; and any activity otherwise permitted by law, required pursuant to governmental reporting authority or to comply with legal process. [S.C. Code of Regulations R. 69-58 § 17.]

This regulation does not supercede existing South Carolina law related to medical records, health or insurance information privacy. [S.C. Code of Regulations R. 69-58 § 21.]

## **3. Remedies and Penalties**

**Fines and Penalties.** A person who violates this regulation commits an unfair trade practice and is subject to penalties set forth in Chapter 57 of Title 38 (related to the regulation of trade practices in the business of insurance). [S.C. Code of Regulations R. 69-58 § 23.]

## **C. Long-Term Care Facilities**

Long term care facilities must assure their residents of confidential treatment of their medical records. Residents have the right to refuse the release of their medical records to anyone outside the facility, unless the disclosure is for transfer to another health care institution or as otherwise required by law. [S.C. Code Ann. § 44-81-40.]

## **D. Physicians**

Except as otherwise provided by law, a physician may not honor a request for the release of copies of medical records without the receipt of express written consent of the patient or person authorized by law to act on behalf of the patient. [S.C. Code §

44-115-40.] In responding to a request for medical information from an insurance carrier, the physician is entitled to rely on the representation of the carrier that the patient's authorization for release of medical records is on file. [S.C. Code § 44-115-50.] In such a circumstance, the physician is immune from any civil or criminal liability alleged to be caused by his compliance with the insurance carrier's request to release the information. [*Id.*]

A physician is expressly prohibited from selling medical records to someone other than a physician or osteopath licensed by the South Carolina State Board of Medical Examiners or a hospital licensed by the South Carolina Department of Health and Environmental Control. [S.C. Code § 44-115-130.] Before a physician may sell medical records, he must publish a public notice of his intention to sell the records in a newspaper of general circulation in the area of his practice at least 3 times in the 90 days preceding the sale. The notice must inform patients of their right to retrieve their records if they prefer that their records not be included in the sale. [*Id.*]

## **E. State Government**

**In General.** Medical records are not considered "public records" open to the public under the provisions of the state Freedom of Information Act. [S.C. Code Ann. § 30-4-20(c).]

**Department of Health.** The Department of Health and Environmental Control must be given, upon request, full access to the medical records, tumor registries, and other special disease record systems maintained by physicians, hospitals, and other health facilities as necessary to carry out its investigation of these diseases. [S.C. Code Ann. § 44-1-110.] Patient-identifying information elicited from these records and registries must be kept confidential by the department and is exempt from the provisions of the state Freedom of Information Act. [*Id.*]

## **III. PRIVILEGES**

South Carolina does not recognize the physician-patient privilege. The state does, however, recognize a mental health professional-client privilege. [S.C. Code § 44-22-90.] Mental health professionals include psychiatrists, psychologists, and psychotherapists. An HMO is entitled to claim any statutory privilege against disclosure that the provider who furnished such information to the HMO can claim. [S.C. Code Ann. § 38-33-260.]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Cancer**

South Carolina maintains a central cancer registry for the purpose of providing statistical information that will reduce morbidity and mortality of cancer in the state. [S.C. Code § 44-35-20.] Information that is reported to the registry that could identify the cancer patient must be kept strictly confidential and is only open for inspection by



the patient or his authorized representative. [S.C. Code § 44-35-40.] Additionally, data may be released to researchers in accordance with regulations promulgated by the Department of Health and Environmental Control. [*Id.*]

## **B. Genetic Information**

South Carolina statutorily restricts the method in which genetic tests may be administered and genetic information may be used and disclosed. For purposes of these provisions a “genetic test” is any laboratory test or other scientifically or medically accepted procedure used to determine the presence or absence of genetic characteristics in an individual. [S.C. Code § 38-93-10.] “Genetic information” means information about genes, gene products (RNA and proteins), or genetic characteristics derived from an individual or a family member of the individual. The term does not include routine physical measurements; chemical, blood, and urine analysis, unless conducted purposely to diagnose a genetic characteristic; tests for abuse of drugs; and tests for the presence of the human immunodeficiency virus. [*Id.*]

In general, genetic testing may not be performed on a tissue, blood, urine, or other sample taken from an individual without first obtaining the individual’s specific informed consent. [S.C. Code § 38-93-40.] There are a limited number of exceptions to this rule. For example no authorization is required for genetic tests performed:

- ∞ by or for a law enforcement agency in a criminal investigation, or for the State DNA Database;
- ∞ for purposes of identifying a person or a dead body;
- ∞ to establish paternity;
- ∞ for use in a study in which the identities of the persons from whom the genetic information is obtained are not disclosed to the person conducting the study; or
- ∞ pursuant to a statute or court order specifically requiring that the test be performed.

[*Id.*]

Genetic information is confidential and may not be disclosed in any manner that allows identification of the individual tested without the individual’s written informed consent. [S.C. Code §§ 38-93-30.]

A provider of accident and health insurance may not require a person to consent to the disclosure of genetic information to the insurer as a condition for obtaining accident and health insurance. [S.C. Code § 38-93-30.] These insurers are also prohibited from discriminating on the basis of genetic information by undertaking any of a number of enumerated acts such as terminating or restricting coverage or establishing a differential in premium rates. [S.C. Code § 38-93-20.]

### **Remedies and Penalties**

**Fines and Penalties.** A person who violates this chapter is guilty of an unfair trade practice. [S.C. Code § 38-93-60.]

**Right to Sue.** An individual whose rights are violated may recover equitable relief,

including a retroactive order, actual damages, reasonable costs and attorney's fees. [S.C. Code § 38-93-60.]

## **C. HIV**

Records concerning HIV are generally governed by the statutory provisions covering sexually transmitted diseases (discussed below). In the case of HIV, however, the department must make efforts to identify the infected person's known sexual contact or intravenous drug use contacts. [S.C. Code § 44-29-90.] In notifying these individuals, the identity of the person infected must not be revealed. [*Id.*] A physician or state agency that identifies and notifies a spouse or known contact of a person having HIV or AIDS is not liable for damages resulting from the disclosure. [S.C. Code § 44-29-146.]

## **D. Mental Health**

### **1. Mental Retardation Clients**

A mentally retarded client may have reasonable access to the his medical records upon receipt of written request. [S.C. Code § 44-26-120.] The client may be refused access to his medical information if the attending physician determined that the information would be detrimental to the client's treatment. [*Id.*] The written determination must be added to the client's confidential records. [*Id.*]

Communications between a client and mental retardation professionals are confidential and may generally not be disclosed without the client's consent. [S.C. Code § 44-26-130.] Exceptions to the consent requirement include: pursuant to a court determination that disclosure is necessary for the conduct of proceedings; for research conducted or authorized by the department; to cooperate with law enforcement, health, welfare, and other state agencies, schools, and county entities. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** An individual that willfully causes, conspires with or assists another to cause the denial of a patient's rights accorded to him under this chapter may be fined no more than \$1,000, imprisoned for no more than 1 year, or both. [S.C. Code § 44-26-210.]

### **2. Mentally Ill Patients and Patients with Emotional Conditions**

Generally, a mental health care provider may not reveal a confidence of a patient (*i.e.*, a private communication between a patient and a provider or information given to a provider in the patient-provider relationship) without the written authorization of the patient. Prior to obtaining such an authorization, the provider is required to disclose to the patient what confidences are to be revealed and to whom they will be revealed. [S.C. Code §§ 19-11-95(B); 19-11-95(A)(3) (defining "confidence").] The recipient of such information is bound to the same rules of confidentiality as the provider from whom he received the information. [S.C. Code § 19-11-95.]

A provider may disclose confidences *without* the patient's authorization in a number of circumstances including the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm; confidences reasonably necessary to establish or collect his fee; and others. [*Id.*]

Regardless of whether a disclosure is pursuant to a patient's authorization or is otherwise permissible it is limited to the information and the recipients necessary to accomplish the purpose of the permitted disclosure. [*Id.*]

### **3. State Mental Health Facilities**

**Patient Access.** A patient of a state mental health facility has a right of access to his medical records. [S.C. Code Ann. § 44-22-110.] Access may be denied to information in medical records that was provided by a third party under assurances that the information remains confidential. [*Id.*] The patient may also be denied access to information that the attending physician has determined in writing would be detrimental to the patient's treatment regimen. [*Id.*] A patient denied access may appeal to the director of the department of mental health. [*Id.*]

#### **Remedies and Penalties**

**Fines and Penalties.** An individual that causes the denial of a patient's rights may be fined no more than \$1,000, imprisoned for no more than 1 year, or both. [S.C. Code § 44-22-220.]

**Restrictions on Disclosure.** Communications between a patient undergoing treatment at a program run by the state department of mental health and a mental health professional (including psychiatrists, psychologists, psychotherapists, physicians, nurses and social workers) are "privileged" and may not be disclosed without the patient's consent. [S.C. Code § 44-22-90.] Disclosure of these communications without the consent of the patient is permitted: between facility staff so long as the information is provided on a "need-to-know" basis; in involuntary commitment proceedings; in an emergency where information about the patient is needed to prevent the patient from causing harm to himself or others; and in other specified circumstances. [*Id.*]

Additionally, the certificates, applications, records and reports made for the purposes of court ordered commitment or evaluations that identify a mentally ill or alcohol or drug abuse patient must be kept confidential and generally may not be disclosed unless the patient consents. [S.C. Code § 44-22-100.] Disclosure without the patient's consent is permitted: as necessary to cooperate with law enforcement, health, welfare and other state or federal agencies; when furthering the welfare of the patient or his family; and as necessary to carry out commitment or evaluation proceedings. [*Id.*] Upon proper inquiry, information as to a patient's current medical condition may be released to members of his family or the state ombudsman office. [*Id.*] Disclosure is permitted for research conducted or authorized by the Department of Mental Health or the Department of Alcohol and Other Drug Abuse Services and with the consent of the patient.

**Remedies and Penalties**

**Fines and Penalties.** A person who violates this provision is guilty of a misdemeanor punishable by a fine of no more than \$500, imprisonment of no more than 1 year, or both. [S.C. Code § 44-22-100.]

**E. Sexually Transmitted Diseases**

Physicians and others who make a diagnosis of or treat a case of a sexually transmitted disease and laboratories performing a positive test for a sexually transmitted disease must report it to the appropriate health authorities. [S.C. Code §§ 44-29-70; 44-29-80.] All information and records held by the Department of Health and Environmental Control and its agents relating to a known or suspected case of a sexually transmitted disease are strictly confidential and generally may not be released. [S.C. Code § 44-29-135.] Disclosure of medical or epidemiological information may be made: for statistical purposes in a manner that no person can be identified; with the consent of all persons identified in the information released; to the extent necessary to enforce the laws governing the control and treatment of a sexually transmitted disease; and to medical personnel to the extent necessary to protect the health or life of any person. [*Id.*] Special rules apply in cases involving minors. [*Id.*] Disclosure of sexually transmitted disease information to a solicitor or a law enforcement agency for the purposes of disease control must be obtained pursuant to a court order. [S.C. Code § 44-29-136.] There are several protective measures applied in a court proceeding, such as the use of pseudonyms in pleadings. [*Id.*]

**Remedies and Penalties**

**Fines and Penalties.** Any person who violates this provision is guilty of a misdemeanor, punishable by a fine of no more than \$200 or imprisonment of no more than 30 days. [S.C. Code § 44-29-140.]

**F. Substance Abuse**

Records and reports directly or indirectly identifying an alcohol or drug abuse patient are confidential and may not be disclosed without consent unless a court directs that disclosure is necessary: for the conduct of proceedings; to cooperate with law enforcement, health, welfare, and other state or federal agencies for the welfare of the patient; or to carry out the specified mental health provisions under title 44 of the state code. [S.C. Code § 44-22-100.] Disclosure is permitted for research conducted or authorized by the Department of Mental Health or the Department of Alcohol and Other Drug Abuse Services and with the consent of the patient.

**Remedies and Penalties**

**Fines and Penalties.** A person who violates this provision is guilty of a misdemeanor, punishable by a fine not more than \$500, imprisonment not more than 1 year, or both. [*Id.*]

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## **SOUTH DAKOTA**

South Dakota statutorily grants a patient the right of access to his medical records maintained by health care facilities (such as hospitals), and by practitioners of the healing arts, including physicians. The state does not have any general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### **I. PATIENT ACCESS**

#### **A. Health Care Facilities, Including Hospitals**

A health care facility must provide a copy of all medical records, reports and X-rays pertinent to the health of a patient, if available, to a discharged patient upon its receipt of a written request signed by the patient. [S.D. Codified Laws § 34-12-15.] This provision encompasses hospitals, nursing facilities, adult foster care homes, sanitariums, maternity homes, ambulatory surgery centers, assisted living centers and rural primary care hospitals but does not apply to chemical dependency treatment facilities. [S.D. Codified Laws §§ 34-12-1.1 (defining “health care facility”); 34-12-15.] The facility may require that the patient pay the actual reproduction and mailing expenses prior to the delivery of the requested material. [S.D. Codified Laws § 34-12-15.]

#### **B. Physicians and Other Practitioners of the Healing Arts**

South Dakota statutorily requires practitioners of the healing arts to furnish to a patient copies of his medical records. [S.D. Codified Laws § 36-2-16.] This provision apparently applies to doctors of medicine, osteopaths, chiropractors, optometrists, pharmacists and others. [See S.D. Codified Laws § 36-2-1 (defining “healing art” broadly as “any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury, unhealthy or abnormal physical or mental condition”) and title 36 for licensing requirements.] HMOs are not considered to be engaged in practicing a healing art, and therefore are not covered by this provision. [S.D. §§ 36-2-1; 58-41-15.]

Upon receipt of a written request signed by the patient, a licensed practitioner of the healing arts must provide to the patient a copy of all requested medical records, reports and X-rays, if available. [S.D. Codified Laws § 36-2-16.] The practitioner may require the patient to pay the actual reproduction and mailing expenses prior to the delivery of the requested material. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A person who violates this provision is guilty of a Class 2 misdemeanor punishable by 30 days imprisonment, a \$200 fine, or both. [S.D. Codified Laws §§ 22-6-2 (specifying the sentences for misdemeanors); 36-2-16.]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. HMOs**

Generally, HMOs may not disclose any information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from any person without the enrollee's or applicant's express consent. [S.D. Codified Laws § 58-41-74.] Disclosure without the enrollee/applicant's consent is allowed: to the extent it is necessary to carry out the purposes of the statutory provisions governing HMOs; pursuant to statute or court order for the production of evidence or discovery; or in the event of claim or litigation between the person and the health maintenance organization, to the extent such information is pertinent. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** The director of insurance may issue a cease and desist order directing an HMO to stop engaging in an act or practice that is in violation of this provision. [S.D. Codified Laws § 58-41-78.]

### **B. Pharmacies and Pharmacists**

A pharmacy may only release patient information with the patient's authorization; when it is needed by the board for an inspection or investigation; to practitioners or other pharmacists as necessary to protect the patient's health; or to those who are otherwise authorized or required by law to access patient information. [S.D. Codified Laws § 36-11-69.]

### **C. State Department of Health, Medical Societies and Hospitals**

All information, reports, statements, and other data obtained by the department of health, medical association, allied medical societies, or in-hospital staff committees for medical research is strictly confidential and is not admissible as evidence in any action.

[S.D. Codified Laws § 34-14-1.] A patient, or his relatives or friends may not be named in a medical study, or interviewed for a study without the patient's physician consent. [S.D. Codified Laws § 34-14-5.]

### **Remedies and Penalties**

**Fines and Penalties.** Disclosure of any information, records, or other data obtained for medical study is a Class 1 misdemeanor. [S.D. Codified Laws § 34-14-3.]

## **III. PRIVILEGES**

South Dakota recognizes a number of health care provider-patient privileges that allow a patient, in a legal proceeding, to refuse to disclose and to prevent others from

disclosing confidential communications with these professionals made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction. [S.D. Codified Laws §§ 19-13-6; 19-13-7 (physician/psychotherapist-patient); 36-27A-38 (psychologist-patient); 34-20A-90 (alcohol and drug abuse treatment facilities-patient); 36-26-30 (social worker-client); 36-32-27 (professional counselor-patient).] The person who was the physician or psychotherapist at the time of the communication is presumed to have the authority to claim the privilege on behalf of the patient. [S.D. Codified Laws § 19-3-8.] HMOs are entitled to claim any statutory privileges against disclosure that the provider of the information is entitled to claim. [S.D. Codified Laws § 58-41-73.]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Cancer**

South Dakota maintains a central cancer registry. [S.D. Codified Laws § 1-43-11.] The information contained in the data is strictly confidential and may only be used for medical research. [*Id.* and § 34-14-1.] Although any statistical summary of data collected by the cancer registry is available to the public, it must be presented in such a statistical manner that no person, who represents a case contained in the cancer data collection system, may be identified. [S.D. Codified Laws § 1-43-16.]

### **B. Communicable Diseases, including AIDS/HIV Infection**

Physicians, hospitals, laboratories and others are required to report identifiable and suspected cases of communicable diseases. [S.D. Codified Laws § 34-22-12; *see* S.D. Admin. R. 44:20:01:03 and 44:20:01:04 for list of reportable communicable diseases.] These reports are “strictly confidential” and may not be released, shared with any agency or institution, or made public, upon subpoena, search warrant, discovery proceeding or otherwise and are not admissible as evidence in any action of any kind without the written consent of the patient. [S.D. Codified Laws § 34-22-12.1] Disclosure without the subject’s consent is permitted: for statistical purposes in such a manner that no person can be identified; to the extent necessary to enforce the laws and regulations concerning the prevention, treatment, control or investigation of communicable diseases; and to the extent necessary to protect the health or life of a named person. [*Id.*]

#### **Remedies and Penalties**

**Fines and Penalties.** A person responsible for recording, reporting or maintaining medical reports required to be submitted under these provisions who knowingly or intentionally discloses confidential information or fails to protect this information in violation of the statute is guilty of a Class 1 misdemeanor, punishable by 1 year imprisonment, a \$1,000 fine, or both. [S.D. Codified Laws §§ 22-6-2 (specifying punishment for misdemeanor); 34-22-12.2.]

## C. Genetic Test Results

### 1. In general

No one may order or perform a genetic test without the written, informed consent of the test subject. [S.D. Codified Laws § 34-14-22.] The consent must be signed by the test subject and specify:

- ∞ the nature and purpose of the test;
- ∞ effectiveness and limitations of the test;
- ∞ implications of taking the test, including, risks and benefits;
- ∞ future uses of the sample taken;
- ∞ the meaning of the test results and the procedure for providing notice of the results to the test subject;
- ∞ a listing of who will have access to the sample to conduct the genetic test and the information obtained from the predictive genetic test; and
- ∞ the test subject's right to confidential treatment of his sample and information.

[*Id.*]

A “genetic test” is a test of DNA, RNA, chromosomes, or genes performed to identify the presence or absence of an inherited variation, alteration, or mutation associated with predisposition to disease or other disorder. It does not include routine physical measurements; chemical, blood or urine analysis; any test commonly accepted in clinical practice; or any test performed due to the presence of signs, symptoms, or other manifestations of disease or other disorder. [S.D. Codified Laws § 34-14-21.] These provisions do not apply to genetic tests done in pursuance of a lawful criminal investigation or court order. [S.D. Codified Laws § 34-14-24.]

### 2. Insurers

Health carriers may not require or request an individual or a blood relative of the individual to submit to a genetic test or consider an individual's or a blood relative of the individual's refusal to submit to a genetic test in determining eligibility for coverage, establishing premiums, limiting coverage, renewing coverage, or any other underwriting decision, made for the offer, sale, or renewal of health insurance. [S.D. Codified Laws § 58-1-25.] A “genetic test” is a test of DNA, RNA, chromosomes, or genes performed to identify the presence or absence of an inherited variation, alteration, or mutation associated with predisposition to disease or other disorder. It does not include routine physical measurements; chemical, blood or urine analysis; any test commonly accepted in clinical practice; or any test performed due to the presence of signs, symptoms, or other manifestations of disease or other disorder. [S.D. Codified Laws § 58-1-24.]

## D. Mental Health

**Patient Access.** A person has the right of access to his mental health records upon request. [S.D. Codified Laws § 27A-12-26.1.] Access may be denied to information provided by a third party under assurance that the information would remain confidential. [*Id.*] Specific material in the record can also be withheld if the qualified mental health professional responsible for the mental health services concerned has made a determination in writing that such access would be detrimental to the person's health. [*Id.*] In this event, the material may be made available to a similarly licensed



and qualified mental health professional selected by the patient, who may, in the exercise of professional judgment, provide the patient with access to any or all parts of the material. [*Id.*] This provision remains applicable to records following the patient's discharge. [*Id.*]

**Restrictions on Disclosure.** Medical record information, and other information acquired in the course of providing mental health services to a person is confidential and not open to public inspection. [S.D. Codified Laws §§ 27A-12-26; 27A-12-25.] Any person who receives confidential information pursuant to S.D. Codified Laws § 27A-12-25 may disclose the confidential information to others only to the extent it is consistent with the authorized purpose of the disclosure. [S.D. Codified Laws § 27A-12-32.] The information may be disclosed outside the center, department, mental health program or inpatient facility, whichever is the holder of the record, only if the person (or his parent or guardian) consents or if specifically authorized by law. [S.D. Codified Laws § 27A-12-26.] Disclosure without the patient's consent is permitted in a number of circumstances, including: to a state attorney for the purpose of investigating an alleged criminal act either committed by or upon an inpatient; pursuant to court order or subpoena; in order to comply with another provision of law, and as necessary or beneficial for evaluation and accreditation or to train persons enrolled in an accredited course leading to a degree and qualification. [S.D. Codified Laws §§ 27A-12-27; 27A-12-29.] If protected information is disclosed, the patient's identity may not be disclosed unless it is germane to the authorized purpose for the disclosure. [S.D. Codified Laws § 27A-12-31.]

## **E. Sexually Transmitted Diseases**

Physicians, hospitals and others are required to report cases of venereal disease to the health authorities. [S.D. Codified Laws § 34-23-2.] The identity of any individual appurtenant to an investigation conducted pursuant to such a report must be maintained in strictest confidence within the venereal disease control system. [*Id.*] Any information obtained from the individual may not be disclosed in any action in any court or before any tribunal, board or agency. [*Id.*]

## **F. Substance Abuse**

The registration and other records of alcohol and drug abuse treatment facilities are confidential and privileged. [S.D. Codified Laws § 34-20A-90.] Information may be released for the purpose of research into the causes and treatment of alcohol and drug abuse. However, it may not be published in such a manner that discloses patients' names or other identifying information. [S.D. Codified Laws § 34-20A-91.]

**THE STATE OF HEALTH PRIVACY****TENNESSEE**

The Tennessee Code statutorily grants a patient the right of access to his medical records in the possession of a health care provider or a hospital. The state does not have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these privacy protections are contained in statutes governing specific entities or medical conditions.

**I. PATIENT ACCESS****A. Health Care Providers**

A health care provider must provide a patient with a copy (or a summary) of his medical records, at the option of the provider, within 10 working days of a written request. [Tenn. Code Ann. § 63-2-101(a)(1).] “Medical records” include medical histories, records, reports and summaries, diagnoses, prognoses, records of treatment and medications ordered and given, x-rays and radiology interpretations, physical therapy charts and lab reports. [Tenn. Code Ann. § 63-2-101(c)(2) (defining “medical records”).]

This provision applies to physicians, psychologists, chiropractors, podiatrists, dentists, nurses, pharmacists, optometrists, physician assistants, professional counselors, social workers, and other professionals required to be licensed under Title 63 of the Tennessee Code, which applies to professions of the healing arts. [Tenn. Code Ann. § 63-2-101(c)(1) and Title 63.]

The patient is responsible for paying reasonable copying and mailing costs, and may be required to pay these costs in advance. [Tenn. Code Ann. § 63-2-102.] The copying costs may not exceed \$20 for medical records 40 pages or less in length and 25¢ per page for each page after the first 40 pages. [*Id.*] If the provider uses an outside party to copy records, that party is also subject to the reasonable cost limits and may not impose any charge or fee for these services in excess of the statutory limit. [*Id.*]

**Remedies and Penalties**

**Fines and Penalties.** A health care provider who fails to supply records as requested can be subjected to disciplinary action, including sanctions and monetary fines, from the provider’s licensing board. [Tenn. Code Ann. § 63-2-101(a)(2).]

**B. Hospitals**

The Medical Records Act governs a patient’s access to his hospital records. [See Tenn Code Ann. §§ 68-11-301 through 68-11-311.] “Hospital records” include medical histories, records, reports, records of treatment, x-rays and other written, electronic or

graphic data prepared, kept, made or maintained in hospitals. [Tenn. Code Ann. § 68-11-302(5).] The term does not cover ordinary business records pertaining to the patient's accounts or hospital administration. [Tenn. Code Ann. § 68-11-302(5).]

Those entitled to access include, but are not limited to, outpatients, inpatients, persons dead on arrival, persons receiving emergency room care, and the newborn and their authorized representatives. [Tenn. Code Ann. §§ 68-11-302(6) (defining "patient") and 68-11-304.]

Under this Act, a hospital is required to furnish to a patient a copy of his hospital records upon written request "without unreasonable delay." [Tenn. Code § 68-11-304.] The patient is responsible for the reasonable costs of copying and mailing (unless indigent and filing a Social Security claim or appeal), and may be required to pay these costs in advance. [*Id.*] Reasonable costs may not exceed a retrieval fee of \$15, which includes the first 5 pages of the medical record; 75¢ per page for pages 6-50; 50¢ per page for pages 51-250; and 25¢ per page for all pages after page 250. [*Id.*]

If a hospital closes, the hospital records must be delivered and turned over, in good order and properly indexed, to the state department of health. The department then stores, retains, retires and provides access to the information in the same manner that was provided by the hospital. [Tenn. Code Ann. § 68-11-308.]

### **Remedies and Penalties**

**Fines and Penalties.** A willful violation of the Medical Records Act is a Class C misdemeanor punishable by not greater than 30 days imprisonment, fine not to exceed \$50 or both. [Tenn. Code Ann. §§ 68-11-311(a); 40-35-111(e).] Civil liability is limited to actual damages and is only available where there has been a willful or reckless or wanton act or omission constituting a violation of the Act. [Tenn. Code Ann. § 68-11-311(b).]

## **C. Nursing Homes**

Nursing home facilities must provide patients copies of the policy governing access to and duplication of patient records, and copies of the policy must be available to all residents and their families upon request. [Tenn. Code Ann. § 68-11-901(13).]

# **II. RESTRICTIONS ON DISCLOSURES**

## **A. Health Care Providers**

Under Tennessee law, medical records do not constitute public records. [Tenn. Code Ann. § 63-2-101(b)(1).] Additionally, health care providers, including physicians, chiropractors, podiatrists, dentists, nurses, pharmacists, optometrists, physician assistants, professional counselors, social workers, and other licensed professionals are prohibited from divulging the name and address and other identifying information of a patient except in specified circumstances. [Tenn. Code Ann. § 63-2-101(b)(2).] Tennessee law specifically forbids the selling of this information for any purpose. [*Id.*] Disclosure of patient-identifying information is permitted: for statutorily required reporting to any health or government authorities; to third party payors (such as

insurance companies) for the purpose of utilization review, case management, peer reviews or other administrative function; and pursuant to a subpoena issued by a court of competent jurisdiction. [Tenn. Code Ann. § 63-2-101(b)(1) and (2).]

### **Remedies and Penalties**

**Right to Sue.** A disclosure of identifying information in violation of this provision constitutes an invasion of the patient's right to privacy and may give rise to a private cause of action. [See Tenn. Code Ann. § 63-2-101.]

## **C. HMOs**

Under the Health Maintenance Organization Act, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant without that person's express consent. [Tenn. Code Ann. §§ 56-32-201 (short title of Act); 56-32-225.] Exceptions to this general rule allow disclosures *without* the person's consent: to carry out the purposes of the HMO Act; in response to a claim or litigation between an enrollee/applicant and the HMO to the extent the information is pertinent; to implement public medical assistance programs; and when the data is required to be disclosed by another statute. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** The commissioner of commerce and insurance may issue an order directing an HMO to cease and desist from engaging in any act that violates provisions of the HMO Act, including the confidentiality provisions. [Tenn. Code Ann. § 56-32-220.] If the commissioner elects not to issue a cease and desist order or in the event of noncompliance with the order, he may institute a proceeding to obtain injunctive or other appropriate relief in the chancery court of Davidson County. [*Id.*]

In addition, the commissioner may suspend or revoke any certificate of authority if an HMO fails substantially to comply with the HMO Act. [Tenn. Code Ann. § 56-32-216.] Alternatively, the commissioner may impose an administrative penalty in an amount not less than \$1,000 and not more than \$10,000. [Tenn. Code Ann. § 56-32-220.] The commissioner may increase the penalty by an amount equal to the sum calculated to be the damages suffered by the enrollees or other members of the public. [*Id.*]

## **D. Health Care Facilities, Including Hospitals**

The Patient's Privacy Protection Act grants patients a statutory right to privacy for care received at health care facilities, including hospitals and clinics. [Tenn. Code Ann. §§ 68-11-1502; 68-11-1501.] The statute prohibits the disclosure of (and, more specifically, the selling of) the name, address and other identifying information of a patient. [Tenn. Code Ann. § 68-11-1503.] Exceptions to this general rule of nondisclosure include: mandatory reports to health or government authorities; access by a third party payor (such as an insurance company) for utilization reviews, case management or other administrative functions; access by health care providers who are treating the patient; and, if the patient does not object, directory information including the name, health status and location of the patient. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** Any violation of the these provisions is considered to be an invasion of the patient's right to privacy, and may serve as the basis for a civil action for damages. [Tenn. Code Ann. §§ 68-11-1503; 68-11-1504].

**Fines and Penalties.** Any penalty or injunction available under Title 68, Chapter 11 of the Tennessee Code is available for violations of these confidentiality provisions. [Tenn. Code Ann. § 68-11-1504].

## **E. Nursing Homes**

All nursing home patients have the right to have their medical records kept confidential and private. [Tenn. Code Ann. § 68-11-901(13).] The patient or his legal guardian must consent in writing prior to the release of confidential information unless the disclosure is for persons authorized under the law. [*Id.*]

## **F. Pharmacists**

Pharmacists may disclose patient information to persons authorized to prescribe drugs or to communicate a prescription order, where necessary. [Tenn. Code Ann. § 63-10-412.] The disclosure of information pursuant to this section does not waive confidentiality or privileges that are provided by law. [*Id.*]

## **G. Prepaid Health Service Organizations**

Prepaid limited health service organizations may not release confidential information related to the diagnosis, treatment, or health of an enrollee patient without written consent of the enrollee or unless otherwise provided by law. [Tenn. Code Ann. § 56-51-150.]

## **H. State Government**

**State Hospital and Medical Facilities.** The records of patients in state or local government hospital or medical facilities are confidential and are not open to public inspection. [Tenn. Code Ann. § 10-7-504(a)(1).]

## **I. Utilization Review Agents**

All utilization review agents must comply with all laws to protect the confidentiality of patient medical records. [Tenn. Code Ann. § 56-6-705.]

# **III. PRIVILEGES**

Tennessee recognizes a number of mental health care provider-patient privileges that allow a patient, in legal proceedings, to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of treatment and diagnosis. [Tenn. Code Ann. §§ 24-1-207 (psychiatrist-patient); 63-11-213 (psychologist-client); 63-22-114 (marital and family therapist-client); 63-23-107 (social worker-client); 63-7-125 (registered nurse (specializing in psychiatric and mental health nursing)-client).] Tennessee does not recognize a physician-patient privilege.

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Birth Defects

Tennessee maintains a birth defects registry to monitor information on the incidence, prevalence and trends of birth defects. [Tenn. Code Ann. § 68-5-506.] All patient identifying information that is collected and analyzed in connection with the registry is confidential and may be used solely for the purposes provided by the statute. [Id.] The staff of the registry may use the information collected to conduct studies investigating the causes of birth defects and to determine and evaluate measures designed to prevent their occurrence. [Id.] The commissioner of health also may provide scientists access to the registry information, provided that these scientists are engaged in health research and agree in writing to, among other things, maintain confidentiality of the information. [Id.]

The department must maintain an accurate record of all persons who are given access to the information in the registry.

#### Remedies and Penalties

**Fines and Penalties.** Any individual who willfully discloses confidential information in violation of these provisions commits a Class A misdemeanor, punishable by not greater than 11 months 29 days imprisonment, a fine not to exceed \$2,500, or both. [Tenn. Code Ann. § 68-1-1010(e)(4); 40-35-111 (specifying the authorized punishment for misdemeanor offenses).] Any individual who negligently discloses confidential information commits a Class B misdemeanor, punishable by not greater than 6 months imprisonment, a fine not to exceed \$500, or both. [Id.]

### B. Cancer

The Tennessee Cancer Reporting System Act established a cancer registry that requires all hospitals, laboratories, facilities and health care practitioners within the state to report to the health department information contained in the medical records of patients who have cancer and specified pre-cancerous or tumorous diseases. [Tenn. Code Ann. §§ 68-1-1001; 68-1-1003.] All data from these reports are for the confidential use of the department of health and persons designated by the department. [Tenn. Code Ann. § 68-1-1006.] Information that could possibly identify a patient whose medical record has been used may not be included in materials available to the public. [Id.] Personally identifying medical information from the registry may be released to health researchers who meet specific criteria, including providing a statement explaining the reasons for which confidential and personally identifiable portions of the data are necessary. [Id.] Furthermore, upon completion of the research project, all data provided by the department and all copies of the data must be destroyed. [Id.]

In addition, the commissioner may enter into appropriate written agreements with other states that maintain statewide cancer registries to exchange information on cancer patients. Agreements with other states must specify that all patient specific information must remain confidential and require all research personnel to whom the information is made available to maintain confidentiality. [Tenn. Code Ann. § 68-1-1010.]

## **Remedies and Penalties**

**Fines and Penalties.** Any person receiving information containing the personal identity of any patient from the registry who willfully divulges that identity, except as allowed by the Cancer Reporting System Act, commits a Class C misdemeanor punishable by not greater than 30 days imprisonment, a fine not to exceed \$50, or both. [Tenn. Code Ann. §§ 68-1-1009; 40-35-111(e) (specifying the authorized punishment for misdemeanor offenses).]

## **C. Genetic Testing**

The Genetic Information Nondiscrimination in Health Insurance Act provides that insurance providers may not disclose genetic information without the prior written authorization of the individual. [Tenn. Code Ann. §§ 56-7-2701; 56-7-2704.]

Insurance providers may not condition health insurance coverage, or base premiums, terms, or conditions on the basis that the individual or the individual's family member requested or received genetic services. [Tenn. Code Ann. § 56-7-2703.] In addition, the insurance provider may not request or require an individual to disclose to the provider genetic information about the individual or family member of the individual. [Tenn. Code Ann. § 56-7-2704.]

“Genetic information” is information derived from a genetic test to determine the presence or absence of variations or mutations, including carrier status, that are scientifically or medically believed to cause a disease, disorder or syndrome, or that are associated with a statistically increased risk of developing a disease, disorder or syndrome, which is asymptomatic at the time of testing. Such testing does not include either routine physical examinations or chemical, blood or urine analysis unless conducted purposefully to obtain genetic information or questions regarding family history. [Tenn. Code Ann. § 56-7-2702.]

## **D. Mental Health**

Records relating to the mental health treatment and legal proceedings concerning patients or residents of mental institutions are confidential and generally may not be disclosed without consent of the patient or his legal guardian. [Tenn. Code Ann. §§ 33-3-103; 33-3-104.] Disclosure without the patient's consent is allowed, however, to carry out treatment or commitment of the individual; and pursuant to court order upon a determination that disclosure is necessary to conduct proceedings before it and failure to disclose would be contrary to public interest or detrimental to a party to the proceedings. [Tenn. Code Ann. § 33-3-105.] Disclosure is also permitted, upon proper inquiry, of information as to the current medical condition of a patient or resident to any member of the patient's family. [*Id.*] Adjudications of incompetence and of restoration of competence are to be kept separately by the court clerk and are open to public inspection. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A violation of this provision is a Class C misdemeanor, punishable by not greater than 30 days imprisonment, a fine not to exceed \$50, or both. [Tenn. Code Ann. §§ 33-3-115; 40-35-111(e).]

**Mandatory Outpatient Treatment.** Hospital staff and qualified mental health professional may exchange the confidential information that is necessary if the hospital staff determines preliminarily that a person who was committed involuntarily will need to participate in outpatient treatment upon discharge and refuses to consent to disclose confidential information. [Tenn. Code Ann. § 33-6-601.]

**Minors.** A child, 16 years or older, who has a serious emotional disturbance or mental illness has the same rights as an adult with respect confidential information. [Tenn. Code Ann. § 33-8-202.]

## **E. Sexually Transmitted Diseases, Including HIV and AIDS**

Physicians, clinics, hospitals, laboratories and penal institutions, in which there is a case of sexually transmitted disease, must report the case immediately to persons or agencies designated as recipients of such reports by the commissioner of health. [Tenn. Code Ann. § 68-10-101.] Sexually transmitted diseases include AIDS, HIV, gonorrhea, syphilis, and others. [Tenn. Comp. R. & Regs. 1200-14-1-1.41.]

Strict confidentiality is imposed on records and information relating to known or suspected cases of sexually transmitted diseases that are held by the state or local health department. [Tenn. Code Ann. § 68-10-113.] This information is not subject to release upon subpoena, court order, discovery or search warrants except under very limited circumstances. [*Id.*] In order for a judge to order release of this information during a legal proceeding he must determine the existence of four specific criteria, including that it would be a substantial injustice to the requesting party and the patient not to require the disclosure. The exceptions to nondisclosure include enforcing the regulations for the treatment of sexually transmitted disease, emergencies threatening the health or life of the patient, and cases of suspected child abuse. [Tenn. Code Ann. § 68-10-113(1) through (5).] Release of identifying medical or epidemiological information is permitted with the consent of the patient. [*Id.*]

Also, a person who reasonably believes that a person has knowingly exposed another to HIV may inform the potential victim. [Tenn. Code Ann. § 68-10-115.]

### **Remedies and Penalties**

**Fines and Penalties.** Any health officer or other person who violates these provisions is guilty of a Class C misdemeanor, punishable by not greater than 30 days imprisonment, a fine not to exceed \$50, or both. [Tenn. Code Ann. §§ 68-10-111; 40-35-111(e).]

## **F. Alcohol Abuse**

The registration information and records of a treatment facility are privileged and must remain confidential. [Tenn. Code Ann. § 68-24-508.] Treatment facility includes a private agency meeting the standards prescribed by the department that is licensed by



the department of mental health and developmental disabilities and a non-profit treatment agency operating under the health department providing treatment through a contract with the department and licensed by the department of mental health and developmental disabilities. [Tenn. Code Ann. § 68-24-504 (defining “approved private treatment facility” and “approved public treatment facility”).]

# TEXAS

Effective September 2003, Texas no longer has a comprehensive medical records privacy statute. [See generally 2003 Tex. Sess. Law Serv. Ch. 3 (S.B. 330) (Vernon's) (repealing Tex. Health & Safety Code §§ 181.101 and 181.102.) Texas retains statutes that govern specific providers and specific medical conditions.

## I. PATIENT ACCESS

### A. Chiropractors

A chiropractor must furnish to a patient a copy of “chiropractic records” requested or, if he prefers, a summary of the record within a reasonable amount of time after receiving the patient’s written consent for release. [Tex. Occ. Code Ann. § 201.405(f).] The consent must be signed by the patient and specify: the information or medical records to be released; the reasons or purpose for the disclosure; and the person to whom the information is to be released. [Tex. Occ. Code Ann. § 201.405(b), (c), and (f).] “Chiropractic records” means “any records relating to the history, diagnosis, treatment or prognosis of a patient.” [Tex. Occ. Code Ann. § 201.405(a).] Access may be denied if the chiropractor determines that access to the information would be harmful to the patient’s health. [Tex. Occ. Code Ann. § 201.405(g).]

**Fees.** The patient is responsible for paying a reasonable fee to the chiropractor for furnishing the information. [Tex. Occ. Code Ann. § 201.405(f).] The current fee schedule is as follows: \$30 for retrieval of records and processing the request, including copies for the first 10 pages; \$1 per page for pages 11-60; 50¢ per page for pages 61-400; and 25¢ per page for pages over 400. [Tex. Admin. Code, tit. 22, part 3, chap. 80, Rule 80.3.] For copies of film or other static diagnostic imaging studies, the maximum fee is \$45 for retrieval and processing, including the first 20 pages of copies, and \$1 for every page over 10. [*Id.*]

### B. Hospitals

Hospitals in Texas must provide patients access to and copies of their recorded health care information upon request. [Tex. Health & Safety Code § 241.154.] “Health care information” is defined as information recorded in any form or medium that identifies a patient and related to the history, diagnosis, treatment or prognosis of the patient. [Tex. Health & Safety Code Ann. § 241.151 (defining “health care information”).]

Hospitals must give patients access to their recorded health care information within 15 days of the receipt of a written authorization for disclosure. [Tex. Health & Safety Code § 241.154.] The hospital may not charge a fee for a patient to examine his own health information. [Tex. Health & Safety Code Ann. § 241.154(d)]

The rules for obtaining a copy of a medical record are slightly different. The hospital must respond to the written authorization for disclosure within 15 days of the receipt of the written authorization and payment of the required copying and mailing fees. [Tex. Health & Safety Code § 241.154.] The basic retrieval or processing fee, which

includes the fee for providing the first 10 pages of the copies, may not exceed \$35.30. The fees for subsequent pages are as follows: \$1.18 per page for pages 11-60; 59¢ per page for pages 61 -400; and 30¢ per page for any additional pages. [Tex. Health & Safety Code Ann. § 241.154(b) as adjusted per statute (fee schedule effective until Aug. 30, 2003).] If the requested records are stored on microform or other electronic medium, the retrieval or processing fee, including copies of the first 10 pages, may not exceed \$52.96 and \$1.18 per page thereafter. [*Id.*] In addition the hospital may charge the actual cost of mailing, shipping or otherwise delivering the provided copies. [Tex. Health & Safety Code Ann. § 241.154(b).]

The hospital may not charge for a medical record requested for use in supporting an application for disability benefits or other benefits or assistance that the patient may be eligible to receive. [Tex. Health & Safety Code Ann. §§ 241.154(d); 161.202.] Neither may it charge for the first two copies of an itemized billing statement. [Tex. Health & Safety Code Ann. § 241.154(d) and § 311.002.]

### **C. Physicians**

A physician must furnish to a patient copies of medical records requested no later than 15 business days after the date of receipt of the patient's written consent for release. [Tex. Occ. Code Ann. § 159.006.] The physician may furnish a summary or narrative in lieu of a copy of the medical record at the physician's option. [*Id.*] The information can be furnished in any medium agreed to by the physician and patient. [Tex. Occ. Code Ann. § 159.007.]

The consent must be signed by the patient and must specify: the information or medical records to be released; the reasons or purpose for the disclosure; and the person to whom the information is to be released. [Tex. Occ. Code Ann. § 159.005.]

**Fees.** The physician may charge a fee for providing the requested information that does not exceed \$25 for the first twenty pages and 15¢ per page for additional pages. [Tex. Occ. Code Ann. § 159.008 and Tex. State Bd. Of Medical Examiners Rule 165.2] If the material requested is a copy of a film (e.g., x-ray) or other static diagnostic imaging study, the physician may charge no more than \$8 per copy. In addition to copying fees, the physician may charge actual costs for mailing, shipping, or delivery. [Tex. Occ. Code Ann. § 159.008 and Tex. State Bd. Of Medical Examiners Rule 165.3] The provider does not have to furnish the copies until after the patient has paid the fee unless there is a medical emergency. [Tex. Occ. Code Ann. § 159.008.] The physician may not charge a fee for a medical record requested for use in supporting an application for disability benefits or other benefits or assistance that a patient may be eligible to receive. [Tex. Health & Safety Code Ann. § 161.202.]

**Denial of Access.** If the physician determines that access to the information would be harmful to the patient's health, he may deny the request, in whole or in part. If access is denied, the physician must provide the patient a written statement stating the reason for denial, and place a copy of that statement in the patient's medical records. [Tex. Occ. Code Ann. § 159.006(e).]

## D. Podiatrists

A podiatrist must furnish to a patient a copy of “podiatric records” requested or, if he prefers, a summary of the record within a reasonable amount of time after receiving the patient’s written consent for release. [Tex. Occ. Code Ann. § 202.406(d) and (e).] The consent must be signed by the patient and specify: the information or medical records to be released; the reasons or purpose for the disclosure; and the person to whom the information is to be released. [Tex. Occ. Code Ann. § 202.406(a), (b), and (d).] “Podiatric record” means “a record relating to the history, diagnosis, treatment, or prognosis of a patient.” [Tex. Occ. Code Ann. § 202.401.] Access may be denied if the podiatrist determines that access to the information would be harmful to the patient’s physical, mental, or emotional health. [Tex. Occ. Code Ann. § 202.406(d).]

**Fees.** The patient is responsible for paying a reasonable fee to the podiatrist for furnishing the information. [Tex. Occ. Code Ann. § 202.406(e).] The podiatrist may charge no more than \$25 for the first 20 pages and 15¢ per page for additional pages. [Tex. Admin. Code, tit. 22, part 3, chap. 80, Rule 80.3.] The fee may include the actual costs for mailing, shipping or delivery. [*Id.*]

## E. Utilization Review Agents

If an individual submits a written request for access to his recorded personal information, the utilization review agent must within 10 business days of receipt of the request inform the individual of the nature and substance of the recorded personal information in writing and permit the individual to see and copy the information. [Tex. Ins. Code art. 21.58A § 8.] If the information is in coded form, an accurate translation in plain language must be provided in writing. [*Id.*] The utilization review agent may charge a reasonable fee for providing a copy of the recorded personal information. [*Id.*]

### Remedies and Penalties

**Fines and Penalties.** If the commissioner of insurance finds that a utilization review agent, HMO, insurer or other person or entity conducting utilization review has violated article 21.58A, the commissioner may impose sanctions, a cease and desist order, or impose administrative penalties. [Tex. Ins. Code art. 21.58A § 9.]

## II. RESTRICTIONS ON DISCLOSURE

### A. Chiropractors

Communications between a chiropractor and his patient and the records maintained by the chiropractor are confidential and generally may not be disclosed without the written consent of the patient. [Tex. Occ. Code Ann. § 201.402.] The written consent must be signed by the patient and must specify: the information or medical records to be released; the reasons or purpose for the disclosure; and the person to whom the information is to be released. [Tex. Occ. Code Ann. § 201.405(b) and (c).] The patient may withdraw consent to the release of his information, however, it will not affect information disclosed before the written notice of the withdrawal. [Tex. Occ. Code Ann. § 201.405(f).]

Disclosure without the patient's consent is permitted in a number of enumerated circumstances, including to medical or law enforcement personnel when there is a probability of imminent physical danger to the patient or others; to an individual or entity involved in the payment or collection of fees for services rendered by the chiropractor; to a governmental agency if disclosure is required or authorized by law and the agency protects the identity of the patient whose records are examined; and to qualified personnel for management audits, financial audits, program evaluations or research, provided that they do not directly or indirectly identify a patient in a report or in any other manner. [Tex. Occ. Code Ann. § 201.404.] Disclosure without consent is also permitted in certain judicial or administrative proceedings. [Tex. Occ. Code Ann. § 201.403.] A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. [Tex. Occ. Code Ann. §§ 201.402; 201.405.]

## **B. Emergency Medical Services Personnel**

In general, communications made between certified emergency medical services (EMS) personnel and a patient in the course of providing emergency medical services to the patient are confidential and privileged and may not be disclosed without patient consent. [Tex. Health & Safety Code Ann. §§ 773.091; 773.093.] Records of the identity, evaluation or treatment of the patient that are created or maintained by EMS personnel also are confidential and privileged. [*Id.*]

Patient consent for release of confidential information must be in writing and signed by the patient or his representative, or a parent or legal guardian if the patient is a minor. The consent must specify the information or records covered by the release; the reasons or purpose for the release; and the person to whom the information is to be released. [Tex. Health & Safety Code Ann. § 773.093.] The patient may withdraw consent by submitting a written notice of withdrawal. Withdrawal of consent does not affect information that was disclosed before the date of receipt of the notice. [*Id.*]

Disclosures without patient consent are permitted under certain enumerated circumstances, including to medical or law enforcement personnel when there is a probability of imminent physical danger to the patient or others; to an individual or entity involved in the payment or collection of fees for services rendered by EMS personnel; to a governmental agency if disclosure is required or authorized by law; and to qualified personnel for management audits, financial audits, program evaluations or research, provided that they do not directly or indirectly identify a patient in a report or in any other manner. [Tex. Health & Safety Code Ann. § 773.092.] Disclosures also are permitted in certain judicial or administrative proceedings. [*Id.*] A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purpose for which the information was obtained. [Tex. Health & Safety Code Ann. §§ 773.091; 773.093.]

## C. HMOs

Texas statutorily restricts the disclosure of health information by health maintenance organizations (HMOs), defined as any person who arranges for or provides a health care plan, a limited health care service plan, or a single health care service plan to enrollees on a prepaid basis. Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from that person or from any provider without the patient's or applicant's express consent. [Tex. Ins. Code Ann. § 843.007]

There are limited exceptions to this general rule. Information may be disclosed in the following circumstances: to the extent necessary to carry out the purposes of the statutory provisions governing HMOs, pursuant to statute or court order for the production of evidence or discovery; or in the event of claim or litigation between the person and the HMO, the HMO may disclose data or information that is pertinent. [*Id.*]

### Remedies and Penalties

**Penalties and Remedies.** The commissioner of insurance may issue an order directing an HMO to stop engaging in an act or practice that is in violation of this provision. [Tex. Ins. Code Ann. § 843.461.] If the commissioner, after following appropriate procedures, determines that an HMO has substantially failed to comply with these provisions, he may suspend or revoke the HMO's certificate of authority, impose sanctions or impose an administrative penalty. [*Id.*] A person or an officer of an HMO who willfully violates the Health Maintenance Organization Act, including these nondisclosure provisions, is guilty of a misdemeanor. [Tex. Ins. Code Ann. § 843.464.]

## D. Hospitals

Generally, a hospital may not disclose health care information about a patient without the patient's written authorization. [Tex. Health & Safety Code Ann. § 241.152.] The written disclosure authorization is valid only if it: is dated and signed by the patient; identifies the information to be disclosed; and identifies the person to whom the information is to be disclosed. The authorization is valid for 180 days unless it specifies otherwise or is revoked. [Tex. Health & Safety Code Ann. § 241.152.] The patient or his legally authorized representative may revoke a disclosure authorization to a hospital at any time. Authorization may not be revoked for disclosures required for purposes of making payment to the hospital for health care provided to the patient. [*Id.*]

Disclosures without patient authorization are permitted if the information released is: directory information, unless the patient has instructed the hospital not to include their information in the directory; to a health care provider who is attending the patient; to a qualified organ or tissue procurement organization; to a federal, state or local government agency if authorized or required by law; for use in a research project authorized by an institutional review board; and to others specified in the statute. [Tex. Health & Safety Code Ann. § 241.153.]

A hospital is required to adopt and implement reasonable safeguards for the security of all health care information it maintains. [Tex. Health & Safety Code Ann. § 241.155.]

### **Remedies and Penalties**

**Right to Sue.** A patient may bring an action for injunctive relief and damages for the unauthorized release of confidential health care information. [Tex. Health & Safety Code Ann. § 241.156.]

## **E. Insurers, including HMOs**

### **1. Scope**

In May 2001, Texas amended the Insurance Code to prevent the unauthorized disclosure of consumers' health information. These rules govern the practices of "licensees," which include HMOs, insurance companies and any person who holds or is required to hold a license, registration, certificate of authority or other authority under Texas State Insurance Law. [Tex. Ins. Code art. 28B.01 (defining "licensee").] "Nonpublic personal health information" is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [*Id.* (defining "nonpublic personal health information").] "Health information" is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [Tex. Ins. Code art. 28B.01 (defining "health information").]

Licensees are required to comply with the requirements of state insurance law with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [Tex. Ins. Code art. 28B.05.]

### **2. Requirements**

In general, a licensee must obtain an individual's authorization to disclose any nonpublic personal health information. [Tex. Ins. Code art. 28B.02.] A valid authorization must include: the identity of the individual who is the subject of the nonpublic personal health information; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the individual; the length of time that the authorization is valid (no more than twenty-four months); and notice that the individual may revoke the authorization at any time and the procedure for revocation. [*Id.*]

A licensee, however, may disclose without authorization nonpublic personal health information to the extent that the disclosure is necessary to perform insurance functions on behalf of the licensee, as specified in the statute, such as claims

administration, underwriting, quality assurance, utilization review, disease management, and fraud investigation. [Tex. Ins. Code art. 28B.04.]

These provisions do not supercede Texas law related to medical records, health or insurance information privacy that is in effect on July 1, 2002. [Tex. Ins. Code art. 28B.06.]

### **3. Remedies and Penalties**

**Right to Sue.** A person may bring a cause of action or otherwise seek relief for conduct that is a violation of these provisions. [Tex. Ins. Code art. 28B.12.]

**Fines and Penalties.** The attorney general may institute an action for civil penalties and injunctive relief to restrain a violation of these provisions. Civil penalties may not be less than \$3,000 for each violation. If a court finds that the violations have occurred with a frequency that constitutes a pattern of practice, a civil penalty not exceeding \$250,000 may be imposed. [Tex. Ins. Code art. 28B.09.] In addition, the licensee may be subject to investigation and disciplinary proceedings, including probation or suspension, or license revocation if there is evidence of a pattern of violations. [Tex. Ins. Code art. 28B.10.]

## **F. Physicians**

Communications between a physician and patient, and records of the identity, diagnosis, evaluation or treatment of a patient that are created or maintained by the physician are confidential and may not be disclosed without the written consent of the patient, except as permitted by statute. [Tex. Occ. Code Ann. § 159.002.] The consent must be signed by the patient and must specify: the information or medical records to be released; the reasons or purpose for the disclosure; and the person to whom the information is to be released. [Tex. Occ. Code Ann. § 159.005(a) and (b).] The patient or his authorized representative has a right to withdraw consent. Withdrawal of consent, however, will not affect any information disclosed before written notice of the withdrawal. [Tex. Occ. Code Ann. § 159.005(c).]

Disclosure without the patient's consent is permitted in a number of enumerated circumstances, including to medical or law enforcement personnel when there is a probability of imminent physical danger to the patient or others; to an individual or entity involved in the payment or collection of fees for services rendered by the physician; to a governmental agency if disclosure is required or authorized by law; and to qualified personnel for management audits, financial audits, program evaluations or research, provided that they do not directly or indirectly identify a patient in a report or in any other manner. [Tex. Occ. Code Ann. § 159.004.] Disclosure without consent is also permitted in certain judicial or administrative proceedings. [Tex. Occ. Code Ann. § 159.003.] A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is



consistent with the authorized purposes for which the person first obtained the information. [Tex. Occ. Code Ann. §§ 159.002.]

### **Remedies and Penalties**

**Right to Sue.** A patient whose medical records have been disclosed in violation of the statute may bring a civil suit for injunctive relief and damages. [Tex. Occ. Code Ann. § 159.009.]

**Telemedicine.** A treating physician or health professional who provides or facilitates the use of telemedicine medical services or telehealth services must ensure that the confidentiality of the patient's medical information is maintained as required by Chapter 159, Occupations Code, or other applicable law. [Tex. Ins. Code art. 21.53F § 5.]

## **G. Podiatrists**

Communications between a podiatrist and his patient and the records maintained by the podiatrist are confidential and generally may not be disclosed without the written consent of the patient. [Tex. Occ. Code Ann. § 202.402.] The written consent must be signed by the patient and must specify: the information or medical records to be released; the reasons or purpose for the disclosure; and the person to whom the information is to be released. [Tex. Occ. Code Ann. § 202.406(a) and (b).] The patient may withdraw consent to the release of his information, however, it will not affect information disclosed before the written notice of the withdrawal. [Tex. Occ. Code Ann. § 202.406(c).]

Disclosure without the patient's consent is permitted in a number of enumerated circumstances, including to medical or law enforcement personnel when there is a probability of imminent physical danger to the patient or others; to an individual or entity involved in the payment or collection of fees for services rendered by the podiatrist; to a governmental agency if disclosure is required or authorized by law and the agency protects the identity of the patient whose records are examined; and to qualified personnel for management audits, financial audits, program evaluations or research, provided that they do not directly or indirectly identify a patient in a report or in any other manner. [Tex. Occ. Code Ann. § 202.405.] Disclosure without consent is also permitted in certain judicial or administrative proceedings. [Tex. Occ. Code Ann. § 202.404.] A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. [Tex. Occ. Code Ann. §§ 202.402; 202.407.]

## **H. Utilization Review Agents**

A utilization review agent may not disclose or publish individual medical records, personal information or other confidential information about a patient obtained in the course of utilization review without the prior written consent of the patient or as otherwise required by law. [Tex. Ins. Code art. 21.58A § 8.] A utilization agent may

disclose to a third party under contract or affiliated with the utilization review agent for the sole purpose of performing or assisting with utilization review. Information provided to these third parties must remain confidential. [*Id.*]

Utilization review agents must maintain all patient data in a confidential manner that prevents unauthorized disclosure to third parties. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** If the commissioner of insurance finds that a utilization review agent, HMO, insurer or other person or entity conducting utilization review has violated article 21.58A, the commissioner may impose sanctions, a cease and desist order, or impose administrative penalties. [Tex. Ins. Code art. 21.58A § 9.]

## **III. PRIVILEGES**

Texas recognizes a number of health care provider-patient privileges, which allow a patient, in legal proceedings, to refuse to disclose and to prevent other persons from disclosing confidential communications made with professionals for the purpose of treatment and diagnosis. [Tex. R. Evid. 509 (physician-patient); Tex. Occ. Code Ann. § 201.402 (chiropractor-patient); Tex. Occ. Code Ann. § 202.402 (podiatrist-patient); Tex. Health and Safety Code §§ 611.002 (mental health professional-patient); Tex. Health & Safety Code Ann. § 773.091 (emergency medical services personnel-patient).] The privilege may be claimed by the patient or physician, chiropractor, podiatrist, mental health professional, or emergency medical services personnel acting on behalf of the patient. [Tex. R. Evid. 509; Tex. Occ. Code Ann. §§ 201.402 and 202.403; Tex. Health and Safety Code § 611.003; Tex. Health & Safety Code Ann. § 773.091.] HMOs also are entitled to claim any statutory privileges against disclosure, which the provider of the information is entitled to claim. [Tex. Ins. Code Ann. § 843.007; Tex. Ins. Code art 20A.25.]

There is no physician-patient privilege in criminal proceedings, however, a communication by a patient being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse to a person involved in the treatment or examination is not admissible in a criminal proceeding. [Tex. R. Evid. 509.]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Birth Defects**

Texas maintains a birth defects registry. [Tex. Health & Safety Code Ann. § 87.001 et seq.] Information related to birth defect cases that is provided to an employee of the department of health or an authorized agent of the department is confidential and may only be used for carrying out the purposes of the birth defects statute. [Tex. Health & Safety Code Ann. § 87.002.] The department of health may release, medical, epidemiological or toxicological information with the consent of each person identified in the information; to medical personnel to the extent necessary to protect the health or life of the child identified in the information; to appropriate federal agencies; for

statistical purposes, if released in a manner that prevents identification of any person; or to medical personnel, appropriate state agencies and others to comply with the birth defects statute. [*Id.*]

Access to information in the registry is limited to authorized department employees and other persons with a valid scientific interest who are engaged in demographic, epidemiological, or other studies related to health and who agree in writing to maintain confidentiality. [Tex. Health & Safety Code Ann. § 87.062.] The department is required to maintain a listing of each person given access to information in the registry, the dates of access, and the purpose for which the information was used. [*Id.*]

Research proposals requesting the use of information in the registry must be reviewed by the commissioner of public health and the health department's committee for the protection of human subjects. [Tex. Health & Safety Code Ann. § 87.063.]

## **B. Cancer Registry**

Texas maintains a cancer registry, which includes identifying information collected from hospitals, clinical laboratories and cancer treatment centers. [Tex. Health & Safety Code Ann. § 82.001 et seq.] Data obtained directly from the medical records of a patient is for the confidential use of the department of health and other designated individuals. The data in the registry may not be disclosed to the public in a manner that discloses the identity of an individual whose medical records have been reviewed. [Tex. Health & Safety Code Ann. § 82.009.] Data provided to a hospital cancer registry or a cancer treatment center registry is for the confidential use of those registries. [*Id.*]

## **C. Communicable Diseases**

Texas requires that incidents of communicable diseases, including AIDS/HIV be reported to the local health authority by physicians, laboratories, nursing homes, health professionals, local school authorities and others specified in the statute. [Tex. Health & Safety Code Ann. § 81.041.] These reports are confidential and may be used only for purposes of controlling communicable diseases. [Tex. Health & Safety Code Ann. § 81.046.] Reports, records, and information relating to cases or suspected cases of communicable diseases are not public information and may not be released or made public on subpoena or otherwise except in very limited, specified circumstances, such as to medical personnel for the purposes of controlling and treating the disease. [Tex. Health & Safety Code Ann. § 81.046.] The records of a health care facility that directly or indirectly identify a patient as having a communicable disease are also classified as confidential. [Tex. Health & Safety Code Ann. § 81.203.]

## **D. Genetic Information and Test Results**

In general, genetic information is considered confidential and privileged regardless of the source of the information. [Tex. Lab. Code Ann. § 21.403; Tex. Ins. Code art 21.73 § 4.] Because the definitions of key terms vary in different parts of the Texas Code, the provisions with respect to employers and insurers are discussed separately below.

## 1. Employers

For purposes of the Labor Code “genetic information” is defined as “information obtained from or based on a scientific or medical determination of the presence or absence in an individual of a genetic characteristic; or derived from the results of a genetic test performed on, or a family health history obtained from, that individual.” [Tex. Lab. Code Ann. § 21.401 (defining “genetic information”).] “Genetic test” is “a presymptomatic laboratory test of an individual’s genes, gene products, or chromosomes to identify by analysis of the individual’s DNA, RNA, proteins, or chromosomes genetic variations, compositions, or alterations that are associated with a predisposition for a clinically recognized disease, disorder, or syndrome or to be a carrier of such a disease, disorder or syndrome.” [*Id.* (defining “genetic test”).]

Under the Labor Code, genetic information is considered confidential and may not be disclosed without specific authorization by the individual. [Tex. Lab. Code Ann. § 21.403.] Each subsequent disclosure must also be authorized. [*Id.*] A holder of an individual’s genetic information may not disclose or be compelled to disclose genetic information pursuant to a subpoena absent specific authorization by the individual. [Tex. Lab. Code Ann. § 21.403.] Genetic information may be released *without* specific authorization only to identify individuals pursuant to state or federal criminal law; to establish paternity; to relatives of a decedent for purposes of medical diagnosis; to identify a decedent; and for some categories of research. [Tex. Lab. Code Ann. § 21.403.]

A sample of genetic material taken for a genetic test from an individual must be destroyed promptly after the purpose for which the sample was obtained with a few exceptions such as retained under court order or authorized by the individual to be retained for medical treatment or scientific research purposes. [Tex. Lab. Code Ann. § 21.405.]

Texas also prohibits employers and labor organizations from discriminating against individuals on the basis of genetic information. In particular, an employer may not discriminate against an employee or applicant for employment because of the individual’s genetic information or refusal to submit to a genetic test [Tex. Lab. Code Ann. § 21.402.]

## 2. Health Insurers

For purposes of the Insurance Code, “genetic information” is defined as “information obtained from or based on a scientific or medical determination of the presence or absence in an individual of a genetic characteristic; or derived from the results of a genetic test on that individual.” [Tex. Ins. Code art. 21.73 § 1 (defining “genetic information”).] (Note that unlike the Labor Code, the Insurance Code does *not* include family health history in the definition of genetic information Compare Tex. Ins. Code art. 21.73 with Tex. Labor Code § 21.401).] “Genetic test” is defined as “a presymptomatic laboratory test of an individual’s genes, gene products, or chromosomes to identify by analysis of the individual’s DNA, RNA, proteins, or chromosomes genetic variations, compositions, or alterations that are associated with a predisposition for a clinically recognized disease, disorder, or syndrome or to be a

carrier of such a disease, disorder or syndrome.” [Tex. Ins. Code art. 21.73 § 1 (defining “genetic test”).] The term does not include a blood test, cholesterol test, urine test or other physical test used for a purpose other than determining a genetic or chromosomal variation, composition or alteration in a specific individual, or a routine physical examination, drug use test or HIV test. [*Id.*] “

**Patient Access.** An individual who submits to a genetic test has the right to know the results of the test. [Tex. Ins. Code art. 21.73 § 5.] On the written request of the individual, the group health benefit plan issuer must disclose the test results to the individual or a physician designated by the individual. [*Id.*]

**Disclosure.** A person or entity that holds genetic information may not disclose or be compelled to disclose, by subpoena or otherwise, genetic information about an individual without the individual’s authorization. Genetic information relating to an individual may be disclosed without the individual’s authorization if the disclosure is: authorized under a state or federal criminal law relating to the identification of individuals or a criminal or juvenile proceeding; required by state or federal court order; authorized under state or federal law to establish paternity; made to provide genetic information relating to a decedent to blood relatives of the decedent for medical diagnosis; or made to identify a decedent. [Tex. Ins. Code art. 21.73 § 4.]

A group health benefit plan may not redisclose genetic information unless the redisclosure is consistent with prior disclosures authorized by the tested individual. [Tex. Ins. Code art. 21.73 § 4.] A group health benefit plan, however, may redisclose genetic information without individual authorization under a few specified circumstances, such as for actuarial or research studies if a tested individual cannot be identified in the research report and any materials that identify the individual are returned or destroyed as soon as reasonably practicable. Redisclosures may contain *only* the information reasonably necessary to accomplish the purpose for which the information is disclosed. [*Id.*]

A sample of genetic material taken from an individual for a genetic test must be destroyed promptly after the purpose for which the sample was obtained is accomplished with a few exceptions such as retained under court order or authorized by the individual to retain the sample for medical treatment or research purposes. [Tex. Ins. Code Ann. art. 21.73 § 6.]

### **Remedies and Penalties**

**Fines and Penalties.** If the commissioner of insurance finds that a group health benefit plan has violated these provisions, he may issue a cease and desist order. If the health plan refuses or fails to comply with the order, the commission may revoke or suspend the plan’s certificate of authority or other authorization to engage in the operation of a group health benefit plan in Texas. The group plan may also be subject to administrative penalties. [Tex. Ins. Code Ann. art. 21.73 § 7.]

## E. HIV/AIDS

### 1. General Rules

HIV/AIDS test results are confidential. [Tex. Health & Safety Code Ann. § 81.103.] A person who possesses or has knowledge of a test result may not release or disclose it except in limited circumstances, such as to the state department of health, the spouse of a person who has tested positive, to employees of health care facilities whose job entails dealing with medical records, or to the person tested. [Tex. Health & Safety Code Ann. § 81.103.]

#### **Remedies and Penalties**

**Fines and Penalties.** It is a Class A misdemeanor to release or disclose, with criminal negligence, a test result in violation of this section. [Tex. Health & Safety Code Ann. § 81.103(j).]

**Right to Sue.** An individual may bring an action to restrain a violation or threatened violation of section 81.103. A person found in a civil action to have negligently released or disclosed a test result or allowed a test result to become known in violation of section 81.103 may be liable for actual damages, a civil penalty of not more than \$5,000, and court costs and reasonable attorney's fees. A person found to have willfully released or disclosed the test result is subject to a higher penalty, not less than \$5,000 but no more than \$10,000. [Tex. Health & Safety Code Ann. § 81.104.]

### 2. Health Insurers

HIV-related test results are confidential. An insurer may not release or disclose a test result or allow a result to become known except under specified circumstances, including as required by law or pursuant to a written request of authorization of the proposed insured or his legally authorized representative. [Tex. Ins. Code Ann. art. 21.21-4.] Release of a test result pursuant to a written request is limited to several categories of individuals: the proposed insured or his legally authorized representative; a licensed health care provider or other person designated by the proposed insured; an insurance medical information exchange under specific procedures; a reinsurer; persons within the insurer's organization making underwriting decisions on the insurer's behalf; or outside legal counsel who needs the information to represent the insurer. [*Id.*]

An applicant must be given written notice of a positive HIV-related test result by a physician designated by the applicant, or in the absence of such designation, the Texas Department of Health. [*Id.*]

#### **Remedies and Penalties**

**Fines and Penalties.** It is a Class A misdemeanor to release or disclose, with criminal negligence, a test result in violation of this section. [*Id.*]

**Right to Sue.** An individual who is injured by a violation of article 21.21-4 may bring a civil action for damages. He also may bring an action to restrain a violation or threatened violation. A person found in a civil action to have negligently released or

disclosed a test result or allowed a test result to become known in violation of article 21.21-4 is liable for actual damages, a civil penalty of not more than \$1,000, and court costs and reasonable attorney's fees. A person found to have willfully released or disclosed the test result is subject to a higher penalty, not less than \$1,000 but no more than \$5,000. [Tex. Ins. Code Ann. art. 21.21-4.]

### **3. State Government**

Each state agency is required to develop and implement guidelines regarding the confidentiality of AIDS and HIV-related medical information for the agency's employees and the clients, inmates, patients and residents served by the agency. [Tex. Health & Safety Code Ann. § 85.115.]

## **F. Mental Health**

### **1. Mental Health Facilities**

Records of mental health facilities that directly or indirectly identify a present, former or proposed patient are confidential unless disclosure is permitted by other state law. [Tex. Health & Safety Code Ann. § 576.005.]

### **2. Mental Health Professionals**

**Patient Access.** A person who consults a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction, is entitled to have access to the content of the records made about him. [Tex. Health & Safety Code Ann. §§ 611.001 and 611.0045.] The mental health professional must provide access to these records within a reasonable time and may require the payment of a reasonable fee prior to retrieval.\* [Tex. Health & Safety Code Ann. §§ 611.0045(i) and 611.008.]

The professional, however, may not charge a fee for a mental health record requested for use in supporting an application for disability benefits or other benefits or assistance that a patient may be eligible to receive. [Tex. Health & Safety Code Ann. § 161.202.]

On receipt of a written request from a patient to examine or copy the patient's mental health care record, a professional must make the information available for examination or provide a copy to the patient within 15 days. [Tex. Health & Safety Code Ann. § 611.008.]

Access to any portion of the record may be denied if the professional determines that release of that portion would be harmful to the patient. [Tex. Health & Safety Code Ann. § 611.0045(b).] However, the professional must then notify the patient of the denial in writing, and allow another professional designated by the patient to examine and copy the record.

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\* It is not clear whether the fee schedule set by the Texas Board of Medical Examiners under section 159.008 of the Occupation Code applies to mental health records. [See Tex. Occ. Code Ann. § 159.008 and discussion under Patient Access, Physicians, above at page 2.]

**Authorization Requirements.** Communications between a patient and a mental health care professional, and the records of the identity, diagnosis, evaluation or treatment of the patient maintained by that professional are confidential and generally may not be disclosed without the patient's written consent. [Tex. Health & Safety Code Ann. § 611.002.] A patient or his legally authorized representative may revoke at any time a consent for disclosure to a professional. The revocation must be written, signed and dated by the patient or his representative. The patient may not revoke a disclosure that is required for purposes of making payment to the professional for mental health care services provided to the patient. [Tex. Health & Safety Code Ann. § 611.007.]

**Authorization Exceptions.** Disclosure without the patient's consent is permitted in a number of enumerated circumstances, including to medical or law enforcement personnel when there is a probability of imminent physical danger to the patient or others; to a governmental agency if disclosure is required or authorized by law; and to qualified personnel for management audits, financial audits, program evaluations or research, provided that they do not directly or indirectly identify a patient in a report or in any other manner. [Tex. Health & Safety Code Ann. § 611.004.] A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. [*Id.*] Disclosure without consent is also permitted in certain judicial or administrative proceedings. [Tex. Health & Safety Code Ann. § 611.006.]

### **Remedies and Penalties**

**Right to Sue.** A patient who has been improperly denied access to his mental health records or whose mental health information was improperly disclosed has the right to bring a civil action seeking injunctive relief and damages. [Tex. Health & Safety Code Ann. § 611.005.] In a suit contesting the denial of access premised on the professional's determination that disclosure would be detrimental to the patient, the burden of proving that the denial was proper is on the professional. [*Id.*]

### **3. Mental Retardation Programs**

**Patient Access.** The contents of a record of the identity, diagnosis, evaluation or treatment of a person that is maintained in connection with a mental retardation program or activity may be made available upon his request, except if the person is a client and the qualified professional responsible for supervising the client's habitation states in a signed written statement that having access to the record is not in the client's best interest. [Tex. Health & Safety Code Ann. §§ 595.001; 595.004.] "Client" is defined as a person receiving mental retardation services from the department of mental health and mental retardation or a community center. [Tex. Health & Safety Code Ann. § 595.003 (defining "client").] A minor's parent or a person's guardian must be given access to the contents of any record about the minor or person. [Tex. Health & Safety Code Ann. § 595.004.]

**Authorization Requirements and Exceptions.** Records of the identity, diagnosis, evaluation or treatment of an individual that are maintained in connection with a mental retardation program or activity are confidential and generally may not be disclosed without the individual's prior written consent. [Tex. Health & Safety Code



Ann. §§ 595.001; 595.003.] They may be disclosed without an individual's consent: to medical personnel to the extent necessary for medical emergencies; to qualified personnel for management audits, financial audits, program evaluations or research approved by the department of mental health and mental retardation; to personnel legally authorized to conduct investigations concerning complaints of abuse or denial of rights; or pursuant to an appropriate court order upon a showing of good cause. [Tex. Health & Safety Code Ann. § 595.005.] Persons who receive the information for audit, evaluation or research may not directly or indirectly identify an individual in their reports or otherwise disclose any identities. [*Id.*] A person who receives confidential information may not redisclose the information except to the extent that disclosure is consistent with the authorized purpose for which the information was obtained.

These provisions do not prohibit a qualified professional from disclosing the current physical and mental condition of a person with mental retardation to the person's parent, guardian, relative or friend. [Tex. Health & Safety Code Ann. § 595.010.]

#### **4. Texas Department of Mental Health and Mental Retardation**

Department of mental health and mental retardation facilities, local mental health or mental retardation authorities, community centers, other designated providers, and subcontractees of mental health and mental retardation services may exchange patient or client records with each other without patient or client consent. [Tex. Health & Safety Code Ann. § 533.009.]

A person, including a hospital, sanitarium, nursing or rest home, medical society or other organization, may provide to the department of mental health and mental retardation or a medical organization, hospital or hospital committee any information relating to an individual's condition and treatment for use in a study to reduce mental disorders and mental disabilities. [Tex. Health & Safety Code Ann. § 533.010.] The information and any finding or conclusion resulting from the study is privileged information. The identity of the individual studied is confidential and may not be revealed under any circumstances. [*Id.*]

# UTAH

Utah does not have a general comprehensive statute granting a patient the right of access to his medical records or prohibiting the disclosure of confidential medical information. The state does statutorily afford these privacy protections to medical information that is maintained by the government. Additionally, some privacy protections are addressed in statutes governing other specific entities and medical conditions.

## I. PATIENT ACCESS

### A. Health Care Providers

Utah does not have a general statutory provision granting a patient the right of access to his medical records. However, a patient's authorized attorney, upon presenting a written authorization that has been signed by the patient (in the case of a minor, by a parent or guardian) and notarized, is entitled to examine or copy patient records maintained by a physician, surgeon, dentist, osteopathic physician, registered nurse, psychologist, chiropractor, or a licensed hospital. [Utah Code Ann. § 78-25-25.] The attorney is to pay, as part of the costs advanced on behalf of his client, for all copies made at his request. [*Id.*]

### B. State Government

#### 1. Scope

Under the Government Records Access and Management Act (Utah Code Ann. §§ 63-2-101 to -906), Utah statutorily grants persons the right of access to records maintained by government entities. Persons must be given access to "private records" including those that contain data describing medical history, diagnosis, condition, treatment, evaluation, or similar medical data. [Utah Code Ann. § 63-2-202(1) and § 63-2-302 (defining "private records").] This right of access does not include "controlled records," *i.e.*, medical, psychiatric or psychological data the disclosure of which the governmental entity reasonably believes would be detrimental to the subject's mental health or to the safety of any individual. [Utah Code Ann. §§ 63-2-202(2)(a); 63-2-303 (defining "controlled records").] In order to come within this category, the governmental entity must have properly classified the record. Controlled records may not be disclosed to the subject of the record either directly, or indirectly through a physician or psychologist authorized to receive the data. [Utah Code. Ann. § 63-2-202(2)(a) and (b).]

The individuals entitled to access under these provisions include the subject of the record; the parent or legal guardian of an unemancipated minor who is the subject of the record; the legal guardian of a legally incapacitated individual who is the subject of the record; and any other individual who has a power of attorney from the subject of the record. [Utah Code. Ann. § 63-2-202.]

## 2. Access procedures and requirements

A person making a request for a record must furnish the governmental entity with a written request containing his name, mailing address, daytime telephone number, if available, and a description of the records requested that identifies the record with reasonable specificity. [Utah Code Ann. § 63-2-204.] Before releasing a private record, including records containing individually identifiable medical data, the governmental entity must obtain evidence of the requester's identity. [Utah Code Ann. § 63-2-202(6).]

As soon as reasonably possible, but no later than 10 business days after receiving a written request, the governmental entity must respond to the request by taking one of the following actions: approving the request and providing the record; denying the request; notifying the requester that it does not maintain the record and providing, if known, the name and address of the governmental entity that does maintain the record; or notifying the requester that because extraordinary circumstances listed in the statute, it cannot immediately approve or deny the request. [Utah Code Ann. § 63-2-204.] If the governmental entity fails to provide the record due to extraordinary circumstances, it must describe the circumstances relied upon and specify the date when the records will be available. [*Id.*] If there is more than one subject of a private or controlled record, the portion of the record that pertains to another subject must be segregated from the portion that the requester is entitled to inspect. [Utah Code Ann. § 63-2-202(3).]

**Copying Fees.** Governmental agencies are permitted and encouraged to fulfill a record request without charge when the individual requesting the record is the subject of the record, the subject's parent (if a minor) or guardian or has the subject's power of attorney. [Utah Code Ann. § 63-2-203.] Governmental agencies do, however, have the option of charging a reasonable fee to cover their actual cost of duplicating a record. [*Id.*]

If the governmental entity compiles a record in a form other than that normally maintained by the entity, the actual costs may include the cost of staff time for summarizing, compiling, or tailoring the record into an organization or media that meets the person's request; as well as the cost of staff time for search, retrieval, and other direct administrative costs. Additional fees may be imposed for a record that is the result of computer output other than word processing. [Utah Code Ann. § 63-2-203.]

**Denial of Access.** If a governmental entity denies the request, it must provide a notice of denial to the requestor containing: a description of the requested record information, and citations to the provisions, court rule or order, another state or federal statute, or regulation that exempt the record or portions of the record from disclosure [Utah Code Ann. §§ 63-2-205.] The notice must also advise the requester that he has the right to appeal the denial to the chief administrative officer of the governmental entity; and specify the requirements for filing such an appeal. [*Id.*]

## II. RESTRICTIONS ON DISCLOSURE

### A. Genetic Counselors

A genetic counselor may not disclose any information received from a client unless released by the client or otherwise authorized or required by law. [Utah Code Ann. § 58-75-502 (defining “unprofessional conduct”).]

#### Remedies and Penalties

**Fines and Penalties.** Violating this requirement may subject a genetic counselor to discipline from the Division of Occupational and Professional Licensing, which may, among other things revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of a genetic counselor who fails to maintain the confidentiality of a client’s information. [Utah Code Ann. § 58-1-401.]

### B. Insurers, including HMOs

#### 1. Scope

The commissioner of insurance has issued rules that govern the practices of “licensees,” (*i.e.*, all insurers, producers or other persons licensed or required to be licensed, authorized or registered under the Utah Insurance Code) with respect to the disclosure of “nonpublic personal health information” of insurance consumers and customers. [Utah Admin. Code R. 590-206-4 (17)(a) (defining “licensee”).] These regulations were issued in response to the Gramm-Leach-Bliley Act (commonly known as the Financial Services Modernization Act.) (Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.). It should be noted that if a licensee complies with the Health Privacy Rule issued by the United States Department of Health and Human Services under the Health Insurance Portability and Accountability Act, it is not subject to these state rules. [Utah Admin. Code R. 590-206-20.]

“Nonpublic personal health information” is information, in any form, created by or derived from a health care provider or the consumer that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual, and that relates to the past, present or future physical, mental or behavioral health or condition of an individual, the provision of health to an individual, or payment for the provision of health care. [Utah Admin. Code R. 590-206-4 (defining “health information” and “nonpublic personal health information”).]

Insurance “consumers” are individuals who seek to obtain, obtains, or has obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. “Customers” are generally consumers who have a continuing customer relationship with the licensee. [Utah Admin. Code R. 590-206-4 (9) (defining “consumer”); R. 590-206-4 (10) (defining “customer relationship”); R. 590-206-4 (6) (defining “customer”).]

Licensees are required to comply with the requirements of these rules with respect to health information by January 1, 2003.

## **2. Requirements**

### **a. Authorization Requirements and Exceptions**

The rules generally prohibit the disclosure of any nonpublic personal health information about a consumer or customer without the individual's authorization. [Utah Admin. Code R. 590-206-17.] There are a large number of exceptions to this general rule. No authorization is required for the disclosure of nonpublic personal health information for the purpose of performing a specified list of insurance functions by or on behalf of the insurer or broker including, but not limited to: claims administration, underwriting, quality assurance, utilization review, fraud investigation, scientific, medical or public policy research, and grievance procedures. [Id.] Additionally, no authorization is required for "any activity that permits disclosure without authorization pursuant to the federal Health Insurance Portability and Accountability Act privacy rules promulgated by the U.S. Department of Health and Human Services. [Id.]

A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); and notice that the consumer or customer may revoke the authorization at any time and the procedure for revocation. [Utah Admin. Code R. 590-206-18.]

### **b. Remedies and Penalties**

Any violation of these rules constitutes an undefined unfair or deceptive trade practice and is subject to penalties. [Utah Admin. Code R. 590-206-24.]

## **C. State Government**

**In General.** Records maintained by a governmental entity that contain data on individuals describing medical history, diagnosis, condition, treatment, evaluation, or similar medical data are considered to be "private records" and generally are not open to inspection by the general public under the Government Records Access and Management Act. [Utah Code Ann. §§ 63-2-201; 63-2-302.]

The subject of the information may authorize another person to inspect the subject's records by signing a notarized release, dated no more than 90 days before the date the request is made. [Utah Code Ann. § 63-2-202 .] Additionally, a subject's medical data may be released without the subject's notarized release to a health care provider, if releasing the record is consistent with normal professional practice and medical ethics. [Id.] Records must also be released pursuant to a court order that meets certain specified criteria. [Id.]

Records maintained by a government entity that contain medical, psychiatric or psychological data the disclosure of which the governmental entity reasonably believes

would be detrimental to the subject's mental health or to the safety of any individual are considered "controlled records" and may only be disclosed in very limited circumstances. [Utah Code Ann. §§ 63-2-202 and 63-2-302 (defining "controlled records").] Upon request, a governmental entity must disclose a controlled record to a physician, psychologist, certified social worker, insurance provider or agent, or a government public health agency upon submission of a release from the subject of the record that is dated no more than 90 days prior to the date the request is made and a signed acknowledgment that the information obtained may not be disclosed to any person, including the subject of the record. [*Id.*] Controlled records may also be disclosed pursuant to a court order that meets certain specified criteria. [*Id.*] Information contained in court-ordered disclosures may not be redisclosed to anyone, including the subject. [*Id.*]

A governmental entity may disclose or authorize disclosure of private or controlled records for research purposes if the governmental entity determines that the research purpose cannot reasonably be accomplished without use or disclosure of the information to the researcher in individually identifiable form and meets other requirements. [Utah Code Ann. § 63-2-202(8).]

Before releasing a private or controlled record, the governmental entity must obtain evidence of the requester's identity. [Utah Code Ann. § 63-2-202(6).]

**Insurance Department.** Unless a court orders otherwise, medical records of HMO enrollees that are in the possession of the department of insurance are considered to be confidential and are not to be disclosed to the public. [Utah Code Ann. § 31A-8-405.]

### III. PRIVILEGES

Utah recognizes the physician or surgeon-patient privilege, which allows a patient, in legal proceedings, to refuse to disclose and to prevent his physician or surgeon from disclosing any information acquired in attending the patient that was necessary to enable him to prescribe or act for the patient. [Utah Code Ann. § 78-24-8(4); Utah Rules of Evidence, Rule 506.] Similarly, a sexual assault counselor cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication. [Utah Code Ann. § 78-24-8(6).] Confidential communications with mental health therapists, including psychologists, clinical or certified social workers, and other professional counselors are also covered by an evidentiary privilege. [Utah Rules of Evidence, Rule 506; Utah Code Ann. § 58-60-113.] The physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient. [*Id.*]

## IV. CONDITION-SPECIFIC REQUIREMENTS

### A. Communicable Diseases, Including HIV

The Communicable Disease Control Act requires health care providers, health care facilities, nursing homes, laboratories and others to report to the department of health any person suffering from, or suspected of having, a communicable disease, including venereal diseases and HIV/AIDS. [Utah Code Ann. §§ 26-6-6; 26-6-16 (venereal diseases); 26-6-3.5 (HIV/AIDS).] These reports are “strictly confidential” and the information they contain may not be released without the written consent of the person identified in the report. [Utah Code Ann. § 26-6-27.] Identifying information may not be made public upon subpoena, search warrant, discovery proceedings or otherwise, except as provided by the statute. [*Id.*] Circumstances under which disclosure is permitted without the consent of the person identified in the report include: in a medical emergency to protect the health or life of the identified person; to local health departments for the purpose of controlling the communicable disease; to blood banks, organ and tissue banks, and similar institutions for the purpose of identifying individuals with communicable diseases; to a health care provider, health care personnel, and public health personnel with a legitimate need to have access to the information to assist the patient or protect the health of others closely associated with the patient; and to a few others. [*Id.*] Additionally, the department of health utilizes contact tracing and other methods for “partner” identification and notification. [Utah Code Ann. § 26-6-3.5.]

#### Remedies and Penalties

**Fines and Penalties.** Any individual or entity who releases or makes public confidential information, or otherwise breaches the confidentiality requirements of this chapter, is guilty of a class B misdemeanor. [Utah Code Ann. § 26-6-3.5.]

### B. Genetic Information

The Genetic Testing Privacy Act (2002) restricts the use and disclosure of genetic information by employers and health insurers. [See 2002 Utah Laws Ch. 120 (H.B. 56).] This Act takes effect on January 1, 2003. [*Id.*] For purposes of this Act, “genetic analysis” or “genetic test” means the testing or analysis of an identifiable individual’s DNA that results in information that is derived from the presence, absence, alteration, or mutation of an inherited gene or genes, or the presence or absence of a specific DNA marker or markers. [2002 Utah Laws Ch. 120, § 2, to be codified at Utah Code Ann. § 26-45-102.] “Private genetic information” is information about an identifiable individual that is derived from the presence, absence, alteration, or mutation of an inherited gene or genes, or the presence or absence of a specific DNA marker or markers which has been obtained from a genetic test or analysis of DNA of either the individual or a blood relative of the individual. [*Id.*] “Private genetic information” does not include information that is derived from a routine physical exam; a routine chemical, blood, or urine analysis; a test to identify the presence of drugs or HIV infection; or a test performed due to the presence of signs, symptoms, or other manifestations of a disease, illness, impairment, or other disorder. [*Id.*]

## 1. Employers

Employers may not in connection with a hiring, promotion, or retention decision access or otherwise take into consideration private genetic information about an individual; request or require an individual to consent to a release for the purpose of accessing private genetic information about the individual; or request or require an individual or his blood relative to submit to a genetic test. [2002 Utah Laws Ch. 120, § 3. To be codified at Utah Code Ann. § 26-45-103.] Neither may the employer inquire into whether an individual has taken or refused to take a genetic test. [Id.]

An employer may seek an order compelling the disclosure of private genetic information held by an individual or a third party in connection with: 1) an employment-related judicial or administrative proceeding in which the individual has placed his health at issue; or 2) an employment-related decision in which the employer has a reasonable basis to believe that the individual's health condition poses a real and justifiable safety risk requiring the change or denial of an assignment. [Id.] The statute sets out specific findings that must be made and restrictions that must be included in any such order. [Id.]

## 2. Health Insurers

A health insurer may not, in connection with the offer or renewal of an insurance product or in determining premiums, coverage, renewal, cancellation or any other underwriting decision that pertains directly to the individual or a group of which the individual is a member, take the following actions: access or otherwise take into consideration private genetic information about an asymptomatic individual; request or require an asymptomatic individual to consent to a release for the purpose of accessing private genetic information about the individual; request or require an asymptomatic individual or his blood relative to submit to a genetic test; and inquire into or take into consideration the fact that an asymptomatic individual or his blood relative has taken or refused to take a genetic test. [2002 Utah Laws Ch. 120, § 4, to be codified at Utah Code Ann. § 26-45-104.]

Health insurers are permitted to inquire about, use and disclose private genetic information in a number of circumstances. First, if a claim for payment of a genetic test is made against the individual's health insurance policy, the health insurer may request information regarding the necessity of the genetic test but not the results of the test. [Id.] Further, where the primary basis for rendering health care services is the result of a genetic test and a claim for payment for such services has been made against the individual's health insurance policy, the health insurer may request that portion of private genetic information that is necessary to determine the insurer's obligation to pay for the services. [Id.] The statute sets out specific findings that must be made and restrictions that must be included in any such order. [Id.]

Health insurers may only use or otherwise disclose the information obtained under these provisions in connection with a proceeding to determine their obligation to pay for a genetic test or health care services. [Id.] The insurer must make a reasonable effort, in accordance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), to limit disclosure to the minimum amount necessary. [Id.] In a proceeding to determine the insurer's obligation to pay, an insurer may seek an order compelling genetic information held by the individual or a third party. [Id.] Such an



order must, among other things, limit the amount of information disclosed to that which is essential to fulfilling the objectives of the order and limit the disclosure to those persons whose need for the information is the basis for the order. [*Id.*]

Private genetic information maintained by an insurer about an individual may be redisclosed: to protect the interest of the insurer in detecting, prosecuting, or taking legal action against criminal activity, fraud, material misrepresentations, and material omissions; to enable business decisions to be made about the purchase, transfer, merger, reinsurance, or sale of the insurer's business; and to the Commissioner of Insurance upon formal request. [*Id.*]

### **3. Remedies and Penalties**

**Right to sue.** An individual whose legal rights arising under the Genetic Testing Privacy Act have been violated after June 30, 2003, may recover damages and be granted equitable relief in a civil action. An insurance company or employer who violates the legal rights of an individual is liable to the individual for each separate violation for actual damages sustained as a result of the violation; \$100,000 if the violation is the result of an intentional act; punitive damages if the violation was malicious; and reasonable attorneys' fees. [2002 Utah Laws Ch. 120, §5, to be codified at Utah Code Ann. § 26-45-105.]

**Fines and penalties.** The attorney general is authorized to bring an action to enforce this act. [*Id.*] In such a suit, the court may enjoin or restrain any person from using any method, act or practice in violation of these provisions. [*Id.*] Additionally, after June 30, 2003, the court may require the payment of a civil fine of no more than \$25,000 for each separate intentional violation and reasonable costs of investigation and litigation, including attorneys' fees. [*Id.*]

## **C. Mental Health**

### **1. Psychologists and Counselors**

A psychologist, licensed substance abuse counselor or mental health therapist may not disclose any confidential communication with a client or patient without that patient's or his authorized agent's express consent (a parent or guardian if the patient is a minor). [Utah Code Ann. §§ 58-61-602 (psychologists); 58-60-509 (licensed substance abuse counselors); 58-60-114 (mental health therapists).] Disclosure without authorization is permitted in a limited number of circumstances including: when reporting various conditions as mandated by state law; when disclosure is made as part of an administrative, civil or criminal proceeding, under an exemption from evidentiary privilege; and when release of the communication is made under a generally recognized professional or ethical standard that authorizes or requires disclosure. [*Id.*]

### **2. Mental Health Facilities**

All records, reports, certificates and applications made for the purpose of admitting or committing a person to a mental health facility that directly or indirectly identify a patient or former patient are confidential and may not be disclosed without the patient's consent. [Utah Code Ann. § 62A-12-247.] Disclosure without the patient's

consent is permitted as necessary to carry out the provisions governing admissions and commitments to state hospitals and other mental health facilities and upon court order. [*Id.*]

**Remedies and Penalties**

**Fines and Penalties.** A person who knowingly and intentionally makes an unauthorized disclosure is guilty of a Class B misdemeanor. [Utah Code Ann. § 62A-12-247.]

## **VERMONT**

Vermont does not have a general, comprehensive statute granting a patient access to his medical records or prohibiting the disclosure of confidential medical information. Rather, the privacy protections are addressed in statutes governing specific entities or medical conditions.

### **I. PATIENT ACCESS**

There is no general statute granting a patient access to his medical records.

### **II. RESTRICTIONS ON USE AND DISCLOSURE**

#### **A. Hospitals**

A patient has a statutory right to privacy concerning his own medical care program and communications made during the course of his treatment. [18 Vt. Stat. Ann. § 1852(a)(6) and (7).] Disclosure of this medical information without authorization by the patient is allowed only to medical personnel (and persons under their supervision) directly treating the patient, persons monitoring the quality of the treatment, or persons researching the effectiveness of the treatment. Written authorization of the patient is required for all other disclosures. [18 Vt. Stat. Ann. § 1852(a).] A summary of these rights and the hospital's obligations written in clear language and in easily readable print must be distributed to patients upon admission and posted conspicuously at each nurse's station. [18 Vt. Stat. Ann. § 1852(c).]

#### **Remedies and Penalties**

**Fines and Penalties.** If a physician violates this provision, he may be subjected to disciplinary action by the board of medical practice. [18 Vt. Stat. Ann. § 1852(b) and 26 Vt. Stat. Ann. § 1360.]

#### **B. Nursing Homes**

Nursing home residents have a statutory right to confidential treatment of their personal and medical records. They may approve or refuse the release of these records to any individual outside the facility, except in the case of their transfer to another health care institution, or as required by law or third-party payment contract. [33 Vt. Stat. Ann. § 7301.]

#### **C. State Government**

Records produced or acquired by the state (or any political subdivision thereof) which are designated by law as "confidential" or by a similar term are exempt from the law granting the public the right to inspect and copy public records. [1 Vt. Stat. Ann. § 317(c)(1).]

Research data developed or collected by the University of Vermont, which contains personally identifying information about participants in research is also exempt from public disclosure. [1 Vt. Stat. Ann. § 317(c)(23).]

### III. PRIVILEGES

Vermont recognizes a number of health care provider-patient privileges, which allow a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and the health care provider. The privilege extends to a patient and his physician, chiropractor, dentist, registered professional, licensed practical nurse, or a mental health professional (including psychologists, social workers, mental health counselors, nurses and others). [12 Vt. Stat. Ann. § 1612; 18 Vt. Stat. Ann. § 7101(13) (defining mental health professional; Vt. Rules of Evidence, Rule 503.) In addition to living patients and their guardians, the personal representative of a deceased patient may assert the privilege. [Vt. Rules of Evidence, Rule 503.]

### IV. CONDITION-SPECIFIC REQUIREMENTS

#### A. Cancer

Vermont maintains cancer and mammography registries. [18 Vt. Stat. Ann. §§ 152-157.] Health care facilities and health care providers are required to report each cancer case to the commissioner of the department of health or his or her authorized representative. [18 Vt. Stat. Ann. § 153.] All identifying information contained in records of interviews, written reports and statements is confidential and privileged and may only be used for the purposes of cancer morbidity and mortality studies. Any publications by the commissioner relating to these studies may not identify individual cases or sources of information. [18 Vt. Stat. Ann. §§ 154 and 157]

Disclosure of cancer data may be made to other states' cancer registries and federal cancer control agencies for the purpose of obtaining complete reports of Vermont residents diagnosed or treated in other states and to collaborate in a national cancer registry or collaborate in cancer control and prevention research studies. [18 Vt. Stat. Ann §§ 155 and 157.] Cancer data may also be disclosed to health researchers who have provided evidence of the approval of their academic committee for the protection of human subjects established in accordance with federal regulations (*i.e.*, the Common Rule). [*Id.*] In either event, before releasing the information, the commissioner of health must obtain a written agreement from the proposed recipient to keep the identifying information confidential and privileged. [*Id.*]

#### Remedies and Penalties

**Right to Sue.** An individual injured by an unauthorized disclosure of confidential or privileged information may only maintain an action for damages when the disclosure is due to gross negligence or willful misconduct. [See 18 Vt. Stat. Ann §§ 156 and 157.]

**Fines and Penalties.** The license of the health care facility or provider may not be denied, suspended or revoked for unauthorized disclosures except where such disclosure is due to gross negligence or willful misconduct.[Id.]

## **B. Communicable Diseases**

Mandatory reports to the department of health concerning communicable diseases, which include identifying information, are privileged and confidential. Persons required to report these diseases must have procedures in place to assure confidentiality. [18 Vt. Stat. Ann. § 1001.] These confidential public health records may not be disclosed or discoverable in any civil, criminal, administrative or other proceeding or used to determine issues relating to employment or insurance for any individual. [18 Vt. Stat. Ann. § 1001(c) and (d).]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who willfully or maliciously discloses the content of any confidential public health record without written authorization or as authorized by law is subject to a civil penalty of not less than \$10,000 and not more than \$25,000, and costs and attorney fees as determined by the court. [18 Vt. Stat. Ann. § 1001(e).]

## **C. Genetic Test Results**

### **1. General Rules**

Generally, no person can be required to undergo genetic testing. [18 Vt. Stat. Ann. § 9332.] Genetic testing is defined as a test, examination or analysis that is diagnostic or predictive of a particular heritable disease or disorder and is of: a human chromosome or gene; human DNA or RNA; or a human genetically encoded protein that is generally accepted in the scientific and medical communities as being specifically determinative for the presence or absence of a mutation, alteration, or deletion of a gene or chromosome. [18 Vt. Stat. Ann. § 9331.]

There are several exceptions to this general prohibition. Genetic testing may be required: in connection with certain insurance transactions (subject to the limitations of Section 9334, discussed below), or as required by law for the following purposes: to establish parentage, to determine the presence of metabolic disorders in a newborn, pursuant to a criminal investigation, or for remains identification. Samples collected under these exceptions may *not* be used for any purpose in connection with the state DNA data bank. [Id.] Genetic testing may be specifically required for purposes of the state DNA data bank, the state DNA database and CODIS (which generally collect DNA information on violent criminals). [Id. See also 20 Vt. Stat. Ann. Chap. 113, subchap. 4.]

With a few specified exceptions, results of genetic tests or the fact that an individual has requested genetic services or undergone genetic testing may be disclosed *only* with written authorization from the individual or a person authorized by law to act for the individual. [18 Vt. Stat. Ann. § 9332.] At the time that a person suggests or requests that an individual consent to genetic testing, the person must advise that individual

that the test results may become part of the individual's medical record and may be material to the ability of the individual to obtain certain insurance benefits. [Vt. Stat. Ann. §§ 9332 and 9331 (defining "genetic testing").]

### **Remedies and Penalties**

**Right to Sue.** Any person aggrieved by a violation of these genetic testing provisions may bring an action for civil damages, including punitive damages, equitable relief and attorney's fees and other appropriate relief. [*Id.*]

## **2. Employment-Related Uses**

A person may not require genetic testing or use any of the following facts to affect the terms, conditions or privileges of employment, labor organization membership, or professional licensure, certification or registration:

- ∞ that genetic counseling or testing services has been requested;
- ∞ that genetic testing has been performed;
- ∞ genetic test results or genetic information from an individual or the individual's family member; or
- ∞ the diagnosis of a genetic disease derived from a clinical interview or examination.

[18 Vt. Stat. Ann. § 9333.]

The restriction on uses for employment includes application for employment. [*Id.*] However, subject to Section 9334 genetic testing results or genetic information may be used in connection with life, disability income or long-term care insurance provided under an employee benefit plan. [*Id.*]

Furthermore, a person may not disclose to an employer, labor organization, employment agency, or licensing agency any genetic testing results or information that genetic services have been requested or that genetic testing has been performed, with respect to an individual who is an employee, labor organization member, professional licensee, certificate holder or registrant. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** Any person aggrieved by a violation of these genetic testing provisions may bring an action for civil damages, including punitive damages, equitable relief and attorney's fees and other appropriate relief. [18 Vt. Stat. Ann. § 9335.]

**Fines and Penalties.** Any person who intentionally violates these provisions may be imprisoned for not more than one year or fined not more than \$10,000, or both. [18 Vt. Stat. Ann. § 9335.]

## **3. Health Insurers**

Insurers may not require as a condition of coverage that an individual undergo genetic testing or submit the results of genetic testing of a family member. [18 Vt. Stat. Ann. § 9334.]



## **Remedies and Penalties**

**Right to Sue.** Any person aggrieved by a violation of these genetic testing provisions may bring an action for civil damages, including punitive damages, equitable relief and attorney's fees and other appropriate relief. [18 Vt. Stat. Ann. § 9335.]

**Fines and Penalties.** Any person who intentionally violates these provisions may be imprisoned for not more than one year or fined not more than \$10,000, or both. [18 Vt. Stat. Ann. § 9335.]

## **D. HIV/AIDS**

### **1. Court Proceedings**

HIV-related testing and counseling information is given heightened protection in court proceedings, and is not subject to disclosure absent a demonstration of compelling need. Pleadings pertaining to disclosure of identifying HIV-related information must use pseudonyms. Further protections are also specified. [12 Vt. Stat. Ann. § 1705.]

### **2. Insurers**

While an insurer may not request or require that an individual reveal having taken HIV-related tests in the past, the insurer may, as part of an insurance application process, concurrently require an individual to take a HIV-related test. The insurer must obtain written consent and must follow a number of required procedures. On the basis of the insured's written consent obtained prior to testing, the insurer may disclose the test results to those that are involved in underwriting decisions regarding the individual's application. Additionally, if the test is positive or indeterminate, the insurer may report a code to the medical information bureau (MIB) provided that a nonspecific test result code is used which does not indicate that the individual was subjected to HIV-related testing. Further disclosures require separately obtained written authorization. [8 Vt. Stat. Ann. § 4724(20).]

## **Remedies and Penalties**

**Right to Sue.** Any individual who sustains damage from the unauthorized negligent or knowing disclosure of his individually identifiable HIV-related test result information may bring an action for appropriate relief. The court may award costs and reasonable attorney's fees. [8 Vt. Stat. Ann. § 4724(20).]

**Fines and Penalties.** After notice and opportunity for a hearing, the commissioner of banking, insurance, securities and health care administration may impose a maximum administrative penalty of \$2000 for each violation. [*Id.*]

### **3. Public Health**

Mandatory reports to the department of health concerning cases of HIV may only be reported by a unique identifier code. [18 Vt. Stat. Ann. § 1001(a).] Public health records that relate to HIV/AIDS that contain any personally identifying information that was developed or acquired by state or local public health agencies are confidential and may not be disclosed without written authorization from the subject or the subject's guardian or conservator, except for public health purposes. [18 Vt. Stat. Ann. § 1001(b).]



### **Remedies and Penalties**

**Fines and Penalties.** Any person who willfully or maliciously discloses the content of any confidential public health record without written authorization or as authorized by law is subject to a civil penalty of not less than \$10,000 and not more than \$25,000, and costs and attorney fees as determined by the court. [18 Vt. Stat. Ann. § 1001(e).]

## **E. Mental Illness**

All certificates, applications, and reports (other than court orders requiring hospitalization or care of the mentally ill) identifying a patient or former patient treated for mental illness or an individual whose hospitalization or care for a mental illness was sought pursuant to law, including clinical information relating to that person, shall be kept confidential and may not be disclosed without the individual's written consent. [18 Vt. Stat. Ann. § 7103.] Disclosure without the patient's authorization may be made as necessary for court proceedings, where failure to make disclosure would be contrary to the public interest. Additionally, a patient's medical condition may be disclosed, upon inquiry, to the patient's family members, clergyman, physician, attorney or other interested party. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Violations of this provision are punishable by a fine not to exceed \$500 or imprisonment not to exceed one year, or both. [18 Vt. Stat. Ann. § 7103(c).]

## **F. Sexually Transmitted Diseases**

Mandatory reports to the department of health concerning persons suffering from venereal diseases are "absolutely confidential" and are not accessible to the general public or in court proceedings except in very limited circumstances. [18 Vt. Stat. Ann. § 1099.]

secured by Janlori Goldman, Director, Health Privacy Project.

# VIRGINIA

Virginia statutorily grants a patient the right of access to his medical records maintained by the state government, health care providers (such as physicians and hospitals) and insurance companies (including HMOs). State law also restricts disclosures by these entities and imposes restrictions addressing specific medical conditions.

## I. PATIENT ACCESS

### A. Health Care Providers, Including Physicians, Hospitals, HMOs and Others

#### 1. Scope

Virginia statutorily requires health care providers to furnish patients a copy of their medical records. [Va. Code Ann. § 32.1-127.1:03.] This requirement applies to any “provider,” a term that includes physicians, hospitals, dentists, pharmacists, registered or licensed practical nurses, optometrists, podiatrists, chiropractors, physical therapists, physical therapy assistants, clinical psychologists, clinical social workers, professional counselors, licensed dental hygienists and health maintenance organizations. [Va. Code Ann. §§ 32.1-127.1:03(B) (defining “provider”); 8.01-58.1 (defining “health care provider”).]

It encompasses medical records, which include any written, printed or electronically recorded material maintained by a provider in the course of providing health services to a patient concerning the patient and the services provided. The term “record” also includes the substance of any communication made by a patient to a provider in confidence during or in connection with the provision of health services to a patient. [Va. Code Ann. § 32.1-127.1:03(B) (defining “record”).]

#### 2. Requirements

As a preliminary matter, it should be noted that the following procedures apply only to requests for records not specifically governed by provisions of federal law or regulation or other provisions of Virginia statute or regulation. [See Va. Code Ann. § 32.1-127.1:03(E).]

A patient must submit a written request for a copy of his medical record in writing. Such a request must be signed and dated by the patient, identify the nature of the information requested, and contain proof of identity. [Va. Code Ann. § 32.1-127.1:03(E).] Within 15 days of receipt of the request, the provider must take one of the following actions:

- ∞ furnish the copies;
- ∞ inform the patient if the information does not exist or cannot be found;

- ∞ if the provider does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the provider who maintains the record; or
- ∞ deny the request.

[Va. Code Ann. § 32.1-127.1:03 (E).]

**Denial of Access.** The provider can deny the patient (or anyone authorized to act on the patient's behalf) access to the records if the patient's attending physician or psychologist has made a written statement in the patient's file that, in his opinion, furnishing the record to the patient would be injurious to the patient's health or well-being. [Va. Code Ann. § 32.1-127.1:03(F).] If he is denied access to his records, the patient can select another reviewing physician or psychologist (who is as qualified as the record-holder), to review the records and to make the judgment as to whether they should be made available to the patient. [*Id.*]

**Requests Made in Anticipation of Litigation.** Requests for records made by a patient in anticipation of or in the course of litigation are governed by separate provisions that specify: a time limit for responding to the request (15 days); the maximum allowable charges for copies (no more than 50¢ per page for up to 50 pages and 25¢ per page thereafter; \$1 per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed \$10); and a method for enforcing compliance with the request. [Va. Code Ann. § 8.01-413(B) through (D).] A patient's records may not be provided to the patient if his treating physician has made a statement in the records that furnishing to or review by the patient would be injurious to the patient's health or well-being. In such circumstances, the records must be furnished to the patient's attorney within 15 days of the request. [Va. Code Ann. § 8.01-413(B).]

## **B. Insurance Entities, Including HMOs**

### **1. Scope**

The Virginia Insurance Information and Privacy Protection Act applies to insurance entities including health, dental and optometric service plans, HMOs, insurance agents and insurance support organizations. [Va. Code Ann. §§ 39.2-601(A) (detailing entities and persons covered); 38.2-602 (defining "insurance institutions").]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [Va. Code Ann. § 38.2-602 (defining "personal information").] "Medical record information" is personal information that (1) relates to an individual's physical or mental condition, medical history or medical treatment, and (2) is obtained from a medical professional, medical care institution, including a pharmacy or pharmacist, or an individual, the individual's spouse, parent or legal guardian. [Va. Code Ann. § 38.2-602 (defining "medical record information").] The Act does not apply to medical information that has had personal identifiers removed. [Va. Code Ann. § 38.2-602.]

With respect to health insurance, the rights granted by the Act extend to Virginia residents who are the subject of the information collected, received or maintained in

connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Va. Code Ann. § 38.2-601.]

## 2. Requirements

An insurance company, HMO or other insurance entity must permit the individual to inspect and copy his personal information in person or obtain a copy of it by mail, whichever the individual prefers, within 30 business days of receiving a written request and proper identification from an individual. [Va. Code Ann. § 38.2-608(A).] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Va. Code Ann. § 38.2-608(A)(2).]

The insurance entity can impose a reasonable fee to cover copying costs. [Va. Code Ann. § 38.2-608(D).]

In addition to giving the individual a copy of his personal information, the insurance entity must also give the individual a list of the persons to whom it has disclosed such personal information within two years prior to the request for access, if that information is recorded. If such an accounting of disclosures is not recorded, the entity must inform the individual of the names of those persons to whom it normally discloses personal information. [Va. Code Ann. § 38.2-608 A(3).]

Medical record information provided to the insurance entity by a medical professional or medical care institution that is requested may be supplied either directly to the requesting individual or to a medical professional designated by the individual, at the option of the insurance entity. [Va. Code Ann. § 38.2-608(C).]

**Right to Amend.** A person has a statutory right to have any factual error corrected and any misrepresented or misleading entry amended or deleted, in accordance with stated procedures. [Va. Code Ann. § 38.2-609.] Within 30 business days from the date of receipt of an individual's written request, the insurance institution, agent or support organization must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) notify the individual of its refusal to make the correction, amendment or deletion, the reasons for the refusal, and the individual's right to file a statement of disagreement (which shall be filed with the disputed personal information). [*Id.*] If the entity makes the correction, amendment or deletion, it must notify: (1) any person specifically designated by the individual who within the preceding 2 years may have received the recorded personal information; (2) any insurance support organization whose primary source of the personal information is insurance institutions if the organization has systematically received the information within the preceding 7 years; and (3) any insurance support organization that furnished the personal information that was corrected, amended or deleted. [*Id.*]

## 3. Remedies and Penalties

**Right to Sue.** A person whose rights under this statute are violated has the right to file a civil action seeking equitable relief within two years from the date the alleged violation is or should have been discovered. [Va. Code Ann. § 38.2-617.] The court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

## C. State Government

### 1. Scope

The Government Data Collection and Dissemination Practices Act governs an individual's right of access to personal information, including medical history, that is maintained in an information system of a state agency. [Va. Code Ann. §§ 2.2-3800 (short title and purpose); 2.2-3801(2) (defining "personal information"); 2.2-3806.]

The Act applies to "agencies" a term that is broadly defined as including any agency, department, division, bureau, institution or similar governmental entity of the Commonwealth; any unit of local government including counties, cities, towns and regional governments and their departments; and any entity with whom they have entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function. [Va. Code Ann. §§ 2.2-3801(6) (defining "agency") and 2.2-3806.]

### 2. Requirements

Generally, upon receiving the request and proper identification of an individual, the agency must grant the individual the right to inspect, in a comprehensible form, all personal data maintained on that person, the nature of the sources of the data, and the names of recipients of personal information, other than those with regular access authority. [Va. Code Ann. § 2.2-3806(A)(3).] If the individual opts to have the information mailed to him, his request must be in writing. [Va. Code Ann. § 2.2-3806(A)(4).] Copies of the documents containing personal information are to be furnished to the individual at reasonable standard charges for document search and duplication. [*Id.*]

**Denial of Access.** Access to mental health records maintained in an information system can be denied when the patient's treating physician has entered a written statement in the patient's record that, in his opinion, a review of such records by the subject person would be injurious to his physical or mental health or well-being. [Va. Code Ann. §§ 2.2-3806(A)(3)(a); 2.2-3705(A)(5).]

**Right to Amend.** If an individual gives notice that he wishes to challenge, correct or explain information about him in the system, the agency maintaining the information system must investigate and record the current status of the personal information. [Va. Code Ann. § 2.2-3806(A)(5).] If after the investigation the information is found to be incomplete, inaccurate, not pertinent, not timely or not necessary to be retained, the information must be promptly corrected or purged. If the investigation does not resolve the dispute, the individual may file a statement setting forth his position and the agency must supply previous recipients of the data with a copy of that statement. Subsequent dissemination or use of the individual's information must include the individual's statement and clearly note that the information is in dispute. [*Id.*]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose rights of access have been improperly denied under this Act, may maintain a civil action for equitable relief, including an injunction or mandamus, against the violating person or agency. [Va. Code Ann. § 2.2-3809.]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Emergency Medical Care Attendants and Physicians**

Licensed physicians and other health care providers may disclose a sick or injured person's medical or hospital records to an emergency medical care attendant, technician or another physician who provided that person emergency medical care or assistance for the purpose of promoting medical education. The emergency medical care attendant, technician or physician may not redisclose the records to any person not entitled to receive that information. [Va. Code Ann. § 32.1-116.1:1.]

### **B. Health Care Providers, Including Physicians, Hospitals, HMOs and Others**

#### **1. Scope**

Virginia statutorily restricts the manner in which medical records may be disclosed. [Va. Code Ann. § 32.1-127.1:03.] These restrictions apply to any "provider," a term that includes physicians, hospitals, dentists, pharmacists, registered or licensed practical nurses, optometrists, podiatrists, chiropractors, physical therapists, physical therapy assistants, clinical psychologists, clinical social workers, professional counselors, licensed dental hygienists and health maintenance organizations. [Va. Code Ann. §§ 32.1-127.1:03(B) (defining "provider"); 8.01-58.1 (defining "health care provider").]

The restrictions encompass medical records, which include any written, printed or electronically recorded material maintained by a provider in the course of providing health services to a patient concerning the patient and the services provided. The term "record" also includes the substance of any communication made by a patient to a provider in confidence during or in connection with the provision of health services to a patient. [Va. Code Ann. § 32.1-127.1:03(B) (defining "record").]

#### **2. Restrictions on Disclosure**

Although patient records are the property of the provider maintaining them, Virginia recognizes a patient's right of privacy in the *content* of his medical records. [See Va. Code Ann. § 32.1-127.1:03(A).] No provider or other person working in a health care setting may disclose the records of a patient, without patient consent, except when permitted by state or federal law. [Va. Code Ann. § 32.1-127.1:03(A) and (D)(1).] The suggested format for the consent includes the patient's name, provider's name, person to whom disclosure is to be made, information to be disclosed, expiration date, signature of patient and date of execution. [Va. Code Ann. § 32.1-127.1:03(G).]

There are a number of instances where a provider may disclose the records of a

patient without the patient's consent including:

- ∞ when necessary in connection with the care of the patient;
- ∞ in the normal course of business in accordance with the accepted standards of practice within the health services setting;
- ∞ for public safety and suspect child or adult abuse reporting requirements;
- ∞ to third-party payors and their agents when the patient has requested the provider to submit bills to the payor for payment;
- ∞ as required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting;
- ∞ in compliance with a properly issued subpoena; and
- ∞ others.

[Va. Code Ann. § 32.1-127.1:03(D).]

Parties to a legal action requesting the issuance of a subpoena duces tecum for medical records must follow detailed protective measures, including affording notice to the subject of the information that they have the right to contest the subpoena. [See Va. Code Ann. § 32.1-127.1:03(H).]

Medical records maintained by health care providers are the property of the provider, or the employer if the health care provider is employed by another health care provider. [Va. Code Ann. § 54.1-2403.3.] Patient records may not be transferred with the sale of a professional practice until an attempt is first made to notify patients of the pending transfer, by mail, at the patient's last known address, and by publishing prior notice in a newspaper of general circulation within the provider's practice area. The notice must inform patients that at their written request, within a reasonable time, records or copies can be sent to another like-regulated provider of the patient's choice or destroyed. [Va. Code Ann. § 54.1-2405.]

## **C. Insurance Entities, Including HMOs**

### **1. Scope**

The Virginia Insurance Information and Privacy Protection Act applies to insurance entities including health, dental and optometric service plans, HMOs, insurance agents and insurance support organizations. [Va. Code Ann. §§ 39.2-601(A) (detailing entities and persons covered); 38.2-602 (defining "insurance institutions").]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [Va. Code Ann. § 38.2-602 (defining "personal information").] "Medical record information" is personal information that (1) relates to an individual's physical or mental condition, medical history or medical treatment, and (2) is obtained from a medical professional, medical care institution, including a pharmacy or pharmacist, or an individual, the individual's spouse, parent or legal guardian. [Va. Code Ann. § 38.2-602 (defining "medical record information").] The Act does not apply to medical information that has had personal identifiers removed. [Va. Code Ann. § 38.2-602.]



With respect to health insurance, the rights granted by the Act extend to Virginia residents who are the subject of the information collected, received or maintained in connection with insurance transactions and applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Va. Code Ann. § 38.2-601.]

## 2. Requirements

### a. Authorizations for Obtaining Health Information from Others

If an insurance entity uses an authorization form to obtain health information in connection with an insurance transaction, the authorization form must conform to the requirements of the HIPAA. The authorization form must be written in plain language, dated, specify the types of persons authorized to disclose information concerning the individual, specify the nature of the information authorized to be disclosed, identify who is authorized to receive the information, and specify the purposes for which the information is collected. [Va. Code Ann. § 38.2-606.] The length of time the authorization remains valid varies with the purpose of obtaining the requested information. An authorization signed in support of an application for health insurance remains valid for 30 months while an authorization signed for the purpose of collecting information in connection with a claim for health benefits is effective for the term of coverage of the policy. [Va. Code Ann. § 38.2-606(7).]

### b. Authorization Requirements and Exceptions

Generally, an insurance entity may not disclose medical information about a person that it collected or received in connection with an insurance transaction without that person's written authorization. [Va. Code Ann. § 38.2-613(A).]

Authorizations submitted by those other than insurance entities must be in writing, signed, dated, and obtained 2 years or less prior to the date a disclosure is sought. [Va. Code Ann. § 38.2-613(A)(2).] An insurance entity may not disclose information to another insurance entity pursuant to an authorization form unless the form meets the detailed requirements of the statute. [*Id.*] See Authorizations for Obtaining Health Information from Others, above.

**Authorization exceptions.** There are numerous circumstances under which an insurance entity can disclose information without the individual's authorization including: verifying insurance coverage benefits; for conducting actuarial or research studies, provided certain conditions are met; for the purpose of conducting business when the disclosure is reasonably necessary; to insurance regulatory authorities; to law enforcement agencies in order to prevent or prosecute fraud; in response to a facially valid search warrant or subpoena or other court order; and others. [Va. Code Ann. § 38.2-613(B).]

### c. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Va. Code Ann. § 38.2-604.] The insurance entity has the option of providing a detailed notice or an abbreviated notice. The abbreviated notice must advise the individual that (1) personal information may be collected from persons other than the individual proposed for coverage, (2) such information as well as other

personal information collected by the insurance entity may in certain circumstances be disclosed to third parties without authorization, (3) a right of access and correction exists with respect to all personal information collected, and (4) that a detailed notice of information practices must be furnished to the individual upon request. [*Id.*]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose information is disclosed in violation of these provisions has a statutory right to bring a civil action for actual damages sustained as a result of the disclosure. [Va. Code Ann. § 38.2-617.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

**Fines and Penalties.** Any person who knowingly and willfully obtains information concerning an individual from an insurance entity under false pretenses is subject to a fine not to exceed \$10,000, up to 12 months confinement in jail, or both. [Va. Code Ann. § 38.2-619.]

## **D. State Government**

Medical and mental health records that are maintained by the government are generally exempt from disclosure to anyone other than the subject of the record under the state Freedom of Information Act. [Va. Code Ann. § 2.2-3705.] Additionally, under the Government Data Collection and Dissemination Practices Act, any government agency maintaining an information system that disseminates statistical reports or research findings based on personal information drawn from its system may not make materials available for independent analysis without guarantees that no personal information will be used in any way that might prejudice judgments about the data subject. [Va. Code Ann. § 2.2-3805.] Any agency maintaining an information system that includes personal information may only collect, maintain, use or disseminate personal information that is permitted or required by law to be collected, maintained, used or disseminated, or necessary to accomplish a proper purpose of the agency. [Va. Code Ann. § 2.2-3803(A).]

## **III. PRIVILEGES**

Virginia recognizes a number of health care provider-patient privileges, which allow a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications with the health care provider made for the purpose of diagnosis or treatment of a physical or mental condition. [Va. Code Ann. §§ 8.01-399 (physician and other "licensed practitioner of the healing arts"-patient); 8.01-400.2 (licensed professional counselor, clinical social worker or psychologist-client).]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Birth Defects**

Virginia maintains a Congenital Anomalies Reporting and Education System to collect data on birth defects. The chief administrative officer of every hospital is required to

report to the State Health Commissioner children under two years of age diagnosed as having a congenital anomaly. [Va. Code Ann. § 32.1-69.1.] The Commissioner and all other persons to whom such data is submitted must keep the information confidential. The information may only be published in statistical form or studies that do not identify individuals. The Commissioner may contact parents of children identified with birth defects and their physicians to collect relevant data and provide them with information about public and private health care resources. [Va. Code Ann. § 32.1-69.2.]

## **B. Cancer**

Hospitals, clinics, independent pathology laboratories, and physicians must make available information on and file reports of patients having malignant tumors or cancers. [Va. Code Ann. § 32.1-70.] The information collected in the statewide cancer registry is to be used for determining the means of improving the diagnosis and treatment of cancer patients; conducting epidemiological analyses of the incidence, prevalence, survival and risk factors associated with the occurrence of cancer and other specified purposes. [Id.] The patient identifying information in the registry is confidential. [Va. Code Ann. § 32.1-71.] It may be shared with other cancer registries that have entered into reciprocal data-sharing agreements with Virginia. [Id.] The patient must be notified by the State Health Commissioner or his designee that his personal identifying information has been included in the registry. The notification must include the purpose, objectives, reporting requirements, and confidentiality policies and procedures of the registry along with a copy of the Government Data Collection and Dissemination Practices Act. [Va. Code Ann. § 32.1-71.02.]

### **Remedies and Penalties**

**Fines and Penalties.** An individual who improperly uses, discloses or releases confidential information maintained in the cancer registry is subject to a civil penalty not to exceed \$25,000 for each violation. [Va. Code Ann. § 32.1-71.01.]

## **C. Genetic Test Results**

### **1. Employers**

Employers may not request require, solicit or administer a genetic test to any person as a condition of employment. [Va. Code Ann. § 40.1-28.7:1.] Neither may they refuse to hire, fail to promote, discharge or otherwise adversely affect any terms or conditions of employment of any employee or prospective employee solely on the basis of a genetic characteristic or the results of a genetic test, regardless of how they obtained such information or results. [Id.] These restrictions do not apply to an employer's use of genetic information for long term care, life or disability insurance policies.

“Genetic test” is defined as a test that determines the presence or absence of genetic characteristics in an individual to diagnose a genetic characteristic. “Genetic characteristic” is any scientifically or medically identifiable gene or chromosome or alteration that is known to cause a disease or disorder, or determined to be associated with a statistically increased risk of development of a disease or disorder, and is asymptomatic. “Genetic information” means information about genes, gene products or inherited characteristics that may be derived from an individual or his family

member. [Va. Code Ann. §§ 38.2-508.4 (defining “genetic test,” and “genetic characteristic”) and 40.1-28.7:1 (incorporating definition by reference.)]

### **Remedies and Penalties**

**Right to Sue.** An employee may bring a court action against the employer who took adverse action against the employee in violation of this section. [Va. Code Ann. § 40.1-28.7:1.] The court may, in its discretion, award actual or punitive damages, including back pay with interest or injunctive relief. [*Id.*]

## **2. Insurers**

All information obtained from genetic screening or testing is confidential and may not be made public or used to cancel, refuse to issue or renew, or limit benefits under any accident and sickness insurance plan, including HMO and employee welfare benefit plans. [Va. Code Ann. § 38.2-508.4.] “Genetic test” is defined as a test that determines the presence or absence of genetic characteristics in an individual to diagnose a genetic characteristic. “Genetic characteristic” is any scientifically or medically identifiable gene or chromosome or alteration that is known to cause a disease or disorder, or determined to be associated with a statistically increased risk of development of a disease or disorder, and is asymptomatic. “Genetic information” means information about genes, gene products or inherited characteristics that may be derived from an individual or his family member. [Va. Code Ann. § 38.2-508.4 (defining “genetic test,” “genetic characteristic” and “genetic information”).]

The Virginia Insurance Information and Privacy Protection Act specifically prohibits insurance companies from disclosing any genetic information obtained in connection with an insurance transaction without the written authorization of the individual. [Va. Code Ann. § 38.2-613(D).]

## **D. HIV/AIDS**

The results of HIV tests are confidential and may only be released to: the subject or his legally authorized representative; persons designated in a release signed by the subject; the Department of Health; health care providers for the purpose of treating the subject; the spouse of the subject; medical or epidemiological researchers for use as statistical data only; and other specified individuals and entities. [Va. Code Ann. § 32.1-36.1.]

### **Remedies and Penalties**

**Right to Sue.** A person who is the subject of the unauthorized disclosure of his HIV test results may bring a civil action to recover actual damages or \$100, whichever is greater. [Va. Code Ann. § 32.1-36.1(C).] The aggrieved person also may be awarded reasonable attorney’s fees and court costs. [*Id.*]

**Fines and Penalties.** In any action brought under this section, if the court finds that a person has willfully or through gross negligence made a disclosure in violation of this provision, it may, upon the government’s petition to the court, impose a civil penalty not to exceed \$5,000 per violation. [Va. Code Ann. § 32.1-36.1 B.]

## **E. Mental Health, including Substance Abuse**

### **1. Patient Access**

A person who is admitted to a hospital or other facility operated, funded, or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services has the right of access to his medical and mental records, consistent with his condition and sound therapeutic treatment. [Va. Code Ann. § 37.1-84.1(A)(8); *see also* “Patient Access – State Government,” above.]

A patient who is the subject of information received by a third party payor may request and is entitled to receive from the payor a statement as to the substance of the information, unless the professional or treatment facility, or both, advise the payor that providing such information to the patient will adversely affect the patient’s health. Under such circumstances, the third party payor must provide the information to the attorney designated by the patient. [Va. Code Ann. § 37.1-230.]

### **2. Restrictions on Disclosure**

Each person who is admitted to a hospital or other facility operated, funded, or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services has the right to be assured of the confidentiality of his medical and mental records. [Va. Code Ann. § 37.1-84.1(A)(8).]

Virginia statutorily specifies the type and amount of health care information a professional who is authorized to diagnose or treat a mental health, mental retardation, substance abuse or emotional condition is permitted to disclose to a third party payor. [Va. Code Ann. §§ 37.1-226; 37.1-227.] A third-party payor that receives information about a patient’s mental health, mental retardation, substance abuse or emotional condition may not disclose the information without the patient’s consent, except for purposes of rate review, auditing or evaluation to the extent such information is necessary, and to coordinate benefits with other third party payors, in which case the amount of information released is very limited. [Va. Code Ann. § 37.1-228.] This information may not be used in connection with any legal, administrative, supervisory or other action whatsoever with respect to the patient. [*Id.*] Persons receiving information from a third party payor may not redisclose the information. [*Id.*]

A patient’s consent authorizing a third party payor to disclose this type of information must be in writing, must be signed and dated by the patient and must specify: to whom disclosure is to be made, the nature of the information to be disclosed, the purpose for which disclosure is to be made and the inclusive dates of the records to be disclosed. [Va. Code Ann. § 37.1-229.] The consent may be revoked except to the extent that action has already been taken in reliance on it. [*Id.*]

If any of these provisions are in conflict with federal law, federal law governs. [Va. Code Ann. § 37.1-232.]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose information has been improperly disclosed either to or by a third party payor may bring a civil action for equitable relief or damages. [Va.

Code Ann. § 37.1-231.] Punitive damages may be awarded in the event of multiple or continuous violations. [*Id.*] Any person who willfully violates these provisions is guilty of a Class 2 misdemeanor. [*Id.*]

## **F. Reportable Diseases, including Communicable Diseases**

Physicians and laboratory directors must report any person with a disease that is required to be reported by the State Board of Health, including a communicable disease. [Va. Code Ann. § 32.1-36; 12 Va. Admin. Code §§ 5-90-90; 5-90-80 (lists reportable diseases).] The patient's identity and disease is confidential. However, the State Health Commissioner may, to the extent permitted by law, disclose a patient's identity and disease to the patient's employer if the Commissioner determines that the patient's employment responsibilities require contact with the public, and the nature of the patient's disease and contact with the public constitutes a threat to the public health. [Va. Code Ann. § 32.1-36.]

### **Remedies and Penalties**

**Fines and Penalties.** Any person willfully making unauthorized disclosures is guilty of a Class 1 misdemeanor. The Board or Commissioner may institute a court proceeding to impose a civil penalty or compel the person to comply with this provision or other lawful regulations or orders of the Board or Commissioner. If the person violates an injunction, mandamus or other remedy imposed pursuant this proceeding, the person may be subject to a civil penalty not to exceed \$10,000 for each violation. Each day of violation is a separate offense. [Va. Code Ann. § 32.1-27.]

# WASHINGTON

Washington has a comprehensive statute that governs the access to and disclosure of health care information maintained by health care providers. Washington also has numerous other laws protecting the confidentiality of health information in specific situations. Some of these apply to entities other than health care providers, such as insurers.

## I. PATIENT ACCESS

### A. Health Care Providers

The Uniform Health Care Information Act [Wash. Rev. Code Ann. § 70.02.005 et seq.] governs a patient's right of access to his health care information maintained by a health care provider.

#### 1. Scope

The access provisions of the Uniform Health Care Information Act apply to any "health care provider," which is defined as a person (including individuals, corporations, government agencies and employees and others) who is licensed, certified, registered, or otherwise authorized by Washington law to provide health care in the ordinary course of business or practice of a profession. [Wash. Rev. Code Ann. § 70.02.010(6) (defining "health care provider" and "person") and Wash. Rev. Code Ann. § 42.17.312 (providing that access to health care information that is maintained by state agencies is governed by chapter 70.02 of the Revised Code).] Mental health counselors and social workers are also subject to the Uniform Health Care Information Act. [Wash. Rev. Code Ann. § 70.02.180.]

The Act gives an individual the right to access "health care information," which is "any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with a patient's identity and directly relates to the patient's health care." [Wash. Rev. Code Ann. § 70.02.010(6) (defining "health care information").] The term includes any record of disclosures of health care information. [*Id.*]

The persons entitled to access under these provisions include any "patient," defined as an individual who receives or has received health care, including deceased individuals. [Wash. Rev. Code Ann. § 70.02.010(10) (defining "patient").] A person authorized to consent to health care for another may exercise that person's rights to the extent necessary to effectuate the terms or purposes of the grant of authority. [Wash. Rev. Code Ann. § 70.02.130.] Similarly, a personal representative of a deceased patient may exercise all of the deceased patient's rights. [Wash. Rev. Code Ann. § 70.02.140.] If there is no personal representative, a deceased patient's rights under these provisions may be exercised by the surviving spouse, a parent, an adult child, an adult sibling, or any other person who would have been authorized to make health care decisions for the deceased patient when the patient was living. [See Wash. Rev. Code Ann. §§ 70.02.140 and 7.70.065.]

If the patient is a minor and is authorized under federal and state law to consent to health care without parental consent, only the minor may exercise the rights of a patient under the Uniform Health Care Information Act as to information pertaining to health care to which the minor lawfully consented. [*Id.*] For example, a minor in Washington who is fourteen years of age or older may give consent to the diagnosis and treatment related to sexually transmitted disease. [*See* Wash. Rev. Code Ann. § 70.24.110.]

## **2. Requirements for Requesting and Providing Access**

Within 15 days of receiving a written request from a patient to examine or copy all or part of the patient's recorded health information, a health care provider must do one of the following:

- ∞ make the information available for examination during regular business hours and provide a copy, if requested, to the patient;
- ∞ inform the patient if the information does not exist or cannot be found;
- ∞ if the health care provider does not maintain a record of the information, inform the patient and provide the name and address, if known, of the health care provider who maintains the record;
- ∞ if the information is in use or unusual circumstances have delayed handling the request, inform the patient and specify in writing the reasons for the delay and the earliest date, not later than 21 working days after receiving the request, when the information will be available for examination or copying or when the request will be otherwise disposed of; or
- ∞ deny the request in whole or in part and inform the patient of the reasons for denial.

[Wash. Rev. Code Ann. § 70.02.080.]

Upon the patient's request, the health care provider must provide an explanation of any code or abbreviation used in the record. [*Id.*] If a record of the particular health care information requested is not maintained by the health care provider, the provider is not required to create a new record or reformulate an existing record to make the information available in the requested form. [*Id.*]

**Fees.** The provider may charge a reasonable fee for providing the health care information and is not required to permit examination or copying until the fee is paid. [*Id.*] The maximum fee a provider may charge for copying is 83¢ per page for the first 30 pages and 63¢ per page for all other pages. [Wash. Rev. Code Ann. § 70.02.010(12) (defining "reasonable fee") and Wash. Admin Code § 246-08-400 (establishing that amounts are to be adjusted biennially by the secretary of health to reflect changes in the consumer price index).] In addition, the provider may include a clerical fee of a maximum of \$19 for searching and handling recorded health care information. [*Id.*] If the provider personally edits confidential information from the record, as required by statute, the provider can charge the usual fee for a basic office visit. [*Id.*] This fee schedule is in effect through June 30, 2003. [*Id.*]

**Denial of access.** A health care provider may deny a patient access to his health care information when he reasonably concludes that:



- ∞ knowledge of the health care information would be injurious to the health of the patient;
- ∞ knowledge of the health care information might enable the patient to identify the individual who provided the information in confidence and under circumstances in which confidentiality was appropriate;
- ∞ knowledge of the health care information could reasonably be expected to endanger the life or safety of any individual;
- ∞ the health care information was compiled and used solely for litigation, quality assurance, peer review or administrative purposes; or
- ∞ access to the health care information is otherwise prohibited by law.

[Wash. Rev. Code Ann. § 70.02.090.]

If a health care provider denies a request for examination and copying, the provider, to the extent possible, must segregate health care information that cannot be denied and permit the patient to examine or copy it. [Wash. Rev. Code Ann. § 70.02.090.]

Additionally, when access is denied in whole or in part, the provider must permit examination and copying of the information by another health care provider selected by the patient who is licensed, certified, registered, or otherwise authorized under state law to treat the patient for the same condition as the provider denying the request. [*Id.*] The health care provider denying access must inform the patient of his right to seek another health care provider. [*Id.*]

**Right to Amend.** If a patient believes his medical records are inaccurate or incomplete, he has the right to request in writing that the provider correct or amend the record. [Wash. Rev. Code Ann. § 70.02.100.] Within 10 days of receiving the request, the provider must do one of the following:

- ∞ make the requested amendment or correction and inform the patient of the action;
- ∞ inform the patient if the record no longer exists or cannot be found;
- ∞ if the provider does not maintain the record, inform the patient and provide the name and address, if known, of the person who maintains the record;
- ∞ if the record is in use or unusual circumstances have delayed the handling of the request, inform the patient and specify in writing the date, not to exceed 21 days after receiving the request, when the correction or amendment will be made or when the request will otherwise be disposed of; or
- ∞ inform the patient in writing of the provider's refusal to correct or amend the record as requested and the patient's right to add a statement of disagreement.

[*Id.*]

The health care provider must add the amending information as part of the health care record. [Wash. Rev. Code Ann. § 70.02.110.] If the provider refuses to make the patient's proposed correction or amendment, the patient must be allowed to file as part of the record a concise statement of the requested amendment or correction and the reasons for it. [*Id.*] The provider must also mark the entry to indicate that the patient disputes it and indicate where in the record the statement of disagreement is located. [*Id.*]

Upon a patient's request, the provider must forward any changes made in the patient's health care information or health record, including any statement of disagreement, to any third-party payor or insurer to which the health care provider has disclosed the health care information that is the subject of the request. [*Id.*]

### **3. Notice Requirements**

A health care provider who provides health care at a health care facility that the provider operates must place a copy of the notice of information practices in a conspicuous place in the health care facility, on a consent form or with a billing or other notice provided to the patient. [Wash. Rev. Code Ann. § 70.02.120.]

### **4. Remedies and Penalties**

**Right to Sue.** A person may bring a civil action, within two years of discovery of the cause of action, against a health care provider or facility that has not complied with the Uniform Health Care Information Act. [Wash. Rev. Code Ann. § 70.02.170.] The court may order the provider or facility to comply with the statute and may award actual damages, but not consequential or incidental damages. [*Id.*] The prevailing party may be awarded attorneys' fees and all reasonable expenses. [*Id.*]

## **B. Consumer Reporting Agencies**

Consumer reporting agencies must disclose, upon the request of the consumer, all information in the consumer's file, except that medical information may be withheld. [Wash. Rev. Code Ann. § 19.182.070.] The agency must, however, inform the consumer of the existence of the medical information, and the consumer has the right to have the information disclosed to a health care provider of the consumer's choice. [*Id.*]

## **C. State Government**

The Uniform Health Care Information Act applies to the inspection and copying of the individually identifiable health care information maintained by state agencies. [Wash. Rev. Code Ann. § 42.17.312. *See also* Wash. Rev. Code Ann. § 70.020.010 (defining "person" and "health care provider" in such a manner that they apply to government personnel or agencies that are licensed, certified, registered or otherwise authorized by state law to provide health care in the ordinary course of business or practice of a profession). *See* Section I. A., "Patient Access, Health Care Providers," above, for a thorough discussion of the requirements for providing patients access to their own health information.

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Health Care Providers and Third Party Payors**

#### **1. Scope**

The disclosure provisions of the Uniform Health Care Information Act apply to any health care provider, their agents and employees and anyone who assists a health care

provider in the delivery of health care. [Wash. Rev. Code Ann. § 70.02.020.] For purposes of these provisions a “health care provider” is defined as a person (including individuals, corporations, government agencies and others) who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession. [Wash. Rev. Code Ann. § 70.02.010 (defining “health care provider” and “person”) and Wash. Rev. Code Ann. § 42.17.312 (providing that access to health care information that is maintained by state agencies is governed by chapter 70.02 of the Revised Code).] Mental health counselors and social workers are also subject to the Uniform Health Care Information Act. [Wash. Rev. Code Ann. § 70.02.180.]

In certain circumstances, third party payors are subject to the restrictions imposed by this Act. Third party payors that receive information under the Uniform Health Care Information Act are held to the same disclosure standards with respect to such information as providers. [Wash. Rev. Code Ann. §70.02.045.] Third-party payors are insurers that are regulated and authorized by Washington State insurance law to transact business in Washington or other jurisdiction, including a health care service contractor, HMO, employee welfare benefit plan, and state or federal health benefit program. [Wash. Rev. Code Ann. § 70.02.010(13) (defining “third-party payor”).]

The Act governs the disclosure of “health care information,” which is defined as “any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with a patient’s identity and directly relates to the patient’s health care.” [Wash. Rev. Code Ann. § 70.02.010(6) (defining “health care information”).]

The persons who may exercise rights under these provisions include any “patient,” an individual who receives or has received health care, including deceased individuals. [Wash. Rev. Code Ann. § 70.02.010(10) (defining “patient”).] A person authorized to consent to health care for another may exercise that person’s rights to the extent necessary to effectuate the terms or purposes of the grant of authority. [Wash. Rev. Code Ann. § 70.02.130.] Similarly, a personal representative of a deceased patient may exercise all of the deceased patient’s rights. [Wash. Rev. Code Ann. § 70.02.140.] If there is no personal representative, a deceased patient’s rights under these provisions may be exercised by the surviving spouse, a parent, an adult child, an adult sibling, or any other person who would have been authorized to make health care decisions for the deceased patient when the patient was living. [See Wash. Rev. Code Ann. §§ 70.02.140 and 7.70.065.]

If the patient is a minor and is authorized under federal and state law to consent to health care without parental consent, only the minor may exercise the rights of the patient under the Uniform Health Care Information Act as to information pertaining to health care to which the minor lawfully consented. [*Id.*] For example, a minor in Washington who is fourteen years of age or older may give consent to the diagnosis and treatment related to sexually transmitted disease. [See Wash. Rev. Code Ann. § 70.24.110.] In such a circumstance, the minor has the right to authorize disclosure.

## 2. Authorization Requirements and Exceptions

Under the Uniform Health Care Information Act, a health care provider generally may not disclose health care information about a patient to any other person without the patient's written authorization. [Wash. Rev. Code Ann. § 70.02.020.] In order to be valid, the authorization of disclosure must be in writing; dated and signed by the patient; identify the nature of the information to be disclosed; identify the name, address, and institutional affiliation of the person to whom the information is to be disclosed; identify the patient; and identify the provider who is to make the disclosure (except for third-party payors). [Wash. Rev. Code Ann. § 70.02.030.]

A health care provider may charge a reasonable fee for providing the health care information and is not required to honor the authorization until the fee is paid. [*Id.*] The maximum fee a provider may charge for copying is 83¢ per page for the first 30 pages and 63¢ per page for all other pages. [Wash. Rev. Code Ann. § 70.02.010(12) (defining "reasonable fee") and Wash. Admin Code § 246-08-400 (establishing that amounts are to be adjusted biennially by the secretary of health to reflect changes in the consumer price index).] In addition, the provider may include a clerical fee of a maximum of \$19 for searching and handling recorded health care information. [*Id.*]

A health care provider must honor the authorization unless the patient has been denied access to his record for any of the reasons specified above. [Wash. Rev. Code Ann. § 70.02.030. See "Patient Access" above for discussion of when patient may be denied access.]

Except for an authorization given pursuant to an agreement with a treatment or monitoring program or disciplinary authority, or to provide information to third party-payors, an authorization may not permit the release of information relating to future health care that the patient receives more than 90 days after the authorization is signed, and an authorization that does not contain an expiration date expires 90 days after it is signed. [Wash. Rev. Code Ann. § 70.02.030.] Health care providers and facilities must retain each authorization or revocation with any health care information from which disclosures are made, except those to third-party payors. [*Id.*]

A patient may revoke in writing an authorization at any time, unless disclosure is required to obtain payment for services already provided or other substantial action has been taken in reliance on the authorization. [Wash. Rev. Code Ann. § 70.02.040.]

**Authorization Exceptions.** A health care provider or a third party payor may disclose health care information *without* the patient's authorization, to the extent the recipient needs to know the information and subject to statutory requirements, in certain circumstances including:

- ∞ to a person who the provider reasonably believes is providing health care to the patient;
- ∞ to other persons using the information for health care education, or to provide planning, quality assurance, peer review, administrative, legal, financial, or actuarial services to the health care provider, or for assisting the provider in the delivery of health care if the disclosing provider reasonably believes that the person will not use the disclosed information for any purpose other than that

- for which it was disclosed and will protect the confidentiality of the information;
- ∞ to another provider reasonably believed to have previously treated the patient unless the patient issued written instructions not to make the disclosure;
  - ∞ to any person if the provider reasonably believes that the disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual, but the provider has no obligation to make such a disclosure;
  - ∞ oral disclosures to immediate family members or any other individual with whom the patient is known to have a close personal relationship, if the disclosure is made in accordance with good medical or professional practice, unless the patient has given the provider written instructions not to make the disclosure;
  - ∞ to the health care provider who is the successor in interest to the provider maintaining the information;
  - ∞ for a research project that has received approval from an institutional review board when such approval is based on criteria specified in the law;
  - ∞ to certain persons obtaining the information for an audit, if the persons agree to certain conditions;
  - ∞ to an official of a penal or other custodial institution where the patient is detained;
  - ∞ to provide directory information unless the patient has instructed the provider not to make the disclosure; and
  - ∞ to provide certain information in cases reported by fire, police, sheriff, or other public authorities.

[Wash. Rev. Code Ann. §§ 70.02.045 and 70.02.050(1).]

A health care provider or a third party payor must disclose health care information about a patient without his authorization in the following situations:

- ∞ to federal, state, or local public health authorities if the provider is required by law to report the information, or if it is needed to determine compliance with state or federal licensure, certification or registration rules or laws, or when needed to protect the public health;
- ∞ to federal, state, or local law enforcement authorities as required by law;
- ∞ to county coroners and medical examiners for investigation of deaths; and
- ∞ pursuant to a compulsory process as set forth by state statute.

[Wash. Rev. Code Ann. §§ 70.02.045 and 70.02.050(2).]

### **3. Notice Requirements**

A health care provider who provides health care at a health care facility that the provider operates and who maintains a record of a patient's health care information must place a copy of the notice of information practices in a conspicuous place in the health care facility, on a consent form or with a billing or other notice provided to the patient. [Wash. Rev. Code Ann. § 70.02.120.] The notice must generally advise a patient that the facility will not disclose the patient's information unless authorized by the patient or permitted by law. [*Id.*]

#### **4. Other Requirements**

Health care providers must have reasonable safeguards for the security of the information that they maintain. [Wash. Rev. Code Ann. § 70.02.150.]

Health care providers are required to maintain health care records for one year following an authorization to disclose or while a request for examination and copying or a request for correction or amendment is pending. [Wash. Rev. Code Ann. § 70.02.160.] It should be noted, however, that hospitals are expressly required by licensing statutes to retain medical records directly related to the care and treatment of a patient for at least 10 years following the discharge of an adult patient. [Wash. Rev. Code Ann. § 70.41.190.] In the case of a minor, a hospital must retain medical records until the patient has reached 21 or 10 years after discharge, whichever is longer. [*Id.*]

#### **5. Remedies and Penalties**

**Right to Sue.** A person may bring a civil action, within two years of discovery of the cause of action, against a health care provider, third party payor or other person that has not complied with the Uniform Health Care Information Act. [Wash. Rev. Code Ann. § 70.02.170.] The court may order the provider or facility to comply with the statute and may award actual damages, but not consequential or incidental damages. [*Id.*] The prevailing party may be awarded attorneys' fees and all reasonable expenses. [*Id.*]

### **B. Insurers and HMOs**

#### **1. In General**

Under the Uniform Health Care Information Act, third-party payors may not release health care information disclosed under the Act, except to the extent that health care providers are authorized to do so under Wash. Rev. Code Ann. § 70.02.050. [Wash. Rev. Code Ann. § 70.02.045.] See "Restrictions on Disclosure, Health Care Providers and Third Party Payors" above for a full discussion of restrictions.

#### **2. Insurance Regulations**

##### **a. Scope**

In January 2001, the Washington State Office of the Insurance Commissioner adopted a privacy regulation (Privacy of Consumer Financial and Health Information) to prevent the unauthorized disclosure of consumers' health information. These rules govern the practices of "licensees," (*i.e.*, all licensed insurers, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under Washington Insurance Law) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [Wash. Admin. Code § 284-04-120(18) (defining "licensee").] "Nonpublic personal health information" is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [Wash. Admin. Code § 284-04-120(23) (defining "nonpublic personal health

information”).] “Health information” is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [Wash. Admin. Code § 284-04-120(15) (defining “health information”).] Insurance “consumers” are individuals who seek to obtain, obtain, or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. “Customers” are generally consumers who have a continuing relationship with the licensee. [Wash. Admin. Code § 284-04-120(6) & (9) (defining “consumer” and “customer”).]

If there is a conflict between this regulation and state or federal laws, licensees must comply with the state and federal laws governing privacy, as they relate to the business of insurance, except as expressly required by this regulation. [Wash. Admin. Code § 284-04-525.]

#### **b. Requirements**

All licensees are required to develop and implement written policies, standards and procedures for managing health information, including policies, standards and procedures to guard against unauthorized collection, use or disclosure of nonpublic personal health information, that are consistent with the privacy rule (45 C.F.R. 160 through 164) adopted by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996. [Wash. Admin. Code § 284-04-500.]

These policies and procedures must include:

- ∞ Limitation on access to health information by only those who need to use the information to perform their jobs;
- ∞ Appropriate training for all employees;
- ∞ Disciplinary measures for violations of the policies, standards and procedures;
- ∞ Identification of job titles and descriptions of persons authorized to disclose nonpublic personal health information;
- ∞ Procedures for authorizing and restricting collection, use or disclosure;
- ∞ Methods for individuals to exercise their right to access and amend incorrect information;
- ∞ Periodic monitoring of employee compliance with the licensee’s policies, standards and procedures; and
- ∞ Methods for informing and allowing an individual to request specialized disclosure or nondisclosure of their nonpublic personal health information.

[*Id.*]

**Right to Limit Disclosure.** A licensee must limit disclosure of any information, including health information, about an individual if the individual clearly states in writing that disclosure to specified individuals of all or part of the information could jeopardize the safety of the individual. Limitation of disclosure must be consistent with the individual’s request, such as a request for the licensee to not release information to a spouse to prevent domestic violence. [Wash. Admin. Code § 284-04-510(1).]

In addition, if an individual makes a written request, the licensee may not disclose nonpublic personal health information concerning health services related to reproductive health, sexually transmitted diseases, chemical dependency and mental health, including mailing appointment notices, calling the home to confirm appointments, or mailing a bill or explanation of benefits. [Wash. Admin. Code § 284-04-510(2).]

When requesting nondisclosure, the individual's written request must include: his name and address; a description of the type of information not to be disclosed; the type of services subject to nondisclosure in the case of reproductive health information; information about how payment will be made for any benefit cost sharing; and a phone number or e-mail address where the individual may be reached if additional information or clarification is necessary to satisfy the request. [Wash. Admin. Code § 284-04-510(4).]

A minor who may obtain health care without the consent of a parent or legal guardian pursuant to state or federal law may exclusively exercise the rights granted under Wash. Admin. Code § 284-04-510 (right to limit disclosure of health information). [Wash. Admin. Code § 284-04-510(3).] A licensee may not disclose any nonpublic personal health information related to any health care service to which the minor has lawfully consented to a policyholder or other covered person, without the express authorization of the minor. [*Id.*]

**Authorization Requirements.** The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Wash. Admin. Code § 284-04-505.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [Wash. Admin. Code § 284-04-515.] A licensee that complies with the federal privacy rule's provisions regarding valid authorizations meets the requirements of the state privacy regulation. [*Id.*]

The regulation permits disclosures *without* the authorization of the individual for the performance of insurance functions by or on behalf of the licensee; for activities permitted under Wash. Rev. Code Ann. § 70.02.050 including, but not limited to: treatment; quality assurance; public health reporting; research approved by an institutional review board under specified criteria; and audits; and for activities permitted under the federal health privacy rule. [Wash. Admin. Code § 284-04-505; see Wash. Rev. Code Ann. § 70.02.050 and discussion above under "Restrictions, Health Care Providers and Third Party Payors" for permitted activities.]



**c. Remedies and Penalties**

**Fines and Penalties.** A violation of this regulation is deemed an unfair method of competition or an unfair or deceptive act and practice in the state of Washington. [Wash. Admin. Code § 284-04-610.]

**C. Long-term Care**

Long-term care residents have a right to personal privacy and confidentiality of their personal and clinical records. The resident may approve or refuse the release of personal and clinical records to an individual outside the facility unless otherwise provided by law. [Wash. Rev. Code. Ann. § 70.159.050.]

**D. State Government**

**1. Health Information, In General**

The Uniform Health Care Information Act explicitly applies to the public inspection and copying of identifiable health care information that is maintained by state agencies. [Wash. Rev. Code Ann. § 42.17.312. See discussion under “Restrictions, Health Care Providers” above.] All state and local agencies obtaining health care information pursuant under the Act must adopt rules establishing record acquisition, retention, and security policies that are consistent with this Act. [Wash. Rev. Code Ann. § 70.02.050(3).]

Although records held by state agencies are generally available for public inspection and copying under the public disclosure act, certain information is exempted from disclosure. [Wash. Rev. Code Ann. §§ 42.17.260; and 42.17.310.] Disclosure is not required of personal information when the disclosure would constitute an unreasonable invasion of privacy. [*Id.*] Personal information in any files maintained for patients or clients of public institutions or public health agencies or welfare recipients is also exempt from public inspection and copying. [Wash. Rev. Code. Ann. § 42.17.310(a).]

**2. Research**

The Department of Social and Health Services, the Department of Corrections, certain specified institutions of higher education, and the Department of Health may provide access to individually identifiable personal records for research purposes only with the informed written consent of the subject, or as specified in the statute if consent has not been obtained. [Wash. Rev. Code Ann. § 42.48.010, 42.48.020.]

Research professionals may not redisclose the information in individually identifiable form without the individual’s or his legally authorized representative’s written consent unless: the research professional reasonably believes that disclosure will prevent or minimize injury to a person and the disclosure is limited to information necessary to protect the person, and the research professional reports the disclosure only to the person involved; for purposes of legally authorized or required auditing or evaluation of a research program under specified circumstances; or pursuant to a search warrant or court order that meets certain statutory requirements. [Wash. Rev. Code Ann. §

42.48.040.]

### **Remedies and Penalties**

**Fines and Penalties.** Unauthorized disclosure by the research professional, whether willful or negligent, is a gross misdemeanor. [Wash. Rev. Code Ann. § 42.48.050.] In addition, violation of the statutes governing release of records for research by either the agency or the research professional may subject them to a civil penalty of up to \$10,000 per violation. [*Id.*]

## **III. PRIVILEGES**

Washington recognizes a privilege for communications, subject to certain exceptions, between patients and: physicians and surgeons; osteopathic physicians or surgeons; podiatrists [Wash. Rev. Code Ann. § 5.60.060]; psychologists [Wash. Rev. Code Ann. § 18.83.110]; registered nurses [Wash. Rev. Code Ann. § 5.62.020]; and optometrists [Wash. Rev. Code Ann. § 18.53.200].

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Cancer Registry**

Washington maintains a cancer registry. Health care facilities, independent clinical laboratories, physicians and others providing health care who diagnose or treat a patient with cancer who is not hospitalized within one month of diagnosis must report this information to the registry. The data obtained is confidential and can be used only for statistical, scientific, medical research, and public health purposes. [Wash. Rev. Code Ann. §§ 70.54.230; 70.54.240; 70.54.250.]

### **B. HIV/AIDS and Sexually Transmitted Diseases**

State and local public health officers are authorized to interview persons infected or reasonably believed to be infected with a sexually transmitted disease (STD) in order to investigate the source and spread of the disease. All information gathered in the course of contact investigation is confidential. [Wash. Rev. Code Ann. § 70.24.022.] The department must report annually incidents of unauthorized disclosure by the department, local health departments, or their employees and must include recommendations for preventing future disclosures of confidentiality information. [Wash. Rev. Code Ann. § 70.24.450.]

Disclosure of the identity of any person who has investigated, considered, or requested a test or treatment for a sexually transmitted disease or the HIV antibody is prohibited except as authorized by statute. Information about test results, diagnosis, and treatment for HIV or any other STD is also prohibited from disclosure except as authorized by statute. [Wash. Rev. Code Ann. § 70.24.105.]

**Authorization Exceptions.** Those who may have access to the information, subject to conditions set forth in the statute, include:

- ∞ the subject of the test or his legal representative for health care decisions;
- ∞ any person who secures a release executed by the subject or his legal representative;
- ∞ the state public health officer, a local public health officer, or the Centers for Disease Control and Prevention of the United States Public Health Service in accordance with reporting requirements;
- ∞ certain health facilities or health providers, such as those who procure, process, distribute, or use human body part, tissue, or blood from a deceased person;
- ∞ any state or local public health officer conducting an investigation into the spread of a sexually transmitted disease, provided that the record was obtained by means of court ordered HIV testing;
- ∞ any person obtaining a court order after application showing good cause as provided in the statute;
- ∞ local law enforcement agencies;
- ∞ persons at risk because of their interaction with the infected individual;
- ∞ a law enforcement officer, fire fighter, health care provider, or other specified persons who have been substantially exposed to the infected individual;
- ∞ claims management personnel employed by an insurer, health care service contractor, HMO, and other third-party payors and health plans where disclosure is used for evaluation and payment of medical claims, the information is confidential, and is not released to persons not involved with claims payment; and
- ∞ a department of social and health services worker and other designated individuals for case-planning decisions.

[*Id.*]

No person to whom disclosure is authorized may redisclose to another person, except one who is similarly authorized to receive the information. The statute also includes other restrictions on the use of the information. [Wash. Rev. Code Ann. § 70.24.105.]

### **Remedies and Penalties**

**Right to Sue.** Any person aggrieved by a violation of the STD statutes has a right of action against the person violating the laws. [Wash. Rev. Code Ann. § 70.24.084.] For a negligent violation, the aggrieved person may recover the greater of \$1,000 or actual damages per violation. [*Id.*] For an intentional or reckless violation, the aggrieved person may collect the greater of \$10,000 or actual damages per violation. [*Id.*] Aggrieved persons may also recover reasonable attorneys' fees and costs and other appropriate relief, including injunctions. The suit must be brought within three years after the cause of action accrues. [Wash. Rev. Code Ann. § 70.24.084.]

**Fines and Penalties.** Any person violating any statute relating to the collection and disclosure of information about STDs, or any lawful order issued by a state, county, or municipal public health officer, is guilty of a gross misdemeanor punishable by imprisonment in the county jail for a maximum term of not more than one year, a fine not more than \$5,000, or both. [Wash. Rev. Code Ann. §§ 70.24.080; 9A.20.021.]

**Insurers.** Insurers who request an insured or potential insured to submit to an HIV test must provide certain written information to that individual before the test is given, obtain the individual's specific written consent, and inform the individual of the confidential nature of the test results and that access is limited to persons specified in the statute. [Wash. Rev. Code Ann. § 70.24.325.] Positive or indeterminate HIV test results may not be sent directly to the applicant, but the applicant may designate a health care provider or health care agency to whom the insurer will provide the results. [*Id.*]

## C. Mental Health

### 1. Information Related to Civil Commitment

Washington has detailed statutory provisions governing the disclosure of information related to persons who have been voluntarily and involuntary committed. [*See generally* Wash. Rev. Code Ann. §§ 71.05.390 and 71.05.020 defining "admission," "private agency," and "public agency").] The fact of admission pursuant to civil commitment as well as all information and records compiled, obtained or maintained in the course of providing mental health services by public or private agencies pursuant to such commitment are confidential. [Wash. Rev. Code Ann. § 71.05.390.] This information generally can be released only when the person receiving services for mental illness (or his guardian, or parent if the person is a minor) designate persons to whom information or records may be released. [*Id.*]

Disclosure of this information is permitted without the individual's consent in a number of enumerated circumstances including, but not limited to, the following:

- ∞ in communications between qualified persons to meet the requirements of the commitment act;
- ∞ to provide services or appropriate referrals, or in guardianship proceedings. [*Id.*]

The consent of the patient or his representative must be obtained before a professional person employed by a facility may disclose information, unless the disclosure is to a person specified in the statute. [*Id.*]

The statute specifies other authorized disclosures such as:

- ∞ when the communications regard the special needs of a patient and the necessary circumstances giving rise to such needs and the disclosure is made by a facility providing outpatient services to the operator of a care facility in which the patient resides;
- ∞ to those designated by the patient or his guardian (a parent if the patient is a minor);
- ∞ those necessary for a recipient to make a claim on behalf of the recipient for aid, insurance, or medical assistance;
- ∞ for program evaluation or research, subject to certain rules adopted by the secretary of social and health services, including the requirement that all evaluators and researchers must sign an oath of confidentiality regarding redisclosure;
- ∞ to courts as necessary to administer the mental illness statutes;
- ∞ to law enforcement officers, public health officers, or personnel of the department of corrections or the indeterminate sentence review board to carry

- out the responsibilities of their office;
- ∞ to the detained person’s attorney;
  - ∞ to the prosecuting attorney;
  - ∞ to appropriate law enforcement agencies and to an identified person whose health and safety has been threatened by the patient or is known to have been repeatedly harassed by the patient;
  - ∞ to appropriate law enforcement agencies, upon request, in the event of a crisis or emergent situation that poses a significant and imminent public risk;
  - ∞ to the patient’s next of kin, in the event of death; and
  - ∞ to the department of health for determining compliance with state or federal licensure, certification, or registration rules or laws.

[Wash. Rev. Code Ann. § 71.05.390.]

In addition, the fact of admission and all records maintained pursuant to chapter 71.05 are not admissible in any legal proceeding without the written consent of the patient, except in certain criminal prosecutions. [*Id.*] These records also have other protections in court proceedings. [*Id.*]

A public or private agency may release a patient’s information to the patient’s next of kin, attorney, guardian or conservator if: a patient is in a facility or is seriously physically ill; or a statement of the patient’s condition and probable duration of confinement when requested by the next of kin, attorney, guardian or conservator. [Wash. Rev. Code Ann. § 71.05.400] When a patient disappears from a mental health facility and his whereabouts are unknown, disclosure of the disappearance and other relevant information to relatives and governmental law enforcement agencies is permitted for the protection of the patient and others due to the unauthorized disappearance. [Wash. Rev. Code Ann. §§ 71.05.410.]

The Uniform Health Care Information Act applies to all records and information compiled, obtained or maintained in the course of providing mental health services, *except* as otherwise specified in chapter 71.05 (pertaining to mental illness). [Wash. Rev. Code Ann. § 71.05.395.]

**Accounting of Disclosures.** In general, when any disclosure of information or records is made, the physician in charge of the patient or the professional person in charge of the facility must promptly enter into the patient’s medical record the date and circumstances under which the disclosure was made, the names and relationships to the patient of the persons or agencies receiving the information, and the information disclosed. [Wash. Rev. Code Ann. § 71.05.420.]

### **Remedies and Penalties**

**Right to Sue.** A person whose records or confidential information are released without authorization or in violation of chapter 71.05 (pertaining to mental illness) may bring an action against any individual who has “willfully” released the confidential information or records. [Wash. Rev. Code Ann. § 71.05.440.] Allowable damages are the greater of \$1,000 or three times the amount of actual damages, plus reasonable attorney fees in addition to those otherwise allowed by law. [*Id.*] A person may also sue to enjoin the release of any of his confidential information or records. [*Id.*]

## 2. Mental Health Treatment Records

### a. Scope

In addition to the provisions summarized above applying to civil commitment records, Washington also has detailed statutory provisions governing disclosure of, and access to, “treatment records.” [Wash. Rev. Code Ann. § 71.05.610 through 71.05.690.] Treatment records are defined as “registration and all other records concerning individuals who are receiving or who at any time have received services for mental illness that are maintained by the department of social and health services, by regional support networks and their staffs, and by treatment facilities.” [Wash. Rev. Code Ann. § 71.05.610.] They do not include notes or records maintained for personal use by individuals providing treatment services for the department, networks or facilities if they are not available to others. “Registration records” include all the records of the department, regional support networks, treatment facilities, and other persons providing services to the department or facilities that identify patients receiving or who have received mental illness services. [Wash. Rev. Code Ann. § 71.05.610.]

### b. Patient Access

Following discharge, the individual has a right to a complete record of all medications and somatic treatment prescribed during evaluation, admission or commitment, and to a copy of the discharge summary. [Wash. Rev. Code Ann. § 71.05.640.] Treatment records may be modified to protect the confidentiality of other patients or the names of other persons referred to in the record who gave information on the condition that their identify would remain confidential, but entire documents may not be withheld to protect such confidentiality. [*Id.*]

**Fees.** A reasonable fee for copying may be charged. [*Id.*]

**Accounting of Disclosures.** Each time written information is released from a treatment record, the record’s custodian must make a written notation in the record that specifies the information released; the person to whom it was released; and the purpose and date of the release. [Wash. Rev. Code Ann. § 71.05.630.] The patient must have access to this release data. [*Id.*]

### c. Authorization Requirements and Exceptions

In general, information from court or treatment records cannot be released without the informed, written consent of the individual who is the subject of the records or the person legally authorized to give consent for the individual. [Wash. Rev. Code Ann. § 71.05.620.] The consent form must contain the name of the individual or entity to which the disclosure is to be made; the name of the patient; the purpose of the disclosure; specific type of information to be disclosed; time period during which the consent is effective; date; and signature of the patient or person legally authorized to provide consent. [*Id.*] The files and records of court proceedings under chapter 71.05 (pertaining to mental illness) are closed but must be accessible to any individual who is the subject of a petition, his attorney, and certain other authorized individuals. [*Id.*]

**Authorization Exceptions.** Treatment records may be released without informed written consent in the following circumstances:

- ∞ to an individual, organization, or agency as necessary for management or financial audits or program monitoring and evaluation;
- ∞ to the department of social and health services, the director of regional support networks, or a qualified staff member designated by the director when necessary for billing or collection purposes;
- ∞ for purposes of research as permitted by statute;
- ∞ pursuant to a court order;
- ∞ to qualified staff members of the department and others designated in the statute as necessary for determining the progress and adequacy of treatment and whether the person's site or method of treatment should be modified;
- ∞ to certain persons within the treatment facility where the patient is receiving treatment;
- ∞ within the department of social and health services as necessary to coordinate treatment for individuals under the department's supervision;
- ∞ to a licensed physician who has determined that the life or health of the individual is in danger and treatment without the information contained in the treatment records could be injurious;
- ∞ to a facility receiving a person who is involuntarily committed;
- ∞ to a correctional facility or a corrections officer under certain circumstances;
- ∞ to an individual's counsel or guardian ad litem; or
- ∞ to staff members of the protection and advocacy agency or staff members of a private nonprofit corporation for protection and advocacy purposes.

[Wash. Rev. Code Ann. § 71.05.630]

The statute contains restrictions on the use and disclosure of the information even when released to these designated persons. [Wash. Rev. Code Ann. § 71.05.630] It also authorizes the department of social and health services to release information as necessary to comply with federal law governing the records of those receiving treatment for alcohol and drug dependency. [*Id.*]

#### **d. Remedies and Penalties**

**Right to Sue.** In general, any person, including the state or political subdivision of the state, who violates the provision governing treatment records is subject to the provisions of Wash. Rev. Code Ann. § 71.05.440. [Wash. Rev. Code Ann. § 71.05.670.] A person whose records or confidential information are released without authorization or in violation of chapter 71.05 (pertaining to mental illness) may bring an action against any individual who has "willfully" released the confidential information or records. [Wash. Rev. Code Ann. § 71.05.440.] Allowable damages are the greater of \$1,000 or three times the amount of actual damages, plus reasonable attorney fees in addition to those otherwise allowed by law. [*Id.*] A person may also sue to enjoin the release of any of his confidential information or records. [*Id.*]

**Fines and Penalties.** Any person who requests or obtains confidential information from treatment records under false pretenses is guilty of a gross misdemeanor. [Wash. Rev.

Code Ann. § 71.05.680.]

#### **D. Substance Abuse**

The registration and other records of alcohol and drug addiction treatment programs are confidential and may be disclosed only: with the patient's prior written consent; if authorized by a court order granted after application showing good cause; to comply with state laws mandating the reporting of suspected child abuse or neglect; or when a patient commits or threatens to commit a crime on program premises or against program personnel. [Wash. Rev. Code Ann. § 70.96A.150.] The secretary of social and health services may receive information from patients' records for research, verification of eligibility and appropriateness of reimbursement, and evaluation of programs, but may not publish the information in a way that discloses patients' names or otherwise reveals their identities. [*Id.*] These state requirements are in addition to federal regulations protecting the confidentiality of alcohol and drug abuse patient records. [*Id.*]

Any provider of outpatient treatment who furnishes outpatient treatment for alcoholism, intoxication, or drug addition to a minor 13 years of age or older must provide notice of the minor's request for treatment to the minor's parents if the minor signs a written consent authorizing the disclosure or the treatment program director determines that the minor lacks capacity to make a rational choice regarding consent to disclosure. [Wash. Rev. Code Ann. § 70.96A.230.]

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## WEST VIRGINIA

West Virginia statutorily grants a patient the right of access to his medical records in the possession of health care providers including physicians, hospitals and others. The state does not have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

### I. PATIENT ACCESS

#### A. Health Care Providers

A health care provider licensed, certified or registered under the laws of West Virginia must furnish a copy of all or a portion of a patient's record to the patient (or his authorized agent or representative) within a reasonable time after receiving a written request. [W. Va. Code § 16-29-1.] This provision appears to apply to physicians, surgeons, physician assistants, pharmacists, registered professional nurses, practical nurses, optometrists, podiatrists, chiropractors, physical therapists, psychologists, social workers, speech pathologists, licensed professional counselors, and acupuncturists. [See W. Va. Code §§ 16-2D-2(k) and 16-29B-3 (which define the term "health care provider" for purposes of other Public Health chapters) and W. Va. Code, Chapter 30 (which contains the licensing provisions for professions and occupations).]

At the time of delivery, the patient must pay reasonable expenses incurred by the provider in retrieving and copying the records. The cost may not exceed 75¢ per page for copying and the search fee may not exceed \$10. [W. Va. Code § 16-29-2.] A charge may not be imposed on indigent persons or their authorized representatives if the records are necessary for supporting a claim or appeal under the Social Security Act. [*Id.*]

In the case of records of psychiatric or psychological treatment, a summary of the record must be made available to the patient or his authorized agent or representative following termination of the treatment program. [W. Va. Code § 16-29-1(a).]

With respect to a minor receiving treatment or services for birth control, prenatal care, drug rehabilitation or related services, or venereal disease according to any provision of the West Virginia Code, these provisions do not require a health care provider to release the minor's patient records to a parent or guardian without the minor patient's prior written consent. [W. Va. Code § 16-29-1(b).]

These provisions do not apply to health care records maintained by health care providers governed by the state's AIDS-related medical testing and confidentiality act (W. Va. Code §§ 16-3C-1 et seq.). [W. Va. Code § 16-29-1(f).]

### **Remedies and Penalties**

**Right to Sue.** A patient may maintain a civil action to enforce these provisions, and if the health care provider is found to be in violation of the law, the patient may be awarded attorney fees and costs, including court costs incurred in the course of enforcement. [W. Va. Code § 16-29-1(e).]

## **B. State Government**

Under the state Freedom of Information Act, a person has the right to inspect and copy his own personal, medical or similar files that are maintained by a public body. [W. Va. Code §§ 29B-1-3; 29B-1-4(2).] A request to inspect or copy must be made directly to the custodian of the record and must state with reasonable specificity the information sought. As soon as practicable but within a maximum of 5 days (not including Saturday, Sundays or legal holidays), the custodian must: (1) furnish copies of the requested information; (2) advise the person making the request of the time and place to inspect or copy the information; or (3) deny the request and state in writing the reasons for denial. The public body may establish reasonable fees for the actual cost of reproducing the records. [W. Va. Code § 29B-1-3.]

### **Remedies and Penalties**

**Right to Sue.** A person who is denied the right to inspect his files maintained by a public body may institute an action in equity for injunctive or declaratory relief and, if he prevails, is entitled to recover attorney fees and court costs. [W. Va. Code §§ 29B-1-5; 29B-1-7.]

**Fines and Penalties.** Any public records custodian who willfully violates the provisions of the Freedom of Information Act is guilty of a misdemeanor, punishable by a fine not less than \$200 or more than \$1,000, imprisonment for no more than 20 days, or both. [W. Va. Code § 29B-1-6.]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. HMOs**

The Health Maintenance Organization Act provides that HMOs may not disclose any information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from that person or from any provider without the patient's or applicant's express consent. [W. Va. Code §§ 33-25A-1; 33-25A-26.] Disclosure is allowed to the extent it is necessary to facilitate an assessment of quality of care delivered; to review grievance procedures; pursuant to statute or court order for the production of evidence or discovery; in the event of a claim or litigation between the person and the health maintenance organization, to

the extent such information is pertinent; or to a department or division of the state pursuant to the terms of a group contract for the provision of health care services between the HMO and the department or division. [*Id.*]

In addition, managed care plans must provide enrollees with notice of the enrollee's rights to privacy, confidentiality and the right of access to medical and treatment information including the right to examine and offer corrections to the enrollee's medical records. [W. Va. Code § 33-25C-3.]

## **B. Insurers**

### **1. Scope**

The West Virginia Insurance Commission adopted a privacy regulation (Privacy of Consumer Financial and Health Information) to prevent the unauthorized disclosure of consumers' health information. These rules govern the practices of "licensees," (*i.e.*, all licensed insurers, producers and other persons licensed, authorized or registered or required to be licensed, authorized or registered under West Virginia Insurance Law) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [W. Va. Code St. R. § 114-57-2.17 (defining "licensee").] "Nonpublic personal health information" is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [W. Va. Code St. R. § 114-57-2.21 (defining "nonpublic personal health information").] "Health information" is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [W. Va. Code St. R. § 114-57-2.15 (defining "health information").] Insurance "consumers" are individuals who seek to obtain, obtain, or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. "Customers" are generally consumers who have a continuing relationship with the licensee. [W. Va. Code St. R. §§ 114-57-2.6, 114-57-2.9 & 114-57-2.10 (defining "consumer," "customer" and "customer relationship").]

Licensees are required to comply with the requirements of the state regulation with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [W. Va. Code St. R. § 114-57-18.]

### **2. Requirements**

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual

authorization. [W. Va. Code St. R. § 114-57-15.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [W. Va. Code St. R. § 114-57-16.]

The regulation permits disclosures *without* the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; actuarial, scientific, medical or public policy research; any disclosure permitted without authorization under the privacy regulation promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996; and any activity that is otherwise permitted by law, required pursuant to a governmental reporting authority or required to comply with legal process. [W. Va. Code St. R. § 114-57-15.]

This regulation does not supercede any existing West Virginia law related to medical records, health or insurance information privacy. [W. Va. Code St. R. § 114-57-19.]

### **C. Prepaid Limited Health Service Organization**

A prepaid health service organization may not disclose information pertaining to an enrollee's or applicant's diagnosis, treatment or health without the individual's express written consent except as necessary to facilitate an assessment of the quality of care delivered; to review the grievance procedure; pursuant to statute or court order for the production of evidence or discovery; for claim or litigation between the patient and the prepaid limited health service organization; for a Medicaid recipient enrolled under a group contract between a prepaid limited health service organization and the agency responsible for the Medicaid program. [W. Va. Code § 33-25D-28.]

### **D. Pharmacists**

A pharmacist generally may not disclose information maintained in a patient's record, which was communicated to the patient as part of patient counseling, or which is communicated by the patient to the pharmacist without the patient's authorization. [W. Va. Code § 30-5-1b.] Disclosure of this confidential information without the patient's authorization is permitted to other members of the health care team, where necessary to the patient's health and well-being; to persons and agencies authorized by law to receive the information; as necessary for the limited purpose of peer review and utilization review; and pursuant to court order. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** A pharmacist who violates these provisions may be subject to disciplinary action by the board of pharmacy. [W. Va. Code § 30-5-7.]

## **E. State Government**

Information of a personal nature, such as that kept in a personal or medical file, is exempt from disclosure under the state Freedom of Information Act if the public disclosure of the information would constitute an unreasonable invasion of privacy. [W. Va. Code § 29B-1-4(2).] If a person demonstrates by clear and convincing evidence that the public interest requires disclosure in a particular instance, the information may be disclosed. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any public records custodian who willfully violates the provisions of the Freedom of Information Act is guilty of a misdemeanor, punishable by a fine not less than \$200 or more than \$1,000, imprisonment for no more than 20 days, or both. [W. Va. Code § 29B-1-6.]

## **III. PRIVILEGES**

There is no physician-patient privilege in West Virginia. [*West Virginia ex rel. Allen v. Bedell*, 193 W.Va. 32, 4545 SE2d 77 (1994); *See also Keplinger v. Virginia Electric & Power Co.* 208 W. Va. 11; 537 S.E.2d 632 (2000).] However, there are detailed statutory provisions that govern the production of hospital records in response to a subpoena issued in a legal action in which the hospital is not a party. [*See* W. Va. Code § 57-5-4a through 4j.]

## **IV. CONDITION-SPECIFIC RESTRICTIONS**

### **A. Birth Defects**

West Virginia maintains a statewide birth defects information system for the collection of information, identification of congenital anomalies, stillbirths and abnormal conditions in newborns and to identify congenital anomalies and stillbirth trends and epidemics. [W. Va. Code §§ 16-40-2; 16-40-3.] All information in the birth defects information system is confidential. [W. Va. Code § 16-40-4.]

In addition, a child's parent or legal guardian may have any information that may identify the child removed from the birth defects information system by requesting from the local board of health or the child's physician a form prepared by the commissioner. [W. Va. Code § 16-40-5.]

### **B. Cancer**

West Virginia maintains a cancer registry that requires physicians, hospitals, laboratories and others to report incidents of cancer. [W. Va. Code § 16-5A-2a.]

All information contained in the mandatory reports is confidential. They may be used solely for the purpose of determining the sources of malignant neoplasms and nonmalignant intracranial and central nervous system tumors, and evaluating measures designed to eliminate, alleviate or ameliorate their effect. [*Id.*] Reports may be released to health researchers demonstrating a need that is essential to health related research, provided that personal identities remain confidential. [*Id.*]

## C. HIV/AIDS

The AIDS-Related Medical Testing And Records Confidentiality Act requires that the identity of a person who has been the subject of an HIV-related test and the results of such a test are confidential and generally may not be disclosed, even under a compulsory process, to anyone else without the test subject's consent. [W. Va. Code §§ 16-3C-1; 16-3C-3.] Disclosure without the subject's authorization is permitted in a number of circumstances, primarily to prevent the spread of HIV. [W. Va. Code § 16-3C-3.] For instance, disclosure may be made to: the victim of a sexual assault; blood banks and transplant facilities; persons who have had sexual contact with or shared a needle with the subject; pursuant to court order when compelling need is shown; and others. [*Id.*] Court proceedings to determine whether disclosure should be made employ a variety of protective measures including the use of pseudonyms. [*Id.*] Recipients of the information may not disclose HIV test results to another person. [*Id.*]

### Remedies and Penalties

**Right to Sue.** A person whose HIV-related information has been disclosed in violation of this provision has a civil right of action and, in the instance of a reckless violation, may recover liquidated damages of \$1,000 or actual damages, whichever is greater. [W. Va. Code § 16-3C-5.] If the disclosure was an intentional or malicious violation, the person is entitled to liquidated damages of \$10,000 dollars or actual damages, whichever is greater. [*Id.*] The court may also award reasonable attorney's fees and grant such other relief, including an injunction, as the court may consider appropriate. [*Id.*]

## D. Mental Health

**In General.** Communication and information obtained in the course of treatment or evaluation of any mental health client or patient is considered to be confidential and generally may not be disclosed. [W. Va. Code § 27-3-1.] "Confidential information" includes the fact that the person is or has been a patient; information transmitted by a patient (or his family) for purposes relating to diagnosis or treatment; all diagnoses or opinions formed regarding a client's physical, mental or emotional condition; any advice, instructions or prescriptions and any record or characterization of the foregoing. [*Id.*] This protected information may be disclosed without the patient's authorization: in proceedings related to involuntary examinations; pursuant to court order where the court has made a finding that the disclosure of the information outweighs the importance of maintaining confidentiality; to protect against a clear and substantial danger of imminent injury by a patient to himself or another; and

for internal review purposes. [*Id.*] The consent for disclosure of confidential information must be in writing and signed by the patient or by his legal guardian. [W. Va. Code § 27-3-2.]

**Social Workers and Licensed Professional Counselors.** A licensed social worker or a licensed professional counselor is prohibited from disclosing without the patient's consent any confidential information he may have acquired from clients in his professional capacity, except in limited circumstances such as when the communication reveals the contemplation of a crime or harmful act. [W. Va. Code §§ 30-30-12; 30-31-13.]

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# WISCONSIN

Wisconsin statutorily grants a patient the right of access to: his health care records maintained by health care providers (including physicians, hospitals, pharmacists, and others); personal medical information maintained by insurers; and records maintained by mental health, developmental disabilities, and drug and alcohol abuse treatment facilities. The state has a general, comprehensive statute that restricts the disclosure of patient health care records. Additionally, there are privacy protections addressed in statutes governing specific entities or medical conditions.

## I. PATIENT ACCESS

### A. Health Care Providers

#### 1. Scope

Wisconsin provides patients a statutory right of access to their health care records. [See Wis. Stat. Ann. §§ 146.81 through 146.84.] These provisions apply to records maintained by physicians, nurses, hospitals, pharmacists, occupational therapists, optometrists, dentists, chiropractors, acupuncturists, psychologists, dietitians, athletic trainers, social workers, marriage and family therapists, speech-language pathologists and others. [Wis. Stat. Ann. §§ 146.81 (defining “health care provider”); 50.135(1) (defining “inpatient health care facility”).] They encompass all records related to the health of a patient prepared by or under the supervision of a health care provider with certain specified exceptions (such as mental health records, discussed below). [Wis. Stat. Ann. § 146.81 (defining “patient health care records”).]

#### 2. Access Requirements

Upon submitting a statement of informed consent, and giving the provider reasonable notice, a patient has the right to inspect his health care records maintained by a health care provider during regular business hours. [Wis. Stat. Ann. § 146.83.] Similarly, a patient has the right to receive a copy of health care records and X-ray reports upon payment of reasonable costs. [*Id.*]

The patient’s statement of informed consent must be in writing, signed by the patient, and must specify the name of the patient, the type of information to be disclosed, the types of health care providers making the disclosure, to whom the information will be disclosed and the purpose of the disclosure. [Wis. Stat. Ann. § 146.81 (defining “informed consent”).]

#### 3. Notice and Other Requirements

The health care provider must provide each patient with a statement advising him of his right to see and copy his health record upon admission to an



inpatient facility or upon the first provision of services by the health care provider. [Wis. Stat. Ann. § 146.83.]

Providers must also maintain records documenting patients' access to their own records. For each request by a patient or person authorized by the patient to inspect the patient's health care records, the provider must note the time and date of the request, the name of the inspecting person, the time and date of inspection and identify the records released for inspection. [Wis. Stat. Ann. § 146.83.]

No person may intentionally falsify a patient health care record. Neither may any person conceal or withhold a patient health care record with intent to prevent or obstruct an investigation or prosecution or with intent to prevent its release to the patient or his guardian. [Wis. Stat. Ann. § 146.83.]

#### **4. Preservation or Destruction of Records**

A health care provider who ceases practice or business or the personal representative of a deceased health care provider who was an independent practitioner is required to provide for the maintenance or destruction of patient health care records. [Wis. Stat. Ann. § 146.819.] If the provider or personal representative provides for the maintenance of the records, he must do at least one of the following:

- ∞ Provide written notice to each patient at the patient's last known address, describing where and by whom the records will be maintained;
- ∞ Publish notice in a newspaper that is published in the county in which the provider's practice was located, specifying where and by whom the records will be maintained.

[*Id.*]

If the provider or personal representative provides for the deletion or destruction of the records, he must do at least one of the following:

- ∞ Provide written notice to each patient at the patient's last known address at least 35 days prior to deleting or destroying the records, informing individuals of the date on which the records will be deleted or destroyed unless the patient retrieves them, and the location, dates and time when the records may be retrieved;
- ∞ Publish in a newspaper that is published in the county in which the provider's practice was located, specifying the date on which the records will be deleted or destroyed unless the patient retrieves them, and the location, dates and time when the records may be retrieved.

[*Id.*]

These provisions do not apply to community-based residential facilities or nursing homes, hospitals, hospices, home health agencies or local health departments. [Wis. Stat. Ann. § 146.819(4).]

## **5. Remedies and Penalties**

**Right to Sue.** An individual may bring an action to compel compliance with the provisions granting them the right to see and obtain a copy of their health care records. [Wis. Stat. Ann. § 146.84.] Additionally, any person who is injured as a result of a negligent violation of these access provisions is entitled to actual damages, exemplary damages of not more than \$1,000 and costs and reasonable actual attorney fees. [*Id.*] For knowing and willful violations of the access provisions, exemplary damages of up to \$25,000 may be awarded. These damages may be awarded against any person violating the statute, including the state or any political subdivision of the state. [*Id.*]

**Fines and Penalties.** Any person employed by the state or any political subdivision of the state who violates this provision may be discharged or suspended without pay. [*Id.*]

## **B. Employers**

An employee or his designated representative has a right to inspect and copy his personal medical records in the employer's files. [Wis. Stat. Ann. § 103.13.] If the employer believes that disclosure of an employee's medical records would have a detrimental effect on the employee, the employer may release the records to the employee's physician or through a physician designated by the employee. [*Id.*] The physician may release the records to the employee or his immediate family.

The employer may charge a reasonable fee for providing copies of records. The fee may not exceed the actual cost of reproduction. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** An employer who violates this section may be fined not less than \$10 and not more than \$100 for each violation. [*Id.*]

## **C. Insurers, Including HMOs**

### **1. Scope**

Wisconsin statutorily grants individuals access to personal medical information maintained by insurers. [See Wis. Stat. Ann. § 610.70.] These access provisions apply to "insurers," a term defined as including any person or association of persons doing an insurance business as a principal and which includes HMOs. [See Wis. Stat. Ann. § 600.03 (defining "insurer" and "health maintenance organization").] The Act covers "personal medical information," which is information concerning an individual that (1) relates to the physical or mental health, medical history or medical treatment of an individual, and (2) is obtained from a health care provider (including a pharmacist or pharmacy), medical care institution, or an individual, the individual's spouse, parent or legal guardian. [Wis. Stat. Ann. § 610.70(1) (defining "health care provider" and "personal medical information").]

The access rights granted by the Act extend to Wisconsin residents. [Wis. Stat. Ann. § 610.70(1)(b).]

## **2. Requirements**

An insurer must permit the individual to inspect and copy his personal information in person or obtain a copy of it by mail, whichever the individual prefers, within 30 business days of receiving a written request and proper identification from an individual. [Wis. Stat. Ann. §§ 610.70(3)(a); 600.03 (defining “insurer”).] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Wis. Stat. Ann. § 610.70(3)(a)(2).]

**Fees.** The insurance entity can impose a reasonable fee to cover copying costs. [Wis. Stat. Ann. § 610.70(3)(f).]

In addition to giving the individual a copy of his personal information, the insurer must also give the individual a list of the persons to whom it has disclosed such personal medical information within two years prior to the request for access, if that information is recorded. If such an accounting of disclosures is not recorded, the insurer must inform the individual of the names of those persons to whom it normally discloses personal information. [Wis. Stat. Ann. § 610.70(3)(a)(3).]

The insurer may, at its discretion, provide a copy of the personal medical information to a health care provider designated by the individual. [Wis. Stat. Ann. § 610.70(3)(b).] If an insurer receives personal medical information from a health care provider or medical care institution with instructions restricting disclosure of the information to the subject of the information, the insurer may not disclose the information to that individual but must disclose the identity of the health care provider or medical care institution that provided the information. [Wis. Stat. Ann. § 610.70(3)(d).]

**Right to Amend.** A person has a statutory right to have any factual error corrected and any misrepresented or misleading entry amended or deleted, in accordance with stated procedures. [Wis. Stat. Ann. § 610.70(4)(a).] Within 30 business days from the date of receipt of a written request, the insurer must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) notify the individual of its refusal to make the correction, amendment or deletion, the reasons for the refusal, and the individual’s right to file a statement of disagreement. [*Id.*]

If the insurer corrects, amends or deletes any of the individual’s recorded personal information, the insurer must notify the individual of its actions in writing and furnish the amendment, correction or fact of the deletion to: (1) any person designated by the individual, who may have received the individual’s personal information within the preceding two years; (2) to insurance support organizations that systematically receive the individual’s personal information from the insurance institution within the preceding seven years, unless the

organization does not maintain information about the individual; and (3) insurance support organizations that furnished the personal information that was corrected, amended or deleted. [Wis. Stat. Ann. § 610.70(4)(b).]

If the insurer refuses to make the requested change, the individual has the right to file a concise statement setting forth what the individual thinks is the correct, relevant or fair information; and a statement of the reasons why the individual disagrees with the insurer's refusal to correct, amend or delete recorded personal information. [Wis. Stat. Ann. § 610.70(4)(c).] The insurer must file the individual's statement and provide a means by which anyone reviewing the disputed personal information will be made aware of the individual's statements and have access to them. Furthermore, in any subsequent disclosure of the personal information that is the subject of the disagreement, the insurer must clearly identify the matter or matters in dispute and provide the individual's statements along with the recorded personal information being disclosed. [Wis. Stat. Ann. § 610.70(4)(d).] Insurers must furnish these statements of disagreement to third parties in the same manner they are required to furnish corrected information. [*Id.*]

## **II. RESTRICTIONS ON DISCLOSURE**

### **A. Health Care Providers**

#### **1. Scope**

Wisconsin has comprehensive statutory provisions governing the disclosure of patient health care records. [See Wis. Stat. Ann. §§ 146.81 through 146.84.] These provisions cover all records related to the health of a patient prepared by or under the supervision of health care providers, including physicians, nurses, hospitals, occupational therapists, pharmacists, optometrists, dentists, chiropractors, acupuncturists, psychologists, dietitians, athletic trainers, social workers, marriage and family therapists, speech-language pathologists, and others. [Wis. Stat. Ann. § 146.81 (defining "patient health care records" and "health care provider").]

Under these provisions, the right to control the disclosure of patient health care records may be exercised by the patient or a "person authorized by the patient." "Persons authorized by the patient" include:

- ∞ In the case of a minor patient, the parent, guardian or legal custodian (and certain others).
- ∞ With respect to a deceased patient, their spouse or personal representative. If no spouse survives the deceased patient, an adult member of the deceased patient's immediate family may exercise the rights.
- ∞ Any person authorized in writing by the patient
- ∞ Specified others.

[Wis. Stat. Ann. §§ 146.81 (defining "informed consent," "patient," and "person

authorized by the patient”) and 146.82.]

## 2. Requirements

Generally, all patient health care records are confidential and may be released only to those with the informed consent of the patient or to the persons specifically designated in the statute. [Wis. Stat. Ann. § 146.82(1).] The consent to disclose patient health care records must be in writing, signed and dated by the patient and include all of the following: the name of the person whose information is being disclosed; the type of information to be disclosed; the types of health care providers making the disclosure; the purpose of the disclosure (*e.g.*, for an application of insurance); the entity to which disclosure is to be made; and the time period during which the consent is effective. [Wis. Stat. Ann. § 146.81 (defining “informed consent”).]

**Exceptions to Consent.** There are a number of circumstances under which patient health care records must or may be disclosed *without* the patient’s consent. *Mandatory* disclosures without informed consent include:

- ∞ For the purposes of conducting management audits, program monitoring and accreditation;
- ∞ To the extent that performance requires access, to a health care provider and certain persons affiliated with a health care provider where
  - The person is rendering assistance to the patient;
  - The person is being consulted regarding the health of the patient;
  - The life or health of the patient appears to be in danger and the information contained in the record may aid the person in rendering assistance; or
  - The person prepares or stores records, for those purposes.
- ∞ To the extent records are needed for billing, collection or payment of claims;
- ∞ Under a lawful order of a court;
- ∞ For the purposes of research if the researcher is affiliated with the health care provider and provides written assurances that the information will not be released to anyone not connected with the research without the informed consent of the patient; to government agencies that require reporting of certain conditions, such as cancer or elder abuse; and to specified others. [Wis. Stat. Ann. § 146.82(2)(a).]
- ∞ Others listed in the statute.

Private pay patients may exempt themselves from disclosures to researchers by annually submitting a signed, written request to the health care provider. [Wis. Stat. Ann. § 146.82(2)(a)(6).]

Recipients of information pursuant to this provision generally must keep the information confidential. [Wis. Stat. Ann. § 146.82(2)(b).] The exceptions are those who receive records for billing, collection or payment of claims and government agencies who receive information to perform legally authorized functions (such as management audits and facility licensure). [*Id.*]

There are also circumstances where a provider is permitted, but not required, to disclose health information. For example, a physician who treats a patient whose mental or physical condition affects his ability to control an automobile may report that person to the department of transportation without the consent of the individual. [Wis. Stat. Ann. § 146.82(3).]

**Accounting of Disclosures.** For each release of patient health care records made pursuant to these provisions, the health care provider must record the name of the person or agency to which records were released, the date and time of the release and the identification of the records released. [Wis. Stat. Ann. §§ 146.82(2)(d) and 142.82(3)(c).]

**Emergency Personnel.** All records made by an ambulance service provider, an emergency medical technician or a first responder in administering emergency care procedures to and handling and transporting patients must be maintained as confidential patient health care records subject to Wis. Stat. Ann. §§ 146.81 through 146.84. For the purposes of these provisions, an ambulance service provider, an emergency medical technician or a first responder is considered to be a health care provider under Wis. Stat. Ann. § 146.81(1). [Wis. Stat. Ann. § 146.50(12).]

### **3. Remedies and Penalties**

**Right to Sue.** An individual may bring an action to compel compliance with the provisions restricting the disclosure of patient health care records. [Wis. Stat. Ann. § 146.84.] Additionally, any person who is injured as a result of a negligent violation of these confidentiality provisions is entitled to actual damages, exemplary damages of not more than \$1,000 and costs and reasonable actual attorney fees. [*Id.*] For knowing and willful violations of the confidentiality provisions, exemplary damages of up to \$25,000 may be awarded. These damages may be awarded against any person violating the statute, including the state or any political subdivision of the state [*Id.*]

#### **Fines and Penalties.**

Any person who negligently discloses confidential information in violation of Wis. Stat. Ann. § 146.82 is subject to a fine of not more than \$1,000 for each violation. The penalty increases to not more than \$100,000, imprisonment not more than 3 years and 6 months, or both for intentional disclosures for pecuniary gain and with knowledge that the information is confidential. [*Id.*]

Any person employed by the state or any political subdivision of the state who violates this provision may be discharged or suspended without pay. [*Id.*]

## **B. Insurance Entities, Including HMOs**

### **1. Wisconsin State Insurance Law**

#### **a. Scope**

Wisconsin statutorily restricts the disclosure of personal medical information by insurers. [See Wis. Stat. Ann. § 610.70.] These restrictions apply to “insurers,” a term defined as including any person or association of persons doing an insurance business as a principal and which includes HMOs. [See Wis. Stat. Ann. § 600.03 (defining “insurer” and “health maintenance organization”).] The Act covers “personal medical information,” which is information concerning an individual that (1) relates to the physical or mental health, medical history or medical treatment of an individual, and (2) is obtained from a health care provider (including a pharmacist or pharmacy), medical care institution, or an individual, the individual’s spouse, parent or legal guardian. [Wis. Stat. Ann. § 610.70(1) (defining “health care provider” and “personal medical information”).]

The Act protects the medical information of an “individual,” defined as a natural person who is a resident of Wisconsin. [Wis. Stat. Ann. § 610.70(1)(b).]

#### **b. Requirements**

##### **i. Authorizations for Obtaining Health Information from Others**

If an insurer uses an authorization form to obtain health information in connection with an insurance transaction, the authorization form must conform to the statutory requirements. The authorization form must be written in plain language; be dated; specify the types of persons authorized to disclose information concerning the individual; specify the nature of the information authorized to be disclosed; identify who is authorized to receive the information; specify the purposes for which the information is collected; specify the length of time for which the authorization will remain valid and advise the patient or representative that he is entitled to receive a copy of the completed authorization form. [Wis. Stat. Ann. § 610.70(2).] The length of time the authorization remains valid varies with the purpose of obtaining the requested information. An authorization signed in support of an application for health insurance remains valid for 30 months while an authorization signed for the purpose of collecting information in connection with a claim for health benefits is effective for the term of coverage of the policy. [*Id.*]

##### **ii. Disclosure Authorization Requirements and Exceptions**

Generally, an insurer may not disclose medical information about a person that it collected or received in connection with an insurance transaction without that person’s written authorization. [Wis. Stat. Ann. § 610.70(5).]

There are numerous circumstances under which an insurance entity can disclose information without the individual’s authorization including: verifying insurance coverage benefits; for fraud detection or prevention; for pursuing a contribution or subrogation claim; to a professional peer review organization; for purposes of actuarial or research studies or accreditation or auditing,

provided certain conditions are met; in response to a facially valid search warrant or subpoena or other court order; and others. [Wis. Stat. Ann. § 610.70(5).]

**c. Remedies and Penalties**

**Right to Sue.** Any person who knowingly and willfully obtains information about an individual under false pretenses is liable to an individual for actual damages, exemplary damages of not more than \$25,000 and costs and reasonable actual attorney fees. [Wis. Stat. Ann. § 610.70(7)(b).]

**Fines and Penalties.** Any person who knowingly *and* willfully obtains information concerning an individual from an insurance entity under false pretenses may be fined not more than \$25,000, imprisoned for not more than 9 months or both. [Wis. Stat. Ann. § 610.70(7)(a).]

**2. Wisconsin State Insurance Regulations**

**a. Scope**

In accordance with the Gramm-Leach-Bliley Act (also known as the Financial Services Modernization Act) the Insurance Commissioner of Wisconsin promulgated privacy regulations (Privacy of Consumer Financial and Health Information) to restrict the disclosure of consumers' health information that is maintained by insurance licensees. Licensees include all licensed insurers, intermediaries, third party administrators and other persons licensed, authorized or registered or required to be licensed, authorized or registered under Wisconsin Insurance Law. [Wis. Admin. Code § Ins 25.04(17) (defining "licensee").] The regulations protect "nonpublic personal health information," *i.e.*, health information that identifies an individual or for which there is a reasonable basis to believe that the information could be used to identify an individual. [Wis. Admin. Code § Ins 25.04(21) (defining "nonpublic personal health information").] "Health information" is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [Wis. Admin. Code § Ins 25.04(15) (defining "health information").] Insurance "consumers" are individuals who seek to obtain, obtain, or have obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. "Customers" are generally consumers who have a continuing relationship with the licensee. [Wis. Admin. Code § Ins 25.04(6), (9) & (10) (defining "consumer," "customer" and "customer relationship").]

Licensees are required to comply with the requirements of the state regulation with respect to nonpublic personal health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [Wis. Admin. Code § Ins 25.77.]



Insurers subject to Wis. Stat. Ann. § 610.70 (see discussion above) or intermediaries acting solely as agents of an insurer subject to Wis. Stat. Ann. § 610.70 with respect to health information are not required to comply with these provisions. [Wis. Admin. Code § Ins 25.80.]

**b. Requirements**

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Wis. Admin. Code § Ins 25.70.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); notice that the consumer or customer may revoke the authorization at any time; and information about the procedure for revocation. [Wis. Admin. Code § Ins 25.73.]

The regulation permits disclosures *without* the authorization of the individual as permitted under the Wisconsin Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act (Wis. Stat. Ann. § 51.30), under the statutory provisions governing patients' access to their own health records (Wis. Stat. Ann. §146.81 and 146.84), or as otherwise authorized by law.

Additionally, the regulation permits disclosures without the individual's authorization for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; actuarial, scientific, medical or public policy research; any disclosure permitted without authorization under the privacy regulation promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996; and any activity that is otherwise permitted by law, required pursuant to a governmental reporting authority or required to comply with legal process. [Wis. Admin. Code § Ins 25.70.]

**C. Nursing Homes and Community-based Residential Facilities**

Every resident in a nursing home or community-based residential facility has a right to the confidentiality of his health and personal records, and a right to approve or refuse the release of his records to any individual outside the facility except: in the case of transfer to another facility; as required by law or 3rd-party payment contracts; or as provided in Wis. Stat. Ann. § 146.82(2) and (3) (see Restrictions on Disclosure—Health Care Providers above). [Wis. Stat. Ann. § 50.09.]

## **D. State Government**

**Department of Health and Family Services.** To ensure that the identity of patients is protected when information obtained by the department is disseminated, the department must: aggregate any data element category containing small numbers; remove or destroy identifying elements on the patient billing forms (*i.e.*, names, addresses, telephone numbers, date of birth, signatures, patient account numbers); develop a data use agreement that specifies data user restrictions, appropriate uses of data and penalties for misuse; and require that a purchaser of data sign and notarize the data use agreement. [Wis. Stat. Ann. § 153.50.] The department may release patient-identifiable data only to the following entities: agent of the department who is responsible for storing the data and ensuring its accuracy; a health care provider to ensure the accuracy of the information in the department's database; and the department or any other entity that is required by federal or state statute to obtain patient-identifiable data for epidemiological investigation or to eliminate the need for duplicative databases. [*Id.*] To obtain the data, these entities must submit a written request to the department that includes the reason for the request. [*Id.*]

## **III. PRIVILEGES**

Wisconsin recognizes a broad health care provider-patient privilege which allows a patient, in a legal proceeding, to refuse to disclose and to prevent others from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition between the patient and his health care providers. [See Wis. Stat. Ann. § 905.04.] This privilege applies to physicians, registered nurses, chiropractors, psychologists, social workers, marriage and family therapists, professional counselors and their respective patients. [*Id.*] The health care provider may claim the privilege on behalf of his patient. [*Id.*]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Birth Defects**

Wisconsin maintains a birth defects registry to monitor all conditions affecting a child that occur prior to or at birth and that require medical or surgical intervention or interfere with normal growth and development. [Wis. Stat. Ann. § 253.12.] All information maintained in connection with the registry that could specifically identify the patient is confidential. [*Id.*] The information may be released under certain conditions specified in the statute, including to: the child's parent or guardian; a physician, hospital or pediatric specialty clinic for the purpose of verification of information reported; a researcher provided that certain requirements are met, such as an agreement from the researcher not to release the information to any persons except those involved in the research; and others. [*Id.*]

## **B. Cancer**

Physicians, hospitals, and laboratories are required to report information concerning any person diagnosed as having cancer or a pre-cancerous condition to the department of health. [Wis. Stat. Ann. § 255.04.] Any information reported which could identify any individual who is the subject of the report is confidential and may not be disclosed by the department except to: a central tumor registry of another state if the individual who is the subject of the information resides in another state; and to a national tumor registry recognized by the department. [*Id.*]

## **C. Genetic Test Results**

**Insurance.** An insurer, the state with respect to a self-insured health plan, or a county, city, village or school board that provides health care services for individuals on a self-insured basis may not require or request directly or indirectly any individual or his health care provider to reveal: whether the individual or a member of the individual's family has obtained a genetic test; or the results of the genetic test, if obtained by the individual or a member of the individual's family. [Wis. Stat. Ann. § 631.89.] A "genetic test" is a test using deoxyribonucleic acid from an individual's cells in order to determine the presence of a genetic disease or disorder or the individual's predisposition for a particular genetic disease or disorder. [*Id.*] This provision does not apply to an insurer writing life insurance coverage or income continuation insurance coverage. [*Id.*]

**Employment.** Employers, labor organizations, or employment or licensing agencies may not require or administer a genetic test to any person as a condition of employment, labor organization membership or licensure. [Wis. Stat. Ann. § 111.372.]

No person may disclose to an employer, labor organization or employment or licensing agency that an employee, organization member or prospective employee or member has taken a genetic test or the results of a test without the prior written and informed consent of the subject of the test. [Wis. Stat. Ann. § 942.07.] "Genetic test" is defined as a test of a person's genes, gene products or chromosomes for abnormalities or deficiencies (including carrier status) that are linked to physical or mental disorders, that indicate a susceptibility to illness, disease or other disorders, or that demonstrate genetic or chromosomal damage due to environmental factors. [*Id.*]

### **Remedies and Penalties.**

**Fines and Penalties.** An individual who violates Sec. 942.07 is guilty of a Class B misdemeanor. [*Id.*]

## **D. HIV**

Wisconsin has a comprehensive statutory scheme governing the confidentiality of HIV-related information. The results of an HIV test are generally confidential and may not be divulged by anyone other than the test subject without the

subject's specific authorization for disclosure. [Wis. Stat. Ann. § 252.15(5).] There are a number of circumstances under which an individual's test result may be disclosed *without* his authorization including: to an agent or employee of a health care provider who prepares or stores patient records; to a funeral director or to a person who performs autopsies; to accreditation or health services review organizations for program monitoring and evaluation; pursuant to a lawful court order; for the purpose of research provided that the researcher meets certain criteria; to the victim of a sexual offense; and others. [Wis. Stat. Ann. § 252.15(5)(a)(1) through (20).] A person who receives test results under this provision may not redisclose this information except as specifically authorized by statute. [Wis. Stat. Ann. § 252.15(6).]

### **Remedies and Penalties**

**Right to Sue.** Any person violating these provisions is liable to the subject of the test for actual damages, costs and reasonable actual attorney fees, plus exemplary damages of up to \$1,000 for a negligent violation and up to \$25,000 for an intentional violation. [Wis. Stat. Ann. § 252.15(8).]

**Fines and Penalties.** A person who intentionally discloses the results of an HIV-related blood test in violation of these provisions and thereby causes bodily or psychological harm to the subject of the test may be fined not more \$25,000, imprisoned not more than 9 months, or both. [Wis. Stat. Ann. § 252.15(8).] If the information was disclosed for purposes of pecuniary gain and with knowledge that the information is confidential, then the person may be fined not more than \$100,000 or imprisoned not more than 3 years and 6 months, or both. [*Id.*]

Any employee of the state or a political subdivision of the state who violates these provisions may be discharged or suspended without pay. [*Id.*]

## **E. Mental Health, Including Developmental Disabilities and Substance Abuse**

### **1. Patient Access**

#### **a. Scope**

Wisconsin statutorily grants a patient receiving services for mental illness, developmental disabilities, alcoholism or drug dependence qualified access to his treatment records. [See Wis. Stat. Ann. § 51.30.] "Treatment records" include registration and all other records maintained by the department of health and family services, county departments and treatment facilities concerning individuals who are receiving (or who at any time have received) services for mental illness, developmental disabilities, or alcoholism or drug dependence. [Wis. Stat. Ann. § 51.30(1).] These records do not include the notes or records maintained for personal use by an individual providing treatment services for the department, county department or treatment facility if these notes or records are not available to others. [*Id.*]

**Minors.** A minor upon reaching 14 has a right of access to his own treatment records. A minor under the age of 14 has access to his records but only in the presence of a parent, guardian, counsel, guardian ad litem or judge. [Wis. Stat. Ann. § 51.30(5)(b).]

Generally, the parent or guardian (or person in the place of a parent) of a developmentally disabled minor has access to the minor's treatment records at all times. [Wis. Stat. Ann. § 51.30(5)(b).] However, a minor aged 14 or older may prevent such access by filing a written objection to such access with the custodian of the records. [*Id.*] With respect to other minors (*i.e.*, those who are not developmentally disabled), the parent, guardian (or person in the place of a parent) has the same rights of access as provided to the subject individual under these provisions. [*Id.*]

**b. Access Requirements**

During his treatment, an individual may have access to his treatment records subject to the restrictions imposed by the director of the treatment facility. [Wis. Stat. Ann. § 51.30(4)(d).] However, access may not be denied at any time to records of all medications and somatic treatments received by the individual. [*Id.*]

A patient who has been discharged from an inpatient facility has the right to a complete record of all medications and somatic treatments prescribed and to a copy of the discharge summary. Additionally, after giving adequate notice, the discharged patient has the right to review and copy any and all of his treatment records. [Wis. Stat. Ann. § 51.30(4)(d)(3).] The director of the treatment facility and the treating physician have the right to be present during inspection. [*Id.*] The records may be modified to protect the confidentiality of other patients or the names of other persons who gave confidential information, but may not be withheld in their entirety. [*Id.*]

**Copying fees.** A reasonable and uniform charge for reproduction may be assessed under either of these provisions. [Wis. Stat. Ann. § 51.30(4)(d)(2) and (3).]

**Right to Amend.** An individual (or his parent or guardian) may challenge the accuracy, completeness, timeliness, or relevance of factual information in his treatment records and request in writing that the facility maintaining the record correct the challenged information. [Wis. Stat. Ann. § 51.30(4)(f).] The director of the treatment facility, the director of the county department or the secretary of health (depending on who has the record) must grant or deny the request to correct within 30 days. [*Id.*] If the request is denied, the reasons for denial must be given to the individual along with an explanation of any applicable grievance procedure or court review procedure. [*Id.*] Upon denial, the patient is permitted to insert into the record a statement correcting or amending the information at issue. [*Id.*] The statement becomes a part of the record and must be released whenever the information at issue is released. [*Id.*]

**d. Remedies and Penalties**

**Right to Sue.** An individual may bring an action to enjoin any violation of this section or to compel compliance with this section, and may in the same action seek damages. [Wis. Stat. Ann. § 51.30(9).] In such an action, the aggrieved individual is entitled to actual damages proved plus exemplary damages of not more than \$1,000 per violation from the person, including the state or any political subdivision of the state, violating this section. [*Id.*] If the court determines that the violation was knowing and willful, the violator is liable for exemplary damages of not more than \$25,000 per violation. [*Id.*] Additionally, if the person damaged prevails in his action, he is entitled to such costs and reasonable attorney fees incurred. [*Id.*]

**2. Restrictions on Disclosure**

Generally, records pertaining to the registration and treatment of persons who are receiving or have received services for mental illness, developmental disabilities, alcoholism or drug dependence which are maintained by a governmental department or a treatment facility are confidential and may not be disclosed without the written consent of the individual. [Wis. Stat. Ann. § 51.30(1) and (4).] The consent to disclose treatment records must be in writing, signed and dated by the patient (or his legally authorized representative), and include all of the following: the name of the person whose information is being disclosed; the type of information to be disclosed; the types of health care providers making the disclosure; the purpose of the disclosure; the entity to which disclosure is to be made; and the time period during which the consent is effective. [Wis. Stat. Ann. § 51.30(2) (defining “informed consent”).]

Disclosure without the patient’s consent is permitted in a variety of circumstances, including but not limited to: for the purpose of management audits, financial audits or program monitoring; for research if the project has been approved by the department of social services and the researcher has provided assurances that identifying information will not be further disclosed; pursuant to lawful court order; to individuals employed by a treatment facility when and to the extent that performance of their duties requires that they have access to such information; and to the parents, children, or spouse of an individual who is or was a patient at an inpatient facility, but limited to the fact as to whether the individual is a patient. [Wis. Stat. Ann. § 51.30(4)(b)(1) through (24).]

**Accounting of Disclosures.** Each time information is released from a treatment record, a notation must be made in the record that includes the name of the person to whom the information was released; the identification of the information released; the purpose of the release; and the date of release. The patient has a right of access to this information. [Wis. Stat. Ann. § 51.30(4)(e).]

**Minors.** The parent, guardian or person in place of a parent of a minor may consent to the release of confidential information in the minor’s treatment

records. [Wis. Stat. Ann. § 51.30(5)(a).] A minor aged 14 or more may provide consent without the consent of his parent or guardian. [*Id.*]

### **Remedies and Penalties**

**Right to Sue.** An individual may bring an action to enjoin any violation of this section or to compel compliance with this section, and may also seek damages. [Wis. Stat. Ann. § 51.30(9).] In such an action, the aggrieved individual is entitled to actual damages proved plus exemplary damages of no more than \$1,000 from the person, including the state or any political subdivision of the state, violating this section. [*Id.*] If the court determines that the violation was knowing and willful, the violator is liable for exemplary damages of no more than \$25,000 per violation. [*Id.*] If the person damaged prevails in his action, he is entitled to such costs and reasonable attorney fees incurred. [*Id.*]

**Fines and Penalties.** In addition, any person who requests or obtains confidential information under false pretenses or discloses such information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm may be fined not more than \$25,000, imprisoned not more than 9 months, or both. [Wis. Stat. Ann. § 51.30(10).] A person who negligently discloses confidential information may be subject to a fine not more than \$1,000 per violation. If the disclosure is intentional, for pecuniary gain, and with knowledge that the information is confidential, the person may be subject to a fine not more than \$100,000, imprisonment not more than 3 years and 6 months, or both. [*Id.*]

Any employee of the department of social services, a county department that provides community mental health, developmental disabilities, alcoholism or drug abuse services, or a public treatment facility that violates these provisions may be subject to discharge or suspension without pay. [Wis. Stat. Ann. § 51.30(11).]

## **F. Sexually Transmitted Diseases**

Physicians and other health care professionals are required to report cases of sexually transmitted diseases to the Department of Health and Family Services and the local health officers. [Wis. Stat. Ann. § 252.11.] Laboratories performing tests for sexually transmitted diseases must also report all positive test results to the local health officer and the department. Reports, examinations and inspections and all records concerning sexually transmitted diseases are confidential, are not open to public inspection, and may not be divulged except as necessary for the preservation of the public health, in the course of commitment proceedings, and in certain proceedings related to juvenile offenders in the criminal justice system. [Wis. Stat. Ann. § 252.11(7).]

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# WYOMING

Wyoming statutorily grants patients the right of access to their hospital records. The state does not have a general comprehensive statute prohibiting the disclosure of confidential medical information. Privacy protections generally are contained in statutes governing specific entities or medical conditions.

## I. PATIENT ACCESS

### A. Hospitals

Wyoming statutorily grants patients the right to see and copy their health care information. [Wyo. Stat. Ann. § 35-2-605 through § 35-2-617.]

#### 1. Scope

The statutory provisions granting individuals access to their health care information apply solely to hospitals. [Wyo. Stat. Ann. § 35-2-611.]

The Act gives rights to access “health care information,” which is any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and relates to the patient’s health care. The term generally includes any record of disclosures of health care information with some specified exceptions, such as examination of the information by the treating physician. [Wyo. Stat. Ann. §§ 35-2-611; 35-2-605 (a)(vii) (defining “health care information”); 35-2-606.]

The persons entitled to access under these provisions include: adult patients, personal representatives of a deceased patient, and any person who is authorized to consent to health care for the patient. [Wyo. Stat. Ann. § 35-2-614.]

If the patient is a minor and is authorized by statute to consent to health care without parental consent, the minor has the exclusive rights to see and copy information pertaining to that health care to which he has lawfully consented. [Wyo. Stat. Ann. § 35-2-614.] Minors in Wyoming may consent to health care in a limited number of circumstances including, but not limited to, for the examination and treatment of any sexually transmitted disease. [See Wyo. Stat. Ann. § 35-4-13.]

#### 2. Requirements

##### a. Requirements for Requesting and Providing Access

Within 10 days after receiving a written request from a patient to examine or copy his recorded health care information, a hospital must do one of the following: (1) make the information available for examination and provide a copy, if requested, to the patient; (2) inform the patient if the information does not exist or cannot be found; (3) inform the patient and provide the name and address, if known, of the entity that maintains the record if the hospital, itself, does not



maintain the record; (4) inform the patient of any delay in handling the request and specify the earliest date (no later than 21 days after receiving the request) when the information will be available; or (5) deny the request, in whole or in part, as allowed by law. [Wyo. Stat. Ann. § 35-2-611.]

**Fees.** Upon request, the hospital must provide an explanation of any code or abbreviation used in the health care information. [*Id.*] The hospital may charge a reasonable fee, not to exceed its actual cost, for providing the information, and is not required to honor the patient's request until the fee is paid. [*Id.*]

**Denial of Access.** A hospital can deny access to health care information by a patient if the hospital reasonably concludes that knowledge of the information: would pose an imminent threat to the life or safety of the patient; could reasonably lead to the patient's identification of an individual who provided information in confidence; or could reasonably be expected to pose an imminent threat to the life or safety of another person. [Wyo. Stat. Ann. § 35-2-612.] Access can also be denied where the health care information is compiled and is used solely for litigation, quality assurance, peer review or administrative purposes. [*Id.*] If a hospital denies a patient's request under this provision, it must notify the patient of its denial in writing and allow a health care provider selected by the patient to examine and copy the health care information. [*Id.*]

#### **b. Notice Requirements**

The hospital is required to post a copy of its notice of information practices in a conspicuous location in the hospital, and provide a copy to patients or prospective patients upon request. The notice must include a statement that patients can ask to see and copy their record. [Wyo. Stat. Ann. § 35-2-613; *see* Section II.B.2. below for other notice requirements.]

### **3. Remedies and Penalties**

**Right to Sue.** A person whose records are not provided to him as required by this statute may file a civil action for equitable relief and for damages. [Wyo. Stat. Ann. § 35-2-616.] In an action by a patient alleging that health care information was improperly denied under section 35-2-612, the burden of proof is on the hospital to establish that the information was properly withheld. [*Id.*] If a court determines that there is a violation of this act, the aggrieved party may recover damages for pecuniary losses sustained as a result of the violation, as well as reasonable attorney's fees and expenses reasonably incurred in the litigation. [*Id.*]

## **II. RESTRICTIONS ON USE AND DISCLOSURE**

### **A. HMOs**

Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant without that person's express consent. [Wyo. Stat. Ann. § 26-34-130.] Exceptions to this general rule allow disclosures *without* the person's consent to carry out the purposes of the Health Maintenance Organization Act (HMO Act); in response to a claim or litigation between an enrollee/applicant and the HMO; to implement quality assurance programs; and when the data is required to be disclosed by another statute. [*Id.*; Wyo. Stat. Ann. § 26-34-108 (quality assurance programs).]

## **Remedies and Penalties**

**Fines and Penalties.** If the insurance commissioner has reason to believe that violations of the HMO Act, including the nondisclosure provisions, have occurred he may hold hearings to arrive at an adequate and effective means of correcting or preventing the violations. The commissioner may issue a cease and desist order or obtain injunctive or other appropriate relief in district court. Other possible penalties include administrative penalties or the suspension or revocation of the HMO's certificate of authority. [Wyo. Stat. Ann. §§ 26-34-125; 26-34-127.]

### **B. Hospitals**

Wyoming statutorily restricts the disclosure of health care information by hospitals. [Wyo. Stat. Ann. § 35-2-605 through § 35-2-617.]

#### **1. Scope**

The statutory provisions restricting disclosure apply to hospitals, their agents and employees. [Wyo. Stat. Ann. § 35-2-606.]

The Act restricts the disclosure of "health care information," which is any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and relates to the patient's health care. [Wyo. Stat. Ann. §§ 35-2-606; 35-2-605(a)(vii) (defining "health care information").]

The persons entitled to exercise rights under these provisions include: adult patients, personal representatives of a deceased patient, and any person who is authorized to consent to health care for the patient. [Wyo. Stat. Ann. § 35-2-614.]

If the patient is a minor and is authorized by statute to consent to health care without parental consent, the minor has the exclusive rights with respect to that health care to which she has lawfully consented. [Wyo. Stat. Ann. § 35-2-614.]

#### **2. Requirements**

##### **a. Authorization Requirements and Exceptions**

A hospital generally may not disclose any hospital health care information about a patient to any other person without the patient's written authorization. [Wyo. Stat. Ann. §§ 35-2-605; 35-2-606.] The written authorization must be: dated and signed by the patient; identify the nature of the information to be disclosed; and identify the person to whom the information is to be disclosed. [Wyo. Stat. Ann. § 35-2-607.] Except for an authorization to provide information to third-party health care payors (such as health insurance companies) an authorization does not permit the release of health care information relating to future health care that the patient receives more than 12 months after the authorization is signed. [*Id.*] The authorization may contain an expiration date not to exceed 48 months after it is signed. [*Id.*] If no expiration date is specified, the authorization expires 12 months after it is signed. [*Id.*]

The patient may revoke the authorization at any time unless disclosure is required to effectuate payments for health care that has been provided. [Wyo. Stat. Ann. § 35-2-608.] Disclosure without the patient's authorization is permitted to the extent a recipient needs to know the

information if the disclosure is: to a person who is providing health care to the patient; to any other person who requires it for health care education or to provide planning, quality assurance, peer review or administrative, legal, financial or actuarial services to the hospital if they meet specified requirements; to immediate family members, unless the patient has instructed otherwise; for use in research projects that meet specified criteria and to other specified individuals and entities. [Wyo. Stat. Ann. § 35-2-609.] In addition, the hospital may disclose health care information about a patient without his authorization if: the disclosure is directory information, unless instructed by the patient not to make the disclosure; or the hospital is required to by law for public health or law enforcement purposes or judicial and administrative proceedings. [Wyo. Stat. Ann. §§ 35-2-609; 35-2-610.] For certain judicial and administrative proceedings, the patient must be given notice before the discovery request is presented to the hospital. [Wyo. Stat. Ann. § 35-2-610.]

**b. Notice Requirements**

The hospital is required to post a copy of its notice of information practices in a conspicuous location in the hospital, and provide a copy to patients or prospective patients upon request. The notice must include a statement that the hospital maintains a record of health care services provided and disclosures are prohibited unless authorized by the patient or by law or the hospital is compelled to do so. [Wyo. Stat. Ann. § 35-2-613.]

**c. Other Requirements**

A hospital is required to establish reasonable safeguards for the security of all health care information that it maintains. [Wyo. Stat. Ann. § 35-2-615.]

**3. Remedies and Penalties**

A person whose records are improperly disclosed may file a civil action for equitable relief and for damages. [Wyo. Stat. Ann. § 35-2-616.] If a court determines that there is a violation of this act, the aggrieved party may recover damages and pecuniary losses sustained as a result of the violation, as well as reasonable attorney's fees and expenses reasonably incurred in the litigation. [*Id.*]

**C. Insurers, including HMOs**

**1. Scope**

Under the authority of Wyoming's HMO Act, the commissioner of insurance issued rules that govern the practices of "licensees," (*i.e.*, all insurers, producers or other persons licensed or required to be licensed, authorized or registered under the Wyoming Insurance Code) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [Wyo. Stat. Ann. § 26-2-133; Weil's Code Wy. R. 044-000-054 §§ 2; 4 (defining "licensee").] Nonpublic personal health information is health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [Weil's Code Wy. R. 0044-000-054 § 4 (defining "nonpublic personal health information").] "Health information" is any information (except age or gender) recorded in any form, that was created by or derived from a health care provider or the consumer that relates to the past, present or future physical, mental or behavioral health or condition of an individual; the provision of health care to an individual; or payment of health care. [Weil's Code Wy. R. 044-000-054 § 4 (defining "health information").] Insurance "consumers" are individuals who seek to

obtain, obtains, or has obtained an insurance product or service from a licensee to be used primarily for personal, family or household purposes. “Customers” are generally consumers who have a continuing relationship with the licensee. [Weil’s Code Wy. R. 044-000-054 § 4 (defining “consumer” and “customer”).]

Licensees must comply with the requirements of these rules with respect to health information, unless they meet the requirements of the federal privacy rule promulgated by the U.S. Department of Health and Human Services pursuant to Sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996. [Weil’s Code Wy. R. 0044-000-054 § 20.] Compliance is required by January 1, 2003. [Weil’s Code Wy. R. 0044-000-054 § 26.]

## **2. Requirements**

The rules generally prohibit the disclosure of any nonpublic personal health information about a consumer or customer without authorization. [Weil’s Code Wy. R. 0044-000-054 § 17.] A valid authorization must be in written or electronic form and include: the identity of the consumer or customer; a general description of the types of nonpublic personal health information to be disclosed and the parties to whom the licensee makes the disclosure; the purpose of the disclosure; how the information will be used; the date and signature of the consumer or customer; the length of time that the authorization is valid (no more than twenty-four months); and notice that the consumer or customer may revoke the authorization at any time and the procedure for revocation. [Weil’s Code Wy. R. 0044-000-054 § 18.]

The regulation permits disclosures *without* the authorization of the individual for the performance of a broad range of insurance functions by or on behalf of the licensee including, but not limited to: claims administration; underwriting; quality assurance; disease management; utilization review; fraud investigation; actuarial, scientific, medical or public policy research; and any disclosure activity permitted without authorization under the federal Health Insurance Portability and Accountability Act Privacy Rules. [Weil’s Code Wy. R. 0044-000-054 § 17.]

This regulation does not supercede existing Wyoming law related to medical records, health or insurance information privacy. [Weil’s Code Wy. R. 0044-000-054 § 21.]

## **3. Remedies and Penalties**

**Fines and Penalties.** Any violation of these rules constitutes an undefined unfair or deceptive trade practice and is subject to penalties. [Weil’s Code Wy. R. 0044-000-054 § 24; Wyo. Stat. Ann. §§ 26-1-107 (specifies penalties); 26-13-116.]

### **D. Professional Counselors, Marriage and Family Therapists, and Social Workers**

Generally, under the Mental Health Professions Practice Act, licensed professional counselors, marriage and family therapists, social workers and chemical dependency therapists may not

disclose without the consent of the client any communication made by the client or any advice he gave to the client in the course of professional counseling. [Wyo. Stat. Ann. § 33-38-109.]

Disclosure without the client's consent is appropriate where indicated by other statutory provisions, such as the requirement that suspected child abuse or neglect be reported to the local child protective agency. [*Id.*; *See also* Wyo. Stat. Ann. § 14-3-205 (requiring reports on suspected child abuse).]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who violates this Act is guilty of a misdemeanor, punishable by imprisonment, a fine or both. A person who is convicted for a third or subsequent violation during a thirty-six month period is guilty of a felony. [Wyo. Stat. Ann. § 33-38-110.] In addition, the mental health professions licensing board may refuse to renew or may deny, suspend, revoke or restrict licensure or certification of anyone willfully violating this Act. [*Id.*] The board may also seek an injunction to enjoin violations. [*Id.*]

## **E. State Government**

The custodian of any public records must deny a request to inspect medical, psychological and sociological data relating to an individual as well as hospital records relating to medical care and medical information, which are maintained by the government. [Wyo. Stat. Ann. § 16-4-203.]

### **Remedies and Penalties**

**Fines and Penalties.** A person who willfully and knowingly violates this provision is guilty of a misdemeanor, punishable by a fine of up to \$750. [Wyo. Stat. Ann. § 16-4-205.]

## **III. Privileges**

Wyoming recognizes a number of health care provider-patient privileges that allow a patient, in legal proceedings, to refuse to disclose and to prevent others from disclosing confidential communications made to a health care provider for the purpose of treatment and diagnosis. [Wyo. Stat. Ann. §§ 1-12-101 (physician-patient); 33-27-123 (psychologist-client); 35-2-610 (hospital-patient).] An HMO is entitled to claim any statutory privilege against a disclosure that the provider who furnished such information to the HMO could claim. [Wyo. Stat. Ann. § 26-34-130.]

## **IV. CONDITION-SPECIFIC REQUIREMENTS**

### **A. Genetic Test Results**

In cases where genetic testing is undertaken for establishing paternity, the testing of any identifiable genetic material for other purposes is prohibited without the individual's written consent. [Wyo. Stat. Ann. § 14-2-109.] Any information obtained from identifiable genetic material in the course of a paternity determination is confidential and used solely for the purposes

of determining paternity. The information may be used for other purposes only after individual identifiers are removed. [*Id.*] “Genetic tests” are defined as blood or tissue typing tests, which include, but are not limited to, tests of red cell antigens, red cell isoenzymes, human leukocyte antigens, serum proteins or DNA. [Wyo. Stat. Ann. § 14-2-109 (defining “genetic tests”).]

### **Remedies and Penalties**

**Fines and Penalties.** Release of any information obtained in paternity testing without the individual’s written consent to anyone not directly involved in the paternity determination is a misdemeanor and is punishable by a fine not to exceed \$1,000, imprisonment for not more than 1 year, or both.

## **B. Mental Health**

The records and reports made during the course of voluntary or involuntary hospitalization of a person for mental illness, which identify a patient, a former patient or a person for whom an application for hospitalization has been filed are confidential and generally may not be disclosed by any person without the patient’s consent. [Wyo. Stat. Ann. § 25-10-122.] Disclosure without the patient’s consent is permitted where it is necessary to carry out hospitalization proceedings; where a court determines disclosure is necessary for the proceedings before it and failure to disclose would be contrary to public interest; and by and between a mental health center, the state hospital and other designated hospitals solely for the purpose of facilitating referral treatment, admission, readmission or transfer of the patient. [*Id.*]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who willfully violates this provision is guilty of a misdemeanor, punishable by imprisonment, a fine or both. [Wyo. Stat. Ann. § 25-10-126.]

In addition, records of residents, former residents and proposed residents of the Wyoming state training school, which provides diagnosis, evaluation, education, training, custody and care of mentally retarded persons, are confidential with a few exceptions – *e.g.*, access to these records may be provided to the subject of the records or his guardian, guardian ad litem or attorney, or the subject’s physician or surgeon. [Wyo. Stat. Ann. § 25-5-131.]

### **Remedies and Penalties**

**Fines and Penalties.** Any person who willfully violates this provision is guilty of a misdemeanor, punishable by imprisonment, a fine or both. [*Id.*]

## **C. Sexually Transmitted Diseases**

Physicians, laboratories and other health care providers are required to report sexually transmitted diseases, including venereal diseases and AIDS, to the state health officer or his designee. [Wyo. Stat. Ann. §§ 35-4-107; 35-4-130; 35-4-132.] Information and records relating to a known or suspected case of a sexually transmitted disease, which have been reported, acquired or maintained under these statutes, are confidential and generally may not be disclosed without the written consent of the individual. [Wyo. Stat. Ann. § 35-4-132.] Disclosure of identifying information may be made without the affected individual’s consent: for statistical purposes, provided that the person’s identity is protected; as necessary for the control and treatment of sexually transmitted diseases; and for notification of health care professionals and employees

reasonably expected to be at a risk of exposure to a dangerous or life-threatening disease, as necessary to protect life and health. [*Id.*]

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