

State Privacy Regulation: New York and New Jersey

Harvey Z. Werblowsky, Esq.
McDermott, Will & Emery
(212) 547-5432
hwerblowsky@mwe.com

Background

- Health care providers are already sensitive to the confidentiality of health information.
- State laws and professional codes of ethics have long required providers to keep medical information confidential.
- State law may be different and/or conflict with HIPAA Privacy Rules.

Background

- State laws typically accomplish four objectives:
 - Require health information to be confidential
 - Create exceptions: patient denied access
 - Create exceptions: no patient consent required for disclosure
 - Create exceptions: “extra-sensitive” information

Background

- State law varies substantially state by state
- If a covered entity is using or transmitting information in more than one state, it will be subject to different state laws

Preemption

Remember Three HIPAA Reconciliation Principles

- Preemption
- Adherence to stricter State law
- Compliance with State law disclosure requirements

Preemption

- Rule One: If State law is conflicting or less stringent, follow HIPAA. (This is referred to as preemption.)
- A State law is conflicting if:
 - it is impossible to comply with both the law and HIPAA; or
 - if it would stand as an obstacle to the accomplishment of the purposes of HIPAA.
- Preemption analysis is not always as easy as one might think

Preemption

- Rule Two: If State law is stricter or provides for greater protections, follow state law.
- A State law is stricter if it imposes:
 - greater limitation on the health care provider's uses or disclosures;
 - gives greater right of access or amendment to the patient; or
 - provides greater privacy protection.

Preemption

- Rule Three: HIPAA expressly defers to State law on certain matters, including, for example:
 - reporting child abuse, disease, birth, death, etc.;
 - who may act as a personal representative of the patient;
 - the relationship between a minor and his/her parents or guardian.

HIPAA's Process for Requesting the DHHS Secretary's Determination

State law survives only when the Secretary determines:

- that the State law is necessary:
 - to prevent fraud and abuse;
 - to ensure appropriate State regulation of insurance and health plans
 - for State reporting on health care delivery and costs
 - for purposes serving a compelling need related to public health, welfare or safety or the privacy intrusion is warranted when balanced against the need to be served
- that the State law's principal purpose is the regulation of controlled substances

HIPAA's Process for Requesting the DHHS Secretary's Determination

- Requests are submitted by States, not private sector covered entities
- "Chief elected official or designee"
- Who will this be?

State Initiatives: New York

- State Office For Technology
- Coordination, not compliance
- How will health care providers be heard?
- What will be the template?

State Initiatives: New Jersey

- HINT Advisory Group
- Educational effort
- State agencies focused on their own individual HIPAA compliance efforts

New York Existing Privacy Framework

- Historically, well-developed confidentiality scheme
- Different laws apply to each type of license held by facility, for example:
 - Article 28: hospital, nursing homes, etc.
 - ward, wing or unit certified by OMH, OMRDD, OASAS
 - substance abuse services
- Already very specific time frames and forms

Intersection of New York & HIPAA

New York health care providers already satisfy many HIPAA requirements

- Duty to keep information confidential
- Patient right to access information
- Procedures in place to obtain a patient's consent to disclosures
- Permit disclosure without patient consent in certain cases

New York: Duty to Keep Information Confidential

- Professional misconduct
- Patient statement of rights
- General statements in facility-specific provisions (except: OMH, OMRDD)
- Information-specific provisions
 - general statements: genetic information, chemical dependence services, etc.
 - more detail: HIV (facility-specific)

New York: Patient Access

- Most detailed
- Bulk of preemption analysis here
 - more than just time frames
 - type of information which is accessible
 - bases for denial

New York: Patient Consent

- Little guidance as to content and procedure
- Exceptions:
 - HIV related information
 - Information held by facilities (or ward, wings or units) regulated by OMH or OMRDD

New York: Disclosures Without Consent

- Expressly addressed in HIV and OMH/OMRDD facility provisions
- Scattered reporting obligations: for example, child abuse, disease reporting, etc.

New York: What's New?

- HIPAA adds many new administrative requirements:
 - Privacy Officer
 - Notices
 - Training
 - Authorizations
 - Marketing

New York: What's New?

- (. . . continued) HIPAA adds many new administrative requirements:
 - Fundraising
 - Research
 - Greater Rights to Amend

New York: Open Issues

- Physical Safeguards
 - HIPAA provides that a covered entity must have in place appropriate administrative, technical and physical safeguards to protect the privacy of protected health information
- Security

New York Security

- Limited existing guidance for health care providers in New York
 - Facility-specific general admonitions to safeguard information from loss, destruction and unauthorized use
 - General Hospitals--policies and procedures regarding the authentication of medical records

New Jersey Existing Privacy Framework

- Also well-developed
- “Meat” is in the facility/practitioner - specific regulations
- Less detailed compared to New York and HIPAA
 - No forms provided
 - Less instruction as to content, process or method

Intersection of New Jersey & HIPAA

Like New York, New Jersey also addresses many of the major topics:

- Duty to keep information confidential
- Patient right to access information
- Require patient “approval” to disclose
- Permit disclosure without patient consent in certain cases

New Jersey: Duty to Keep Information Confidential

- Professional misconduct
- Patient Statement of Rights
- General Statements in facility-specific provisions
- Information-specific provisions
 - HIV
 - genetic information
 - venereal disease

New Jersey: Patient Access

- Not much detail as to process
- No appeal rights addressed
- “More stringent” aspects:
 - legible copies, typewritten transcriptions, translations to English
 - No categories of information which are inaccessible
 - If medically contraindicated, must still provide access to the patient’s representative or health care provider

New Jersey: Patient "Approval"

- Facilities: do not release without patient "approval"
- Physicians: "current written authorization"

New Jersey: Disclosures Without Consent

- List differs by facility/practitioner
- Anyone within the facility

New Jersey: What's New?

- Administrative Requirements
- Patient Amendment Rights
- Patient Appeals to Denials
- More Process and Forms

New Jersey: Open Issues

- Physical Safeguards
- Security

New Jersey Security

- General admonishment to protect against loss, damage, unauthorized removal or use
- Facility/provider-specific
- Not detailed

Preemption Can Be Complicated

- Need to watch for developments in State administrative agencies and legislatures
- Judgment, Judgment, Judgment