

**STATE PRIVACY REGULATION:  
DISTRICT OF COLUMBIA,  
MARYLAND & VIRGINIA**

Anne Marie “Nancy” Wheeler  
Benjamin T. Butler  
*Crowell & Moring LLP*

The Third National HIPAA Summit  
Washington, D.C.  
October 26, 2001

---

---

---

---

---

---

---

**District of Columbia**

- No comprehensive privacy law pertaining to all medical information
- D.C. Mental Health Information Act (D.C. Code §7-1201.01) (recently amended under emergency legislation)
  - new “joint consent” for participating providers in DMH organized health care arrangement
  - prospective release now allowed

2

---

---

---

---

---

---

---

**District of Columbia**

- D.C. Mental Health Information Act
  - “personal notes” -- m.h. information disclosed to m.h. professional on condition that such information not be disclosed to client or others, and m.h. professional’s speculations
  - cf. “psychotherapy notes” in HIPAA regs. -- separately kept notes recorded by m.h. professional documenting or analyzing contents of conversation during counseling

3

---

---

---

---

---

---

---

## District of Columbia

- D.C. Mental Health Information Act
  - HIPAA language re/ psychotherapy notes is somewhat broader than D.C. Act, despite exclusion of items such as Dx, Rx, Tx plan, progress, tests, session start and stop times
  - interplay between federal and D.C. law could cause confusion for m.h. providers
    - preemption -- “contrary to” / “more stringent”
    - provision-by-provision assessment

4

---

---

---

---

---

---

---

## District of Columbia

- D.C. Mental Health Information Act
  - law presumes that “personal notes” will not be disclosed, even with authorization
  - HIPAA regs. presume “psychotherapy notes” will be released with authorization
  - a few differences exist between the required forms of authorization; additionally, D.C. law draws no distinction between “consent” and “authorization”

5

---

---

---

---

---

---

---

## District of Columbia

- D.C. Mental Health Information Act
  - m.h. professional has authority to limit authorized disclosures (*e.g.*, to protect client or others from substantial risk of imminent and serious physical injury or to protect client from imminent psychological impairment)
    - analyze preemption: contrary to / more stringent?
  - disclosure is limited to 3rd party payors - can “progress” notes be released?

6

---

---

---

---

---

---

---

## District of Columbia

- D.C. Mental Health Information Act
  - right to access information (except “personal notes”; m.h. professional may also limit access [safety risk])
  - HIPAA - right of access does not include access to psychotherapy notes; access may be limited for safety reasons
  - what does provider include in “personal notes” or “psychotherapy notes,” since they are not exactly synonymous?
  - minors’ disclosure rights (D.C. law not preempted)

7

---

---

---

---

---

---

---

## District of Columbia

- D.C. Mental Health Information Act
  - both D.C. law and HIPAA regs. allow for “correction” or “amendment” of records; with comparison, the devil is in the details
    - e.g., with HIPAA, if covered entity denies proposed amendment, it must permit individual to submit a written statement of disagreement; the covered entity may then prepare a rebuttal
  - notice and accounting requirements differ

8

---

---

---

---

---

---

---

## District of Columbia

- D.C. Health Occupations Boards, Licensing of Health Professionals
  - disciplinary action may be taken against professional for:
    - failure to provide details of a patient’s medical record to a hospital or other licensed health professional
    - willfully breaching a confidentiality law, regulation or ethical requirement (D.C. Code §3-1205.14)

9

---

---

---

---

---

---

---

## District of Columbia

- Child Protection Register
  - certain information may be divulged to medical professionals to obtain a diagnosis
  - confidentiality requirements exist (D.C. Code §4-1302)
- Communicable Diseases
  - disclosure by Comm’r of Public Health allowed only to safeguard health) (D.C. Code §7-131)

10

---

---

---

---

---

---

---

## District of Columbia

- Communicable Diseases
  - AIDS
    - comprehensive AIDS Health-Care Response Plan (plan to be updated annually) (D.C. Code §7-1602); Preventive Health Services Amendments Act of 1985 ( D.C. Law 6-83)
    - informed consent; restrictions on disclosure of test for AIDS (D.C. Code §31-1606)

11

---

---

---

---

---

---

---

## District of Columbia

- reporting duties (HIV and AIDS) and mandate to turn over medical records to Director, Dep’t of Health (22 DCMR 206)
- Other Diseases (cont’d)
  - confidentiality of cancer registry information (D.C. Code §§7-302 and 7-304)

12

---

---

---

---

---

---

---

## District of Columbia

- HMOs
  - Confidentiality and Access (D.C. Code §31-3426)
- Medical Record and Peer Review Information (D.C. Code §§44-801 - 44-805)
- D.C. FOIA (D.C. Code §2-534)

13

---

---

---

---

---

---

---

## District of Columbia

- Public Health
  - confidentiality of independent review information (22 DCMR 6010)
  - confidentiality of Public Benefit Corporation patient and employee information (22 DCMR 8105 and 22 DCMR 9002)
  - Confidentiality of Occupational Health Services information (22 DCMR 9001)

14

---

---

---

---

---

---

---

## District of Columbia

- Physicians and Mental Health Professionals Privilege Law (D.C. Code §14-307)
- Medical and Psychiatric Care and Treatment; Records
  - law pertains to public hospital records (D.C. Code §21-562)

15

---

---

---

---

---

---

---

## District of Columbia

- Treatment of Minors - Health Professional May Inform Parents of Certain Medical Conditions (except as provided in D.C. Mental Health Information Act) (22 DCMR 602)

16

---

---

---

---

---

---

---

## District of Columbia

- Mentally Retarded Citizens
  - records of “customers” shall be considered privileged and confidential (D.C. Code §§7-1305.12 and .13)
- Maternity Center Records
  - requirement of confidentiality guidelines (22 DCMR 2621)

17

---

---

---

---

---

---

---

## District of Columbia

- Community Residence Facilities
  - requirement of confidentiality (22 DCMR 3412 and 22 DCMR 3801)
- Confidentiality of Medical Information Held by the Commission on Judicial Disabilities and Tenure (28 DCMR 2044)
- Crime Victims Compensation Program - Privacy of Claimant’s Medical Records (28 DCMR 2308)

18

---

---

---

---

---

---

---

## Maryland

- Fairly comprehensive health care information/ medical record law governing release of information, confidentiality and patient access to information (Md. Code Ann., Health-Gen. § 4-301 *et seq.*)
  - “directory information” (presence and general condition of patient in h.c. facility) generally does not require authorization

19

---

---

---

---

---

---

---

## Maryland

- Authorization (§ 4-303) shall:
  - be in writing, dated and signed by “person in interest”
  - state name of health care provider
  - identify to whom the information is to be disclosed;
  - state the period of time the authorization is valid (generally not more than one year)
  - apply only to record developed by the provider
    - unless authorization specifies disclosure of record received from another provider and latter hasn’t prohibited release

20

---

---

---

---

---

---

---

## Maryland

- Patient access to records
  - h.c. provider shall comply within reasonable period of time after a person in interest requests in writing to receive a copy or see and copy the medical record
  - if record is related to psychiatric or psychological problem, and attending provider believes disclosure would be injurious to person or recipient, provider may refuse to disclose that portion but
    - make summary available; insert summary in record; permit exam/copying by another provider; and inform patient of right to select another provider (§ 4-304)

21

---

---

---

---

---

---

---

## Maryland

- Procedures for addition/correction of record
  - within reasonable time after request for change, provider shall:
    - make requested change or
    - issue written notice of refusal, which shall contain:
      - » each reason for refusal and
      - » the procedures, if any, that provider has established for review of the refusal
  - if final determination is a refusal, the provider:
    - shall permit concise statement of reason for disagreement
    - may insert statement of reasons for refusal

22

---

---

---

---

---

---

---

---

## Maryland

- Provider shall give notice of change or copy of statement of disagreement:
  - to any individual the person in interest has designated to receive the notice or statement and
  - to anyone to whom the provider has disclosed an inaccurate, incomplete or disputed record with the previous 6 months
  - to future recipients of the record
- certain disclosures are allowed without consent of person in interest (§ 4-305)
  - compare HIPAA: “consent” may be required

23

---

---

---

---

---

---

---

---

## Maryland

- Mental health “personal notes” (§ 4-307 (a)(6))
  - work product and personal property of a mental health provider
    - does not include Dx, Tx plan, symptoms, prognosis or progress notes
  - not discoverable or admissible as evidence in criminal, civil or administrative actions (except malpractice or similar claims against provider)
  - must be maintained separately; “sole possession” notes (except for disclosure to supervisor, consulting provider or provider’s attorney)

24

---

---

---

---

---

---

---

---



## Maryland

- Detailed procedures re/ use of medical information by courts, correctional facilities, and pursuant to subpoena or other compulsory process (§ 4-307)
- Penalties (§ 4-308)
- Reporting of Infectious Diseases and Confidentiality Requirements (Md. Code Ann., Health-Gen. § 18-205)

25

---

---

---

---

---

---

---

## Maryland

- tuberculosis reporting (§ 18-322)
- HIV/AIDS
  - confidentiality of testing of pregnant women (MD Code Ann., Health-Gen. § 18-338.2(c))
  - confidentiality in context of correctional institution (§ 18-338)
  - requirement for separate files for HIV testing; procedures for confidential testing; confidentiality of results (§ 18-338.1)

26

---

---

---

---

---

---

---

## Maryland

- Records Maintenance and Destruction -- New Confidentiality Provisions (MD Code Ann., Health-Gen. § 4-403) (effective 10/1/01)
  - Sec'y of Health and Mental Hygiene is authorized to promulgate new regulations; these will presumably apply to health care providers, including certain facilities and HMOs

27

---

---

---

---

---

---

---

## Maryland

- Law Permits Physicians and Certain Medical Staff Members to Release Information about Treatment of Minor to Parent or Guardian (§ 20-104)
  - law has been expanded to include psychologists (effective 10/1/01)
- Abortion Notice (§20-103)
- Vital Records (§ 4-224)

28

---

---

---

---

---

---

---

## Maryland

- Cancer Reporting (§§ 18-203 and 18-204)
- Maryland Health Care Commission Medical Care Database (§§ 19-103 and 19-134)
- HMO - Health and Medical Records System
  - requirements of confidentiality while allowing ready access to authorized persons; documentation requirements (§ 19-710)
    - Department examinations (§ 19-719)

29

---

---

---

---

---

---

---

## Maryland

- Health Occupations Regulatory Boards - Release of Health Records (MD Code Ann., Health Occup. §§ 6-205.2, 6-205.3, 12-313, 12-403, 12-409, 14-404, 14-411, 16-312)
- Insurance-- Medical Files (MD Code Ann., Insurance §§ 4-402, 4-403, 4-404)
  - Genetic Information (§ 27-909)
- State Gov't. (§§ 10-615, 10-616, 10-617)

30

---

---

---

---

---

---

---

## Virginia

- **Overview**

- Existing applicable requirements spread through Virginia Code and Code of Regulations
- These requirements will need to be meshed with the regulations under HIPAA

31

---

---

---

---

---

---

---

## Virginia

- **Primary Statute: Va. Code § 32.1-127.1:03**

- Designed similar to HIPAA privacy regulations – combines general prohibitions with specific exceptions when disclosure is permissible
- Recognizes generally a “patient’s right to privacy in the content of a patient’s medical record”
- Patient records are the property of the provider maintaining them

32

---

---

---

---

---

---

---

## Virginia

- Providers or other persons “working in a health care setting” may not disclose patient records except as authorized by section 127.1:03 or “by another provision of state or federal law”
- Patient records may not be removed from premises where maintained without approval of provider, except as authorized by law
- With certain exceptions, redisclosure of patient records is not permitted beyond purpose for which disclosure was made without first obtaining patient’s specific consent to redisclosure

33

---

---

---

---

---

---

---

## Virginia

- Section 127.1:03 lists 26 circumstances when providers' disclosure is permissible under statute, including:
  - Pursuant to written consent of patient (or in emergency, oral consent, to discuss records with third party specified by patient)
  - In compliance with a legally-authorized subpoena
  - When necessary to establish or collect a fee or defend against accusation of wrongful conduct
  - As required in course of investigation of provider

34

---

---

---

---

---

---

---

## Virginia

- As required or authorized by public health, public safety, and abuse reporting statutes (discussed *infra*)
- When necessary “in the care of the patient, including the implementation of a hospital routine contact process”
- In the “normal course of business in accordance with accepted standards of practice within the health services setting”
- When patient has waived right to privacy of the medical records

35

---

---

---

---

---

---

---

## Virginia

- To “third party payors and their agents for purposes of reimbursement”
- As is necessary to support an application for health care benefits
- To communicate a patient’s “specific and immediate threat to cause serious bodily injury or death of an identified or readily identifiable person,” as authorized by law
- To the patient, except as authorized where injurious to patient’s health or well-being

36

---

---

---

---

---

---

---

## Virginia

- Section 127.1:03 details procedures for requesting and producing copies of medical records
  - Requests to be in writing
  - Within 15 days of request, provider must respond by:
    - » Producing records
    - » Informing requester that records do not exist, cannot be found, or that the provider does not otherwise have information requested
    - » Deny request, as authorized by law

37

---

---

---

---

---

---

---

## Virginia

- This section applies “only to requests for records not specifically governed by other provisions of this Code, federal law or state or federal regulation”
- Section 127.1:03 provides suggested format for written consent to allow release of patient records
- Section 127.1:03 details procedure for requesting records via subpoena duces tecum, including notice to patients and providers, and the specific language to be included therein

38

---

---

---

---

---

---

---

## Virginia

### – Other Laws

- Virginia Freedom of Information Act (§ 2.2-3700 *et seq.*)
  - Medical and mental health records generally excluded except when person subject to records requests them
- Physician-patient privilege (§ 8.01-399)
  - Applies to “any duly licensed practitioner of any branch of the healing arts,” including clinical psychologists

39

---

---

---

---

---

---

---

## Virginia

- Privilege does not prevent practitioner from disclosing applicable information “where disclosure is necessary in connection with the care of the patient, the protection or enforcement of the practitioner’s legal rights ..., or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law”
- Mental health professional-client privilege (§ 8.01-400.2)
  - Applies to licensed professional counselors, licensed clinical social workers, and licensed psychologists

40

---

---

---

---

---

---

---

---

## Virginia

- Use of records in court proceedings (§ 8.01-413)
- Various reporting laws under Title 32.1 (Health), including:
  - Diseases (§ 32.1-36);
    - » Special confidentiality provisions for HIV (§ 32.1-36.1)
  - Cancer (§ 32.1-70 to –71.02)
  - Traumas (§ 32.1-116.1 to 116.2)

41

---

---

---

---

---

---

---

---

## Virginia

- Mental health laws under Title 37.1, including
  - Rights of patients and residents (§ 37.1-84.1)
- Insurance laws under Title 38.2
- The most important of these is § 38.2-600 *et seq.* (Insurance information and privacy protection)
  - § 38.2-600 *et seq.* requires insurance institutions and agents to provide to all applicants and policyholders a notice of information and disclosure practices

42

---

---

---

---

---

---

---

---

## Virginia

- Requires insurance institutions to provide within thirty business days access to recorded personal information, in response to a written request. Permits insurance institution to provide any medical-record information related to such request to be provided to the medical professional or medical care institution that provided information, so long as requesting individual is so informed
- Requires insurance institutions to respond to individual's request to correct, amend, or delete recorded personal information within its possession within thirty business days, and sets forth procedure for responding to such requests

43

---

---

---

---

---

---

---

---

## Virginia

- Specifies that no "insurance institution, agent, or insurance-support organization" shall "disclose any medical-record information or privileged information about an individual collected or received in connection with an insurance transaction" unless the disclosure is with the individual's legally valid authorization (§ 38.2-613)
- 18 exceptions when authorization not required, including:
  - » "Pursuant to any federal Health Insurance Portability and Accountability Act privacy rules"

44

---

---

---

---

---

---

---

---

## Virginia

- The Virginia Public Records Act (§ 42.1-79.1)
- Title 54.1 (Professions and Occupations)
  - Includes rules on ownership of medical records (§ 54.1-2403.3), reiterating requirements of § 32.1-127.1:03
  - Also includes certain reporting requirements (DMV, impaired practitioners)
- Finally, Title 63.1 (Welfare (Social Services)) addresses adult and child abuse & neglect reporting requirements (§ 63.1-55.3; § 63.1-248.2 *et seq.*)

45

---

---

---

---

---

---

---

---

## Virginia

### – Examples of HIPAA impact on Virginia state requirements

- Section 32.1-127.1:03
  - authorized disclosure by provider subject to “minimum necessary” considerations
  - HIPAA’s consent and authorization requirements to be incorporated into disclosure p&p’s; amendment and accounting rights to be incorporated into provider p&p’s

46

---

---

---

---

---

---

---

## Virginia

- State law restrictions on “redisclosure” without consent may continue to apply; “hybrid entities” may merit exception
- Section 38.2-600 *et seq.*
  - Sets up a dichotomy between providers and health plans; health plans covered hereunder have “30 days” to respond to request for amendment; HIPAA establishes “60 day” timeframe, which would now apply to Virginia providers
  - This section permits individuals to request that information be “deleted” -- query whether this right is preempted or not under HIPAA

47

---

---

---

---

---

---

---

## Virginia

- HIPAA business associate requirements must be integrated into provisions specifying when disclosure by insurance entities without consent is permissible (§ 38.2-613(B)(1))
- HIPAA marketing restrictions must be integrated into provisions authorizing disclosure of certain information by insurance entities (§ 38.2-613(B)(10))
- These kinds of analyses must be carried out on a section by section basis.

48

---

---

---

---

---

---

---



## Conclusion

- Parting thought: Take a look at your state requirements; where significant privacy protections already exist, a thorough analysis will be required.
- Developing a comprehensive understanding of existing state law now will save your organization both time and money over the long term.

49

---

---

---

---

---

---

---

Anne Marie “Nancy” Wheeler  
Benjamin T. Butler  
Crowell & Moring LLP  
Washington, D.C.  
(202) 624-2500  
nwheeler@crowell.com  
bbutler@crowell.com  
www.crowell.com

1548096

50

---

---

---

---

---

---

---