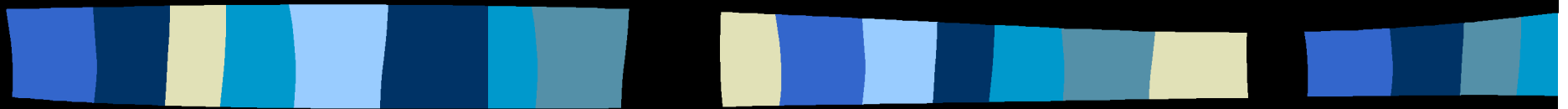


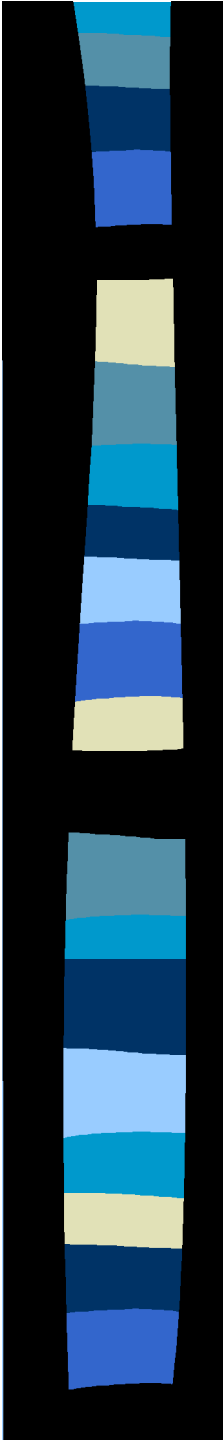
What is Left of State Privacy Laws: Louisiana, New Mexico, Oklahoma & Texas



Presented by:

David W. Hilgers

Hilgers & Watkins, P.C
dhilgers@hwlaw.com

- 
- Patient Rights
 - Prohibitions on Disclosure
 - Condition-Specific Laws
 - Remedies and Penalties



Louisiana: Patient Rights

Generally, a patient may obtain his/her medical record from a hospital or provider by:

- Submitting the appropriate, written, and signed form, and
- Paying the reasonable copying, handling, and postage charges as set by statute



Louisiana: Patient Rights

A copy of the record must be furnished within 15 days of receiving the patient's written request.

- A hospital may deny access for “good cause shown”, such as, “Medical Contraindication”
- Providers may deny access if:
 - he/she reasonably concludes,
 - that the knowledge would be injurious to the patient; or
 - to the life or safety of another



LOUISIANA: Preemption

- a hospital may deny for “good cause” or “medical contraindication”
- HIPAA allows denial only if a danger to the individual or another and this is subject to review. [164.524(a)(3)(iii)]



Louisiana

Prohibitions on Disclosure

Generally, medical information may not be disclosed without patient consent.

Exceptions include:

- HMOs may disclose to carry out statutory provisions governing HMOs
- Records generated by public medical facilities can be disclosed, without a subpoena, only to persons “legitimately” interested in the the health of the patient



Louisiana

Prohibitions on Disclosure

Mental Health

- Records of the mentally ill and mentally retarded are not public information, &
- May not be released except as required by law, or
- The policies, procedures and regulations of the DHHS.



Louisiana

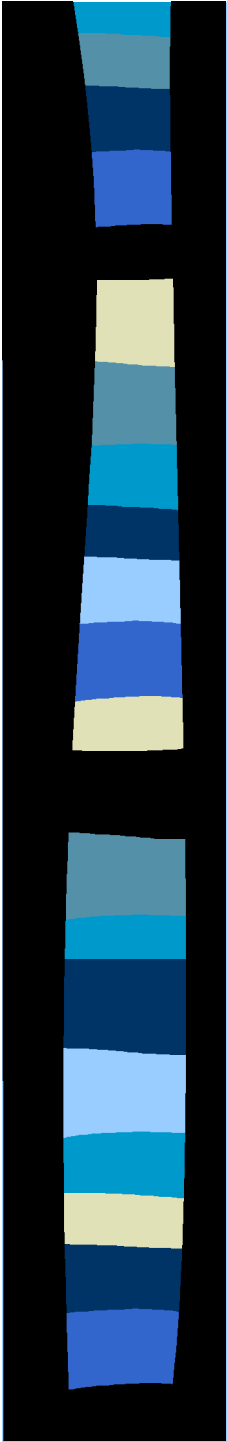
Condition Specific Requirements

- Cancer
- Communicable Diseases
- Genetic Information
- Gunshot Wounds
- HIV/AIDS



LOUISIANA: CANCER REPORTING

- Patient identifying information may be exchanged with other cancer registries
- May be disclosed to researchers if ok'd by department of health
- Preempted?
 - Public Health Reporting? 164.512(b)(1)(I)
 - If it is properly disclosed to a Public Health agency can it be disclosed to researchers?
 - Are the researchers Business Associates?



LOUISIANA: REPORTING COMMUNICABLE DISEASE

- Disclosed to Public Health Agencies
- May only be used for statistical, scientific and medical research
- Not available to subpoenas
- Preempted?
 - If disclosed to a public agency, is HIPAA irrelevant?
 - Are the researchers Business Associates?
 - HIPAA allows information to be subpoenaed



LOUISIANA: GENETIC INFORMATION

- May be used to determine paternity
- Requires separate authorization for use by insurer?
- Preempted?
 - Under HIPAA must be subpoenaed
 - HIPAA requires no consent for insurer use for treatment, payment or health operations. 164.506 (c)
 - Separate authorization for any other use. 164.508 (c)



Louisiana

Remedies and Penalties

- **Failure to Provide Individual with Access:**

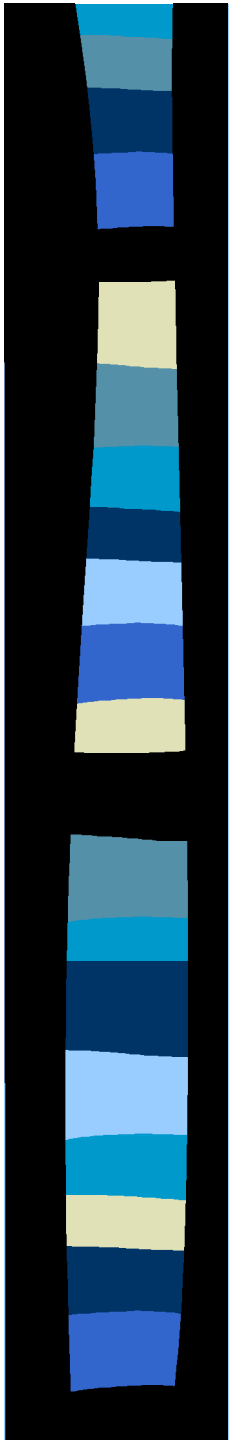
The provider is liable for any reasonable attorney fees and court costs related to obtaining a court order or subpoena for the record.

- **Unauthorized Disclosures:**

An intentional unauthorized disclosure of the contents of any confidential data to a third party:

- Civil penalty in an amount not less than \$1,000 and not more than \$5,000 plus court costs. (Paid to the person whose record was unlawfully disclosed).
- Additionally, a person damaged by an unauthorized intentional disclosure may receive actual damages suffered because of such a disclosure.

New Mexico





New Mexico: Patient Rights

Generally, New Mexico has almost no patient rights provisions (with the exception of certain mental health records as seen next).



New Mexico: Patient Rights

Mental Health

- A patient currently receiving treatment in a mental health facility has a right of access to the medical records
- The patient also has the right to submit clarifying or correcting statements, which must be included whenever the record is disclosed
- Access may be denied if the healthcare professional believes and notes in the record that disclosure would not be in the best interest of the patient



New Mexico

Prohibitions on Disclosure

Generally, patient information is confidential and may not be disclosed without consent by statute.

- Counselor/therapist may disclose in 3 situations, or for the welfare of children:
 - (1) If the information reveals the potential for a crime or harmful act,
 - (2) If the information indicates that the patient is a crime victim, or
 - (3) If the client initiates charges against the counselor



New Mexico

Prohibitions on Disclosure

Disclosure without patient consent is also addressed in a few other situations, including:

- HMOs can disclose without consent to carry out statutory provisions governing HMOs, and in the event of a claim against the HMO.
- To another health professional on the behalf of the patient,
- To protect either the patient or another individual from serious injury, or
- For continuity of treatment.



New Mexico Condition Specific Laws

- Alcohol Treatment
- Genetic Information
- Sexually Transmitted Diseases/ HIV



NEW MEXICO: GENETIC INFORMATION

- Exceptions to non-disclosure
 - paternity
 - to insurers if use for underwriting is based on sound actuarial principles
- Preempted?
 - HIPAA requires a subpoena
 - Underwriting is ok. 164.514 (g)



New Mexico

Remedies and Penalties

Mental Health:

- If a patient is denied he can petition the court for an order granting access

Genetic Information Privacy Act:

- The Attorney General or District Attorney may bring a civil action

HIV/STD:

- Unauthorized disclosure is a petty misdemeanor punishable by fine, imprisonment or both.

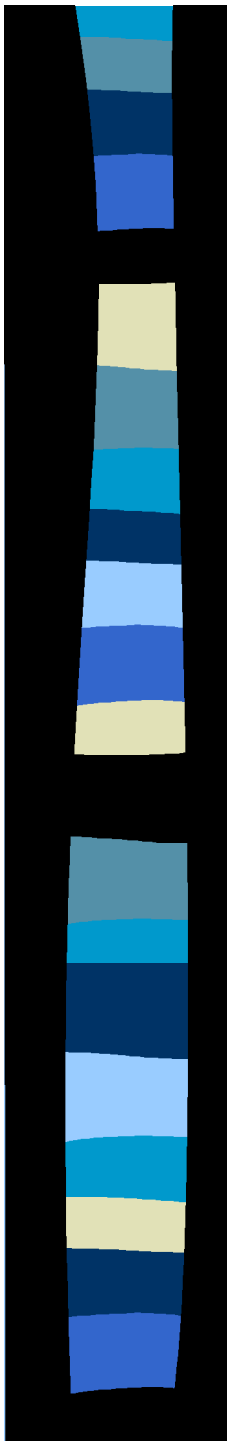


New Mexico

Condition Specific Violations

- An individual may bring civil action for:
 - Equitable relief
 - Actual damages
 - Reasonable attorney's fees and court costs
 - The court may also award up to \$5,000 in addition to economic loss.

OKLAHOMA





Oklahoma: Patient Rights

- Generally, a patient may obtain access and a copy of his/her information by:
 - Submitting a request, and payment of copying costs, (not to exceed \$.25 cents per page).
- Mental Health Patient
 - Not entitled to personal access to his records unless the treating practitioner consents or access is ordered by a court
 - The treating practitioner may also determine:
 - What part of the record will be released and
 - The manner in which it will be disclosed to the patient.



OKLAHOMA: MENTAL HEALTH DISCLOSURE

- Preempted?
 - Only psychotherapy notes can be withheld 164.524(a)(1)(i)
 - Endangering the life or physical health of the individual 164.524 (a)(3)(iii)



Oklahoma

Prohibitions on Disclosure

- There are no statutes prohibiting the disclosure of patient identifying information without patient consent for hospitals and physicians
- Mental Health
 - A psychologist is specifically prohibited from disclosing:
 - That a patient is undergoing treatment,
 - Any information acquired during treatment, or
 - Record of treatment without written consent.
 - Exceptions:
 - When a patient has communicated a specific intent to kill himself or others.
 - For treatment purposes



Oklahoma Condition Specific Laws

- Tumor Registry
- Venereal Diseases



Oklahoma

Remedies and Penalties

- A person refusing to furnish records or information is guilty of a misdemeanor
- A willful disclosure of any information provided to the tumor registry will result in exclusion from all other confidential information maintained by the department of health
- Any person who, negligently, knowingly, or intentionally discloses confidential information can be found guilty of a misdemeanor, subject to fine and imprisonment
 - A private civil action is also authorized and the violator may be liable for: actual damages, exemplary damages, court costs and attorney fees.



Oklahoma: Medical Information Privacy Act

- House bill 1953
- Would create the “Oklahoma Commission of Information Practices”
- Promulgate privacy standards for medical records on or before January 1, 2002

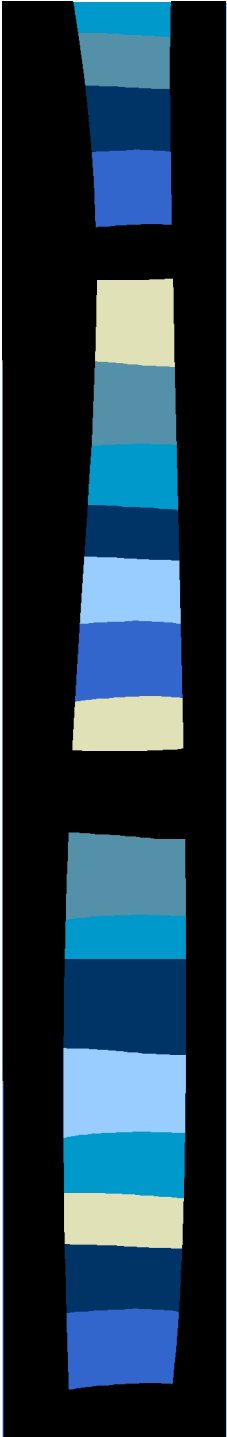


Texas

- Texas previously had a patchwork of laws, similar to (but generally more comprehensive than) other three states.
- However, Texas recently passed SB11 and changed the way privacy must be analyzed in Texas.

Texas

Three TIERS of Privacy in Texas.





Texas

1. Federal (HIPAA privacy standards)
2. Senate Bill 11 (the new Texas privacy law)
3. Preexisting Texas law



Texas

HIPAA is the national, default standard,
but:

- If SB 11 is more restrictive than HIPAA, it controls.
- If preexisting state law is more restrictive than federal or state law, it control.

*Problems determining what is more restrictive
and what is just *different*.



Texas: Examples

Patient Rights

SB 11 specifically adopts the HIPAA privacy standards relating to:

- An individual's access to the individual's PHI;
- Amendment of PHI;
- Uses and disclosures of PHI, (including consent requirements), and
- Notice of privacy practices for PHI



Texas: Examples

Marketing

SB11 is stricter than and therefore preempts, the HIPAA standards for marketing communications.

(HIPAA would allow one exception to the prohibition of use or disclosure of PHI without authorization for marketing communications, SB 11 does not allow for that exception)



Texas: Examples

Disclosure to Family Members

(preexisting Texas law stricter)

HIPAA (Sec.510(b)) allows a covered entity to disclose:

- to a family member, other relative, or
- a close personal friend of the individual, or
- any other person identified by the individual,

The PHI directly relevant to such person's involvement with the individual's care or payment

**Texas allows no such disclosure and therefore
Texas law controls.**



Texas: HMO Consents

- Texas requires consents to disclose information (Art. 28b.02)
 - claims by an individual against the HMO
- Preempted?
 - HIPAA: HMO's don't have exception for claims against them.



TEXAS: Psychotherapy Notes

- If notes are deemed to be harmful to a patient, therapist may withhold, but must disclose to another therapist designated by patient.
- Preempted?
 - HIPAA: all notes can be withheld
164.534(a)(1)(i)
 - Texas is stricter.



TEXAS MENTAL HEALTH

- Court holding: a therapist is at a liability risk if he/she reveals medical information if a patient threatens someone else.
- Preempted?
 - HIPAA is more lenient
 - A therapist can disclose if a third party is at risk. 164.512(j)(1)



Texas: Remedies and Penalties

Under SB 11:

- Attorney General may institute an action:
 - for injunctive relief, and/or
 - civil penalties (not to exceed \$3,000 per violation)
 - If the court finds that the violations constitute a pattern or practice, it can
 - assess additional penalties (not to exceed \$250,000);
 - suspend or revoke the facility's license;
 - exclude the covered entity from state-funded health care programs.
- * Additionally, individuals may bring a cause of action under other law for violations under SB 11



TEXAS REMEDIES AND PENALTIES

- Texas adopts HIPAA
- But its penalties are greater than HIPAA
- In Texas, a violation of HIPAA has a greater punishment than elsewhere



Questions?