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PRIVACY
PROJECT**

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**The State of Health
Privacy**
SECOND EDITION

A SURVEY OF STATE HEALTH PRIVACY STATUTES

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The State of Health Privacy Second Edition

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Preface

Background

The Health Privacy Project first issued the *State of Health Privacy* in 1999. In so many ways, that seems a lifetime ago. Since then the U.S. Department of Health and Human Services has issued the first generally applicable federal rules governing the privacy of people's health information ("Federal Health Privacy Rules").

The Federal Health Privacy Rules do not cover everyone that holds health information. They only directly cover health care providers who transmit standard administrative and financial transactions (such as claims for health care) data electronically, most health plans, and health care clearinghouses, referred to collectively as "covered entities." The rules impose restrictions on how these covered entities can use information internally and share it with others. Under the rules, covered entities must develop policies and administrative and physical safeguards to protect the privacy of health information. They must also give patients notice of their privacy practices. The Federal Health Privacy Rules also grant patients some core rights including the right to see, copy, and amend their own health information. There are civil and criminal penalties for violations of the rules. Notably, the Federal Health Privacy Rules do not preempt (override) state health privacy laws that do not conflict with the federal standards or that are more stringent than the federal rules.

With the promulgation of the Federal Health Privacy Rules a survey of state laws may at first seem superfluous. But there are at least two very good reasons for updating this survey. First, state health privacy laws will continue to be the primary law governing a number of entities even after the implementation of the federal rules. The Federal Health Privacy Rules do not cover everyone that holds health information. For example, health care providers that do not accept any insurance and therefore do not engage in any standard transactions will not be covered by the Federal Health Privacy Rules. For these entities, state privacy laws remain the primary regulatory force. Second, even those organizations and persons that are covered by the Federal Health Privacy Rules will need to remain familiar with state law. As noted above, the Federal Health Privacy Rules do not preempt state health privacy laws that provide protection that is equal to or greater than the federal standards. Thus, many state laws will remain in effect for even these entities.

The Impact of the Federal Health Privacy Rules on States

The terrain of state health privacy law remains uneven. While the Federal Health Privacy Rules have established some uniform minimum standards, state health privacy laws remain diverse in the rights and protections that they afford. Because the Federal Health Privacy Rules do not cover all who hold health information and do not preempt many state laws, the level of protection afforded to health information continues to vary depending on who is holding the information and the state in which they are located.

Many stakeholders have voiced concern about the states' reactions to the implementation of the Federal Health Privacy Rules. Some in the health care industry have expressed concern that the states will rush to pass legislation that is more protective than the Federal Rules, creating even more lack of uniformity in regulation. In contrast, those who study the issue from the consumer perspective are concerned that the states may forsake their traditional role of the protectors of health information in light of the Federal Health Privacy Rules. Two states, Texas and Hawaii, have already taken this approach: They have both repealed major state health privacy laws that afforded more protection than the Federal Health Privacy Rules.

The ultimate impact of the Federal Health Privacy Rules on state health privacy laws remains to be seen.

Guide to the State Report

At the outset, it is important to say what this report is, and what it is not.

First and perhaps foremost, **we have not attempted to analyze which state laws are preempted by the Federal Health Privacy Rules in this report.** Although such an analysis is crucial to understanding the privacy protections that exist in any given state, we had neither the time nor the resources to undertake such a massive project.

The survey presents a summary of state *statutes*, not *laws*. This distinction is important: for the most part, we did not research or include regulations or common law, both of which ultimately must be understood in order to know the full range of protections at the state level.

The survey is also not exhaustive. There are many more statutes that address the confidentiality of health information. The summaries speak most directly to the use and disclosure of information gathered and shared in the context of providing and paying for health care.

Throughout, keep in mind that medical information is used in many different settings and for many different reasons. There are innumerable state laws that speak to the confidentiality of health information — such as laws on workers compensation, public health reporting, adoption records, birth and death records, motor vehicle requirements, minor’s rights, and so on — that are not generally addressed in our summaries.

Organization

Each state is divided into the following sections:

- **PATIENT ACCESS**
- **RESTRICTIONS ON DISCLOSURE**
- **PRIVILEGE**
- **CONDITION-SPECIFIC REQUIREMENTS**

Generally, the summaries of state statutes were revised in late 2001-2002. The revision dates are noted at the end of each state summary.

Each state summary also has a link to the state’s website in the lower-right hand corner where copies of the primary statutes may be found. If there is no site listed, it is because we were not able to find the state’s statutes on a publicly accessible, free website.

Because the legal climate has dramatically changed from the first publication of this survey, we have not only updated the statutes summarized but have also made a number of other changes to the material we included.

- Where possible, we have attempted to format the material so that it is more readily comparable to the standards of the Federal Health Privacy Rules.
- We have given a much more detailed summary of state health privacy statutes. This publication is nearly twice as long as the original.
- Rather than give a broad range of illustrative examples of laws that govern specific medical conditions, we have attempted to summarize statutes governing a few medical conditions consistently over the states.
- In an exception to the rule, we have summarized state regulations governing the privacy of health information held by insurers and others licensed by the state insurance regulators. In compliance with the Gramm-Leach-Bliley Act (also known as the Financial Services Modernization Act) nearly every state took action to protect the privacy of health information held by insurers. Some states passed new statutes, but most states issued new regulations. Since this was a nation-wide development, we have summarized both statutes and regulations.

We reiterate that although we have changed the format of this report to more closely reflect that of the Federal Health Privacy Rules, this report ***does not analyze which state laws are preempted by the Federal Rules.***

Terms and Definitions

It must be emphasized that every state defines terms differently. One state may define “health care provider” to include pharmacists, another may not. One state may define “provider of mental health services” to include social workers, another may not. Therefore, in the summaries there are many entities that are broken out — such as chiropractors, social workers, and optometrists. The categories are designed to reflect the state’s own statutes. Likewise, we have taken care to distinguish between health maintenance organizations (HMOs) and managed care organizations (MCOs). Again, wherever possible, we have used the state’s own terms to describe health care entities and medical conditions.

Also note that many statutes were drafted many years ago and use terms that are not necessarily favored today. The summaries reflect the terms used in the statutes, and so they may include phrases such as “feeble-minded” or “mentally retarded.” Use of the terms does not reflect any of the authors’ preference for the terms. Rather, we use the terms to facilitate ease of access to the state’s own statutes.

The report uses “he” and “she” interchangeably. This language does not mirror the language used in the statutes.

Disclaimer

This survey is intended as a general overview of statutory health privacy protections under state law. The authors have attempted to assure that the information presented in this survey is accurate as of the date of publication. However, this survey is only a summary in a rapidly changing field of law, and should not be used as a substitute for legal or other expert advice. The authors, Georgetown University, and the Institute for Health Care Research and Policy specifically disclaim any personal liability, loss or risk incurred as a consequence of the use and the application, either directly or indirectly, of any information presented herein.

ALABAMA

Alabama does not have a general, comprehensive statute granting patients the right to see and copy their own medical records. Neither does the state have a general statute restricting the disclosure of confidential medical information. The Alabama Code does, however, restrict disclosures by HMOs. Additionally, Alabama has some statutes that govern a patient's access to and the disclosure of information related to specific medical conditions, such as mental health and sexually transmitted diseases.

I. PATIENT ACCESS

There is no general statute granting a patient the right of access to his medical records. For information related to access to mental health records, see "Condition Specific Requirements" below.

II. RESTRICTIONS ON DISCLOSURE

A. HMOs

Alabama statutorily restricts the disclosure of health information by health maintenance organizations (HMOs), defined as any person that undertakes to provide or arrange for basic health care services through an organized system which combines the delivery and financing of health care to enrollees. [Ala. Code § 27-21A-1.] 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. [Ala. Code § 27-21A-25.]

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.*]

Remedies and Penalties

Fines and Penalties. 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. [Ala. Code § 27-21A-22.] 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 or impose an administrative penalty ranging from \$500 to a maximum of \$5,000. [Ala. Code §§ 27-21A-17 and 27-21A-22.] The commissioner also may issue an order directing the HMO to cease and desist from engaging in prohibited conduct. [Ala. Code § 27-21A-22.]

B. Utilization Review Agents

A utilization review agent must comply with all applicable laws to protect the confidentiality of individual medical records. [Ala. Code § 27-3A-5.]

Remedies and Penalties

Fines and Penalties. Violations of this provision may subject the utilization review agent to administrative remedies, including an order to cease and desist, and in the case of frequent violations, monetary fines. [Ala. Code § 27-3A-6.]

III. PRIVILEGES

Alabama statutorily grants communications between mental health care givers and their patients the same status as attorney-client communications. These statutory privileges allow a patient, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and the mental health care provider. [Ala. Code §§ 34-26-2 (psychologist/ psychiatrist-patient); 34-8A-21 (licensed counselors-patient); 15-23-42 (crime victim counselor-victim).] An HMO is entitled to claim any statutory privilege against a disclosure that the provider who furnished such information to the HMO could claim. [Ala. Code § 27-21A-25.] Alabama does not recognize a physician-patient privilege.

IV. CONDITION-SPECIFIC REQUIREMENTS**A. Cancer**

Alabama maintains a statewide cancer registry. All identifying information submitted to the registry is confidential and privileged and is not subject to public inspection. [Ala. Code §§ 22-13-33; 22-13-34; 36-12-40.] It may, however, be furnished to other cancer registries, federal cancer control agencies and health researchers. [Ala. Code § 22-13-34.]

B. Genetic Tests

Health benefit plans (including insurance issuers, self-insured plans, HMOs, preferred providers, etc.) may not use the results of a genetic test which may show the predisposition of a person for cancer to determine insurability or to otherwise discriminate against the person in rates or benefits based on the genetic test results. [Ala. Code § 27-53-2.] Neither may a health benefit plan require that a person take a genetic test to determine if the person has a predisposition for cancer as a condition of insurability. [*Id.*] “Genetic test” is defined as a pre-symptomatic laboratory test, which is generally accepted in the scientific and medical communities for the determination of the presence or absence of the genetic characteristics that cause or are associated with risk of a disease or disorder. [Ala. Code § 27-53-1.]

C. Mental Health

A consumer of mental health services in an inpatient, residential, or outpatient setting has a statutory right of access, upon request, to all information in his mental health and medical records. Access can be denied if a professional staff member determines that access would be detrimental to the consumer’s health. [Ala. Code § 22-56-4(b)(7).]

A mental health patient has the right of confidentiality of all information in his mental health, medical and financial records, but has no rights beyond those of any other person. [Ala. Code §§ 22-56-4(b)(6) and 22-56-10.]

D. Sexually Transmitted Diseases (STDs) and HIV/AIDS

Alabama has a fairly comprehensive statutory scheme, including mandatory reporting requirements, for identifying and preventing the spread of sexually transmitted diseases. Neither the mandatory reports, which contain identifying information, nor any other information or medical records concerning persons infected with STDs may be disclosed to the general public or admitted into evidence in any court without the written consent of the patient. [Ala. Code §§ 22-11A-14 and 22-11A-22.] With respect to HIV/AIDS, the law specifically provides that testing facilities must maintain confidentiality regarding test results. [Ala. Code. § 22-11A-54.] There are a number of exceptions to these prohibitions, most of which are designed to prevent the spread of disease. For example, physicians may disclose to emergency medical personnel, funeral home directors, other treating physicians, and even third parties where there is a foreseeable risk of transmission of the disease. [Ala. Code § 22-11A-38.]

Remedies and Penalties

Fines and Penalties. Criminal penalties may apply for prohibited disclosures. [Ala. Code §§ 22-11A-14; 22-1A-22; 22-11A-38.]

ALASKA

Alaska statutorily grants patients the right to see and copy their medical records that are maintained by health care providers. The state does not have a similar general statute prohibiting the disclosure of confidential medical information. Rather, there are some privacy protections addressing specific entities and medical conditions.

I. PATIENT ACCESS

A. Health Care Providers

A patient is entitled to inspect and copy any records developed or maintained by a health care provider or other person pertaining to the health care rendered to the patient. [Alaska Stat. §§ 18.23.005.] This provision applies to records maintained by hospitals, physicians, psychologists, dentists, dental hygienists, licensed nurse optometrists, dispensing opticians, licensed acupuncturists, chiropractors, pharmacists, physical therapists, occupational therapists, podiatrists, and their respective employees. [Alaska Stat. § 18.23.070 (defining “health care provider”).]

Assisted living home patients are also guaranteed the right of reasonable access to the facility’s files relating to that patient, subject to the constitutional right of privacy of other residents of the home. [Alaska Stat. § 47.33.300.]

II. RESTRICTIONS ON DISCLOSURE

A. HMOs

Alaska statutorily restricts the disclosure of health information by health maintenance organizations (HMOs), which are defined as any person that undertakes to provide or arrange for basic health care services to enrollees on a prepaid basis. [Alaska Stat. § 21.86.900.] 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. [Alaska Stat. § 21.86.280.]

There are limited exceptions to this general rule. Information may be disclosed without the individual’s consent 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;

- 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 an order directing an HMO to stop engaging in an act or practice that is in violation of this provision. [Alaska Stat. § 21.86.250.] If the director, after appropriate proceedings, determines that an HMO has substantially failed to comply with these provisions, he may suspend or revoke the HMO's certificate of authority or impose an administrative penalty ranging between \$1,000 and \$25,000 per violation. [Alaska Stat. §§ 21.86.190, 21.86.200 and 21.86.250.]

B. Managed Care Entities

Alaska statutorily restricts the disclosure of health information by managed care entities, which are defined as including the following: any insurer, hospital or medical service corporation, health maintenance organization, employer or employee health care organization, managed care contractor that operates a group managed care plan, or any other person who has a financial interest in health care services provided to an individual. [Alaska Stat. § 21.07.250 (defining "managed care entity").] Medicaid coverage is not considered to be "managed care" under these provisions. [*Id.*]

In general, medical information in the possession of a managed care entity regarding an applicant or a person who is or was covered by a managed care plan is confidential and is not subject to public disclosure. [Alaska Stat. § 21.07.040.] A managed care entity may not disclose medical information about an applicant or person covered by a managed care plan unless either:

- The individual whose identity is disclosed gives oral, electronic or written consent to the disclosure, or
- The person who is covered by the policy submits a written request for the disclosure. [Alaska Stat. § 21.07.040(b)(1) and (b)(4).]

There are a number of exceptions to the general authorization requirement. Managed care entities may disclose medical information without the individual's consent for the following:

- Payment: Obtaining reimbursement under health insurance. [Alaska Stat. § 21.07.040(b)(3).]
- As Required by Law. [Alaska Stat. § 21.07.040(b)(5).]
- Research: For research that either: 1) is subject to federal law and regulations protecting the rights and welfare of research participants (*i.e.*, the "Common Rule"), or 2) protects the confidentiality of the participants in the study through coding or encryption of identifying information. [Alaska Stat. § 21.07.040(b)(2).]
- Treatment: Between providers in order to provide health care services. [Alaska Stat. § 21.07.040(c).]

C. Pharmacists

Information maintained by a pharmacist in the patient's records or that is communicated to the patient as part of patient counseling is confidential and may be released only to: the patient or as the patient directs; a practitioner or pharmacist when, in the pharmacist's professional judgment, release is necessary to protect the patient's health and well-being; and other persons or governmental agencies authorized by law to receive confidential information. [Alaska Stat. § 08.80.315.]

D. Physicians, Nurse Practitioners, and Physician Assistants

There is no general statutory limitation on when and how physicians and other health care providers can disclose medical information to third parties.

Physicians, advanced nurse practitioners and physician assistants are expressly permitted to disclose a patient's medical or hospital records for the purpose of evaluating the performance of an emergency medical technician, a paramedic or a physician who provided emergency treatment to the patient. [Alaska Stat. § 18.08.087.] The disclosure is limited to the records that are considered necessary for evaluating the emergency treatment provided. [*Id.*] The emergency medical services provider who receives this information generally is prohibited from re-disclosing the information. [*Id.*]

E. State Government

Medical and related public health records are not open to public inspection under the state Freedom of Information Act. [Alaska Stat. § 40.25.120.]

III. PRIVILEGES

Alaska 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 a health care professional made for the purpose of diagnosis or treatment. This privilege extends to physicians, psychotherapists, psychologists, marital and family therapists, professional counselors and sexual assault/domestic violence counselors. [Alaska R. Evid. 504; Alaska Stat. § 09.25.400.] HMOs are entitled to claim any statutory privilege against disclosure that the provider of the information is entitled to claim. [Alaska Stat. § 21.86.280.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Alaska maintains a registry of birth defects. Health care providers and health care facilities must report identifying information about any infant treated or diagnosed with a birth defect (including name, date of birth, place of birth, sex, race, ethnicity, residence, date of diagnosis, and specific type of birth defect). [Alaska Admin. Code tit. 7, § 27.012] Data that is required to be reported regarding birth defects to the department of health is confidential, not subject to public inspection, and may not be

further disclosed to other persons except for clinical, epidemiological, or other public health research. [Alaska Stat. § 18.05.042.]

Remedies and Penalties

Fines and Penalties. Disclosure in violation of the registry provisions is a misdemeanor punishable by a fine not to exceed \$500 or up to one year imprisonment. [Alaska Stat. § 18.05.061.]

B. Cancer

Alaska maintains a cancer registry. Health care providers and facilities must report identifying information about any patient diagnosed or treated for cancer (including name, date of birth, sex, race, ethnicity, diagnosis, and treatment). [Alaska Admin. Code tit. 7, § 27.011] Cancer information that is required to be reported to the department of health is confidential, not subject to public inspection, and may not be further disclosed to other persons except for clinical, epidemiological, or other public health research. [Alaska Stat. § 18.05.042.]

Remedies and Penalties

Fines and Penalties. Disclosure in violation of the registry provisions is a misdemeanor punishable by a fine not to exceed \$500 or up to one year imprisonment. [Alaska Stat. § 18.05.061.]

C. Communicable Diseases, including HIV

Health care providers are required to report over 45 infectious diseases (including HIV) without patient authorization. [Alaska Admin. Code tit. 7, § 27.005 (2001).] In addition, public and private hospitals and laboratories that perform tests relating to human infection must report cases of 40 infectious diseases upon identification. [Alaska Admin. Code tit. 7, § 27.007 (2001).] The data regarding infectious diseases that is required to be reported to the department of health is confidential, not subject to public inspection, and may not be further disclosed to other persons except for clinical, epidemiological, or other public health research. [Alaska Stat. § 18.05.042.]

Remedies and Penalties

Fines and Penalties. Disclosure in violation of the registry provisions is a misdemeanor punishable by a fine not to exceed \$500 or up to one year imprisonment. [Alaska Stat. § 18.05.061.]

D. HIV/AIDS

See “Infectious Diseases” above.

E. Mental Health

1. Community Mental Health Services.

Entities that provide services under the Community Mental Health Services Act, such as screening, diagnosis, consultation and treatment of persons with mental disorders

must ensure each client's right to confidentiality. [Alaska Stat. §§ 47.30.520; 47.30.547(2); 47.30.590.]

2. Voluntary and Involuntary Commitment

Information and records obtained in the course of mental health screening investigation, evaluation, examination, or treatment related to a voluntary or involuntary commitment are confidential and are not public records. [Alaska Stat. § 47.30.845.] The patient may sign a waiver of confidentiality designating an individual to be provided with medical and psychological information. [Alaska Stat. § 47.30.825(b).]

There are a number of exceptions to these restrictions on disclosure. The information and records may be disclosed under regulations established by the Department of Health and Social Services to:

- The patient or to an individual to whom the patient has given written consent; [Alaska Stat. § 47.30.845(2).]
- A physician or a provider of health, mental health or social and welfare services involved in caring for, treating or rehabilitating the patient; [Alaska Stat. § 47.30.845(1).]
- A researcher if the anonymity of the patient is assured; [Alaska Stat. § 47.30.845(4).]
- An individual to whom disclosure is authorized by a court order; [Alaska Stat. § 47.30.845(3).]
- The Department of Corrections when a prisoner confined to the state prison is transferred to a state hospital; [Alaska Stat. § 47.30.845(5).]
- A law enforcement or governmental agency when necessary to secure the return of a patient who is on unauthorized absence from a facility where the patient was undergoing evaluation or treatment; [Alaska Stat. § 47.30.845(6).]
- A law enforcement agency when there is a substantial concern over imminent danger to the community by a presumed mentally ill person. [Alaska Stat. § 47.30.845(7).]
- The Department of Health and Social Services where services are paid through assistance provided under Alaska Stat. §§ 47.30.660 – 47.30.915. [Alaska Stat. § 47.30.845(8).]
- Others specified in the statute.

F. Psychologists, Professional Counselors and Therapists

A psychologist, licensed professional counselor, or marital and family therapist generally may not disclose confidential communications with a client made in the course of a professional relationship without the client's written consent. [Alaska Stat. §§ 08.29.200 (licensed professional counselors); 08.63.200 (marriage and family therapists); 08.86.200 (psychologist).]

Disclosure may be made without the client's consent in the following circumstances:

- Imminent threat: When the client communicates to a psychologist an immediate threat of serious physical harm to an identifiable victim. Judicial and administrative proceedings: In situations where the rules of evidence

- applicable to the psychotherapist-patient privilege allow the release of information;
- **Mandatory reporting:** To report incidents of child abuse or neglect or elderly abuse;
 - **Oversight:** To the board as part of a disciplinary or other proceeding; and
 - **Treatment:** In case consultations where the client is not identified.
- [Alaska Stat. §§ 08.29.200; 08.63.200; 08.86.200.]

ARIZONA

Arizona statutorily grants patients the right of access to their medical records in the possession of health care providers (including physicians, hospitals, pharmacists and others) and insurance entities. The state also restricts the disclosures of confidential medical information made by these entities. Additional privacy protections are addressed in statutes governing other specific entities or medical conditions.

I. PATIENT ACCESS

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

1. Scope

Arizona statutorily requires health care providers to provide patients access to their medical records. [Ariz. Rev. Stat. § 12-2293.] This directive applies to hospitals, pharmacists, health care services organizations, podiatrists, chiropractors, dentists, physicians, surgeons, naturopathic physicians, nurses, dispensing opticians, optometrists, osteopathic physicians and surgeons, physical therapists, psychologists, physician assistants, radiologists, homeopathic physicians, behavioral health professionals, occupational therapists, acupuncturists, accredited health care institutions and ambulance services. [Ariz. Rev. Stat. §§ 12-2291 (defining “health care provider” as any person licensed under title 32 who maintains medical records, any health care institution as defined in § 36-401, any ambulance service as defined in § 36-2201 and any health care service organization licensed under title 20. *See also* Ariz. Rev. Stat. title 32.)]

Access rights, under these provisions, may be exercised by a patient or by the patient’s health care decision maker. [Ariz. Rev. Stat. § 12-2293.] A “health care decision maker” is an individual who is authorized to make health care treatment decisions for the patient, including a parent or guardian of a minor. [Ariz. Rev. Stat. § 12-2291 (defining “health care decision maker”).]

The medical records covered by the statute include reports, notes and orders, test results, diagnoses, treatments, photographs, videotapes, X rays, billing records, psychological records maintained by a health care provider relating to the care or treatment of a patient. [Ariz. Rev. Stat. §§ 12-2291; 12-2281.] Psychologists’ raw test data and psychometric testing materials are exempt from the access provisions of the statute. [Ariz. Rev. Stat. § 12-2293.]

2. Requirements

Upon the written request of a patient, a provider must provide access to or provide copies of the medical records in his possession to the patient or a person designated by the patient. [Ariz. Rev. Stat. §§ 12-2293.] Access must also be provided upon the written request of the patient's health care decision maker or an individual that the decision maker designates unless the patient has specifically limited access. [Ariz. Rev. Stat. § 12-2293.] Records that are not in written form will be released only if the patient specifically requests and identifies in writing the type of record desired. [Ariz. Rev. Stat. § 12-2293(c).]

Copying fees. Generally, the health care provider can impose a reasonable charge for producing the records. [Ariz. Rev. Stat. § 12-2295.] Except as necessary for continuity of care, a health care provider or contractor may require the payment of any fees in advance. [*Id.*] No charge may be imposed, however, for medical records provided to another provider or a patient who requests the records for a demonstrated purpose of obtaining health care. [*Id.*]

Denial of Access. Health care providers may refuse to provide a patient access to his medical records if the attending physician or psychologist determines and notifies the health care provider, in possession of the record, that the patient's access to the patient's medical record is inadvisable because the patient could be harmed by the inclusion of treatment notes for a mental disorder. [Ariz. Rev. Stat. § 12-2293(a).] If a treating physician or psychologist determines that the patient may be harmed by access to his medical records, it must be noted in the patient's medical record. [*Id.*]

For a specific discussion of access to mental health records see Section IV below.

B. Insurance Entities, Including HMOs

1. Scope

The Arizona Insurance Information and Privacy Protection Act applies to insurance entities including fee for service insurers, HMOs, insurance agents and insurance support organizations. [Ariz. Rev. Stat. §§ 20-2101 (detailing entities and persons covered); 20-2102 (11) (defining "insurance institutions" as including health care centers).]

The Act covers "personal information," including individually identifiable "medical record information," which is gathered in connection with an insurance transaction. [Ariz. Rev. Stat. § 20-2102 (18) (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 or medical care institution, an individual, or the individual's spouse, parent or legal guardian. [Ariz. Rev. Stat. § 20-2102 (17) (defining "medical record information").] "Medical professional" is broadly defined as any person licensed or certified to provide health care services including physicians, chiropractors,

dentists, pharmacists and others. [Ariz. Rev. Stat. § 20-2102 (16) (defining “medical professional”).]

With respect to health insurance, the rights granted by the Act extend to Arizona 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. [Ariz. Rev. Stat. § 20-2101.]

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 the individual. [Ariz. Rev. Stat. § 20-2108(A)(1).] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Ariz. Rev. Stat. § 20-2108(a)(2).]

If the requested medical record information was provided to the insurance entity by a medical care institution or medical professional, the insurer has the option of releasing the requested information either directly to the requesting individual or to a medical professional designated by the individual. [Ariz. Rev. Stat. § 20-2108(C).] If the insurer elects to furnish the requested information to a medical professional, the insurer must notify the individual at the time of the disclosure that it has provided the information to the medical professional. [*Id.*]

Fees. The insurance entity can impose a reasonable fee to cover copying costs. [Ariz. Rev. Stat. § 2108(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. [Ariz. Rev. Stat. § 20-2108.]

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. [Ariz. Rev. Stat. §§ 20-2109; 20-2108.] Within 30 business days from the date of receipt of a written request, the insurance entity 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.*]

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. [Ariz. Rev. Stat.

§ 20-2118.] The court may award costs and reasonable attorney’s fees to the prevailing party. [*Id.*]

Fines and Penalties. If after a hearing, the director of insurance determines there has been a violation of these provisions, the director will issue an order requiring the insurance entity to cease and desist from the conduct constituting a violation. [Ariz. Rev. Stat. § 20-2116.] Violations of a cease and desist order may result in the imposition of a civil penalty of not more than \$10,000 for each violation. [Ariz. Rev. Stat. § 20-2117.] The penalty can escalate to \$50,000 where the director finds that violations have occurred with such frequency to constitute a business practice. [*Id.*] Where there has been a finding of a knowing violation, in addition to issuing a cease and desist order, the director may order payment of a civil penalty of up to \$500 for each violation, not to exceed \$10,000 in the aggregate for multiple violations. [*Id.*]

II. RESTRICTIONS ON DISCLOSURE

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

1. Scope

Arizona statutorily requires health care providers to maintain the confidentiality of medical records and the information contained in the records. [Ariz. Rev. Stat. § 12-2292.] These restrictions apply to hospitals, pharmacists, health care services organizations, podiatrists, chiropractors, dentists, physicians, surgeons, naturopathic physicians, nurses, dispensing opticians, optometrists, osteopathic physicians and surgeons, pharmacists, physical therapists, psychologists, physician assistants, radiologists, homeopathic physicians, behavioral health professionals, occupational therapists, acupuncturists, accredited health care institutions and ambulance services. [Ariz. Rev. Stat. § 12-2291(defining “health care provider” as any person licensed under title 32 who maintains medical records, any health care institution as defined in § 36-401, any ambulance service as defined in § 36-2201 and any health care service organization licensed under title 20. See also Ariz. Rev. Stat. title 32.)]

2. Requirements

a. Authorization Requirements and Exceptions

Generally, health care providers may not disclose a patient’s medical record without the patient’s written authorization, unless otherwise authorized by law. [Ariz. Rev. Stat. § 12-2292.] The statute specifically requires that in order for a third party payor (such as an insurer) to obtain medical record information, the payor must separately obtain the patient’s written authorization to disclose the medical record information to the payor and furnish a copy of that authorization to the provider. [Ariz. Rev. Stat. § 12-2294.]

Authorization Exceptions. There are a number of exceptions to the general requirement that providers obtain a patient’s written authorization to disclose medical record

information. First, health care providers must disclose medical record information without the patient's authorization as required by other law. [Ariz. Rev. Stat. § 12-2292(a).]

Furthermore, providers may disclose medical information without the individual's consent in the following circumstances:

- **Billing:** To the person or entity that furnishes a provider's billing, claims management or medical data processing.
- **Duplicating:** To a contractor for the purpose of duplicating the information. The contractor is prohibited from further disclosing the information.
- **Health care operations:**
 - Accreditation:** For accreditation of the facility.
 - Quality assessment:** For quality assurance, peer review or utilization review.
- **Legal Representation:** To a provider's attorney to obtain legal advice.
- **Patient is deceased:** To the patient's health care decision maker, personal representative or certain specified family members at the time of the patient's death.
- **Treatment:** To another provider for consultation for the purpose of diagnosis or treatment of the patient to the extent that the records pertain to the provided treatment and to ambulance attendants for the purpose of providing care to or transferring the patient. [Ariz. Rev. Stat. §§ 12-2292 (duplicating or disclosing medical records on behalf of a health care provider) and 12-2994.]

[Ariz. Rev. Stat. § 12-2294.]

b. Other Requirements

Medical records that are disclosed under this provision remain confidential and may not be further disclosed by the recipient without the written authorization of the patient, unless otherwise provided by law. [Ariz. Rev. Stat. § 12-2294.]

3. Remedies and Penalties

Right to Sue. A patient whose records have been improperly disclosed in violation of this provision has a right to bring a civil action to recover damages. [Ariz. Rev. Stat. § 12-2296.] A health care provider that acts in good faith is not liable for damages in any civil action for the disclosure of medical records or information that is made pursuant to law. [Ariz. Rev. Stat. § 12-2296.] The provider is presumed to have acted in good faith, but this presumption may be rebutted by clear and convincing evidence. [*Id.*]

Fines and Penalties. Additionally, a health care provider who willfully or intentionally reveals a confidential communication, except as required by law, may be subjected to disciplinary action from the appropriate licensing board. [See, e.g., Ariz. Rev. Stat. §§ 32-852(a)(1) (podiatrists); 32-1201(10) and 32-1263 (dentists); 32-1401 and 32-1451 (doctors of medicine); 32-2061 and 32-2081 (psychologists).]

B. Insurance Entities, Including HMOs

1. Scope

The Arizona Insurance Information and Privacy Protection Act applies to insurance entities including fee for service insurers, HMOs, insurance agents and insurance support organizations. [Ariz. Rev. Stat. §§ 20-2101 (detailing entities and persons covered); 20-2102 (11) (defining “insurance institutions” as including health care centers.)]

The Act covers “personal information,” including individually identifiable “medical record information,” which is gathered in connection with an insurance transaction. [Ariz. Rev. Stat. § 20-2102 (18) (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 or medical care institution, an individual, or the individual’s spouse, parent or legal guardian. [Ariz. Rev. Stat. § 20-2102 (17) (defining “medical record information”).] “Medical professional” is broadly defined as any person licensed or certified to provide health care services including physicians, chiropractors, dentists, pharmacists and others. [Ariz. Rev. Stat. § 20-2102 (16) (defining “medical professional”).]

With respect to health insurance, the rights granted by the Act extend to Arizona 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. [Ariz. Rev. Stat. § 20-2101.]

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. [Ariz. Rev. Stat. § 20-2106; 20-2113(1)(b).] 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. [Ariz. Rev. Stat. § 20-2113.] Authorizations submitted

by those *other* than insurance entities must be in writing, signed and dated. [Ariz. Rev. Stat. § 20-2106.] These authorizations are effective for thirty months. [*Id.*]

An insurance entity may only disclose information to another insurance entity pursuant to an authorization form if the form meets the detailed requirements of the statute. [*Id.*] See Authorizations for Obtaining Health Information from Others, above.

The Act specifically prohibits insurance entities from selling medical record information or disclosing this type of information for marketing purposes without the prior written consent of the subject of the information. [Ariz. Rev. Stat. § 20-2113(11) and (12).]

Authorization exceptions. There are a number of circumstances under which an insurance entity can disclose information *without* the individual's authorization including, but not limited to the following:

- **Business transfer or sale:** To the extent it is reasonably necessary, for the sale, transfer, merger or consolidation of insurance entities. [Ariz. Rev. Stat. § 20-2113(10).]
- **Government health plan:** To the proper government authority to determine coverage under a governmental health plan. [Ariz. Rev. Stat. § 20-2113(16).]
- **Insurance coverage:** To a provider to verify insurance coverage benefits. [Ariz. Rev. Stat. § 20-2113(4).]
- **Law enforcement and Judicial and Administrative Proceedings:** To an insurance entity or law enforcement agency in order to prevent or prosecute fraud, in response to a facially valid search warrant or subpoena or as otherwise required by law. [Ariz. Rev. Stat. §§ 20-2113(3); 20-2113(6) through (8).]
- **Notification of a health problem:** To the patient to notify him of a health problem of which he may not have been aware. [Ariz. Rev. Stat. § 20-2113(4).]
- **Payment:** To obtain payment of a health care claim. [Ariz. Rev. Stat. § 20-2113(2).]
- **Peer review:** To a peer review organization to review the service or conduct of a medical institution or professional. [Ariz. Rev. Stat. § 20-2113(15).]
- **Regulation:** To an insurance regulatory agency. [Ariz. Rev. Stat. § 20-2113(5).]
- **Research:** For research and educational purposes as long as the patient's identity is not revealed in any research report and materials identifying the individual are returned or destroyed as soon as they are no longer needed. [Ariz. Rev. Stat. § 20-2113(9).]

c. Notification Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Ariz. Rev. Stat. § 20-2104.] 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 and may recover actual damages sustained as a result of the disclosure. [Ariz. Rev. Stat. § 20-2118.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [Id.] The IIPPA expressly provides that the statutory remedy is the sole remedy or recovery available for violations of the statute. [Id.]

Fines and Penalties. If after a hearing, the director of insurance determines there has been a violation of these provisions, the director will issue an order requiring the insurance entity to cease and desist from the conduct constituting a violation. [Ariz. Rev. Stat. § 20-2116.] Violations of a cease and desist order may result in the imposition of a civil penalty of not more than \$10,000 for each violation. [Ariz. Rev. Stat. § 20-2117.] The penalty can escalate to \$50,000 where the director finds that violations have occurred with such frequency to constitute a business practice. [Id.] Where there has been a finding of a knowing violation, in addition to issuing a cease and desist order, the director may order payment of a civil penalty of up to \$500 for each violation, not to exceed \$10,000 in the aggregate for multiple violations. [Id.]

C. Utilization Review Agent

A utilization review agent must have written procedures for assuring that the patient information it obtains during the process of utilization review is maintained as confidential in accordance with applicable federal and state laws, is used solely for the purposes of utilization review, quality assurance, discharge planning and catastrophic case management and is shared only with agencies authorized by the patient in writing and on a form prescribed by the director to receive the information. [Ariz. Rev. Stat. § 20-2509.]

III. PRIVILEGES

Arizona 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 the professional for the purpose of diagnosis and treatment. [Ariz. Rev. Stat. §§ 12-2235 (physician or surgeon-patient); 13-4430 (crime victim counselor-victim); 32-2085 (psychologist-patient); 32-3283 (behavioral health professional-client).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer, Birth Defects and other Chronic Diseases

The Department of Health Services maintains a central statewide chronic disease surveillance system under which cancer, birth defects and other chronic diseases must be reported to the department. [Ariz. Rev. Stat. § 36-133.] The information may be used by the department for a variety of specified purposes, including establishing a data management system to perform various studies and promoting cancer registries.

[*Id.*] The department may authorize other persons to use the data collected by the system to study the sources and causes of these chronic diseases and to evaluate the cost, quality, efficacy and appropriateness of diagnostic, therapeutic, rehabilitative and preventative services and programs related to them. [*Id.*] Identifying information collected by the system may only be used as specified in this provision. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person who improperly uses or discloses data collected by the state chronic disease surveillance system is guilty of a misdemeanor that is punishable by up to a \$500 fine, imprisonment up to 30 days, or both. [Ariz. Rev. Stat. §§ 13-707 (specifying sentences for misdemeanors); 13-802 (specifying fines for misdemeanors); 36-133.]

B. Communicable Diseases, Including HIV

1. Scope

Arizona requires certain communicable diseases to be reported to the local board of health or the state department of health. Information regarding these reportable communicable diseases that is in the possession of a health services provider or a person who obtains the information pursuant to a written authorization of the patient is considered to be confidential and is protected under the public health statutes. [Ariz. Rev. Stat. §§ 36-661 (defining “communicable disease,” “confidential communicable disease,” and “release of confidential communicable disease related information”) and 36-664.]

The statutory restrictions on disclosure apply to any person who obtains confidential information related to these reportable communicable diseases in the course of providing a health service or pursuant to a written authorization for disclosure of this information (*i.e.*, a “release”). [Ariz. Rev. Stat. §§ 36-661 and 36-664.]

The rights afforded by statute may be exercised by a person who takes an HIV-related test or who has been diagnosed as having HIV infection, acquired immune deficiency syndrome, HIV-related illness or another communicable disease. [Ariz. Rev. Stat. §§ 36-661 (defining “protected person”).]

2. Requirements

a. Authorization Requirements and Exceptions

Generally, a person who obtains confidential communicable disease related information in the course of providing a health service or pursuant to a release of such information may not disclose or be compelled to disclose that information without the protected person’s written authorization, a “release.” [Ariz. Rev. Stat. §§ 36-664 and 36-661 (defining “release of confidential communicable disease related information”).]

A release for disclosure of confidential communicable disease related information must be: in writing, signed and dated by the protected person and must specify to whom disclosure is authorized, the purpose of the disclosure, and the time period during which the release is effective. [Ariz. Rev. Stat. § 36-664(E).] A general authorization for

the release of medical or other information is *not* an authorization for the release of confidential HIV information unless the authorization specifically indicates that it encompasses such information. [*Id.*]

Disclosures of confidential communicable disease related information may be made without authorization in a limited number of circumstances detailed below. [Ariz. Rev. Stat. § 36-664.]

- **Employees:** To an agent or employee of a health facility or health care provider if the agent or employee is authorized to access medical records, the health facility or health care provider itself is authorized to obtain the communicable disease related information and the agent or employee provides health care to the protected individual or maintains or processes medical records for billing or reimbursement.
- **Government Agencies:** To a government agency that is legally authorized to receive the information. The agency may only redisclose the confidential information only pursuant to the article governing communicable disease information or as otherwise permitted by law.
- **Health care operations:**
 - Quality assessment:** For the review of quality of medical care.
 - Utilization Review:** For the review of utilization or necessity of medical care.
 - Accreditation:** To an accreditation or oversight organization for the review of professional practices at a health facility.Disclosures for these health care operations may include only that information necessary for the authorized review and may not include information that directly identifies the protected person.
- **Health Officers:** To a federal, state, county or local health officer if disclosure is mandated by law.
- **Judicial and Administrative Proceedings:** Where the disclosure is ordered by a court or by an administrative body pursuant to specified requirements. The applicant for the order or search warrant must demonstrate that an imminent public health threat exists; there is a compelling need for the confidential information in a court or legal proceeding; or, there exists a clear and imminent danger to a person's life. [Ariz. Rev. Stat. § 36-665.] The court must make specific findings, and the order or search warrant must limit disclosure to that information which is necessary to fulfill the purpose for which the order is granted and to those persons whose need for the information is the basis for the order. [*Id.*] It must specifically prohibit redisclosure to any other persons. [*Id.*] There are also additional requirements. [*Id.*]
- **Research:** For purposes of research.

- **Transplant:** In relation to the procurement, processing, distributing or use of a human body or a human body part for use in medical education, research or therapy or for transplantation to another person.
- **Treatment:** Persons who obtain confidential information may provide the information to another health care provider or health facility if knowledge of the disease is necessary to provide appropriate care or treatment of a patient or a patient's child.

[Ariz. Rev. Stat. § 36-664(A).]

Individuals who receive confidential communicable disease related information under this provision generally may not further disclose the information. [Ariz. Rev. Stat. § 36-664.]

One of the major exceptions to this general prohibition against redisclosure is with respect to state and local health departments. State or local health departments may disclose confidential information without patient authorization regarding communicable diseases in the following circumstances:

- **Contact of the patient:** To a “contact” of the patient (*i.e.*, a spouse or sex partner of the protected person or a person otherwise exposed to a protected person with a communicable disease in a manner that poses an epidemiologically significant risk of transmission of that disease). However, the disclosure must be made without identifying the patient.
- **As authorized by law:** As specifically authorized or required by federal or state law.
- **Research:** For research purposes.

[Ariz. Rev. Stat. § 36-664(B).]

A court or administrative body may not order the state, county or local health department to release confidential HIV-related information in its possession. [Ariz. Rev. Stat. § 36-665.]

b. Other Requirements

A person making a disclosure pursuant to a release of confidential communicable disease related information must keep a record of all disclosures and make that record available to the protected person upon request. [*Id.*]

3. Remedies and Penalties

Right to Sue. A protected person has the right to maintain a civil action for equitable relief and damages against a person who violates these provisions. [Ariz. Rev. Stat. § 36-668.]

Fines and Penalties. The department of health services may impose a civil penalty not to exceed \$5,000 if a person discloses, compels another person to disclose or permits the disclosure of confidential communicable disease information in violation of these

provisions [Ariz. Rev. Stat. §§ 36-666(a)(2); 36-667.] Furthermore, a knowing disclosure in violation of these provisions constitutes a misdemeanor. [Ariz. Rev. Stat. § 36-666.] For purposes of determining whether a misdemeanor has been committed, good faith and absence of malice are to be presumed in relation to disclosures unless the presumption is overcome by a demonstration of clear and convincing evidence to the contrary. [Ariz. Rev. Stat. § 36-666(b).]

C. HIV

1. Authorization Requirements and Exceptions

Insurance entities are generally not permitted to disclose confidential HIV-related information unless authorized by the patient. [Ariz. Rev. Stat. § 20-448.01(C).] The authorization must be written, signed, dated and specify to whom disclosure is authorized and the reason for the disclosure. [Ariz. Rev. Stat. §§ 20-448.01(C); 20-448.01(E).] Medical exchanges between providers and insurers limit the insurance entity from disclosing test results revealing the presence of AIDS antibodies. The insurer may disclose only that the results of blood tests were abnormal, and the reports must be generally coded to include diseases other than HIV or AIDS. [*Id.*] Insurers must keep a record of all disclosures to government agencies authorized by law to receive the information, persons to which disclosure is ordered by a court or administrative bodies and other specified entities for a time period determined by the director of insurance. [Ariz. Rev. Stat. § 20-448.01(H).] Patients must be provided access to the list of disclosures upon request. [*Id.*] Persons or entities to whom confidential information is disclosed may not redisclose the information to another. [Ariz. Rev. Stat. § 20-448.01(F).]

Insurance entities are permitted to disclose HIV-related information without authorization per court order, administrative rule or as otherwise required by law. [Ariz. Rev. Stat. § 20-448.01(C).] HIV test results and responses to an insurance application may be released to a broad variety of persons involved in underwriting decisions if the disclosure is necessary to resolve claims. [Ariz. Rev. Stat. § 20-448.01(D).]

2. Remedies and Penalties

Right to Sue. A patient whose rights are violated under Ariz. Rev. Stat. §§ 20-448.01 has the right to file a civil action seeking equitable relief within two years from the date that the alleged violation is or should have been discovered. [Ariz. Rev. Stat. § 20-2118.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

D. Genetic Testing Information

Genetic testing and information derived from genetic testing are confidential and generally may not be released without the specific, written informed consent of the subject of the test (or that person's authorized representative). [Ariz. Rev. Stat. § 12-2802.] "Genetic testing" is defined as a test of a person's genes, genetic sequence, gene products or chromosomes for abnormalities or deficiencies, including carrier status,

that are linked to physical or mental disorders or impairments; indicate a susceptibility to any illness, disease or other disorder; or demonstrate genetic or chromosomal damage due to any environmental factor. [Ariz. Rev. Stat. 12-2801.] The term does not include blood, chemical and urine analyses that are widely accepted and used in clinical practice and that are not used to determine genetic traits. [*Id.*]

There are a number of exceptions under which information derived from genetic testing may be released without the test subject's authorization, including:

- To the person tested;
- With respect to persons who are subject to an Arizona cancer registry, to a third person if approved by a human subjects review committee or a human ethics committee;
- Under limited conditions, to authorized agents and employees of the health care provider;
- To a health care provider to conduct certain types of utilization review, peer review and quality assurance;
- To the legal representative of a health care provider that is in possession of the medical record in order to obtain legal advice; and
- Others specified in the statute.

[Ariz. Rev. Stat. 12-2802.]

Generally, the recipient of genetic test results under these provisions (other than the test subject) may not disclose the test results to any other person. [*Id.*]

Remedies and Penalties

Right to sue. A health care provider, its agents and employees that disclose information in violation of this article may be subject to civil liability. [See Ariz. Rev. Stat. § 12-2802.] Providers that act in good faith and comply with these provisions are not subject to civil liability. [*Id.*] The good faith of a provider that complies with the provisions is presumed, but may be rebutted by a preponderance of the evidence. [*Id.*]

E. Mental Health

A person undergoing evaluation or treatment pursuant to the statutory provisions for mental health services (including voluntary and involuntary commitment) has the right to examine the written treatment program and the medical record unless the attending physician determines that such an examination is contraindicated. [Ariz. Rev. Stat. § 36-507.] If the attending physician determines that such an examination is contraindicated, this determination must be noted in the patient's medical record. [*Id.*]

All information and records obtained in the course of evaluation, examination or treatment pursuant to the statutory provisions on mental health services (including voluntary and involuntary commitment) are confidential and are not public records. [Ariz. Rev. Stat. § 36-509.] This rule does not apply to information required in a hearing pursuant to the provisions on mental health services. [*Id.*] Information and records may be disclosed, pursuant to rules established by the department of health services to: physicians and providers of health, mental health or social and welfare

services involved in caring for, treating or rehabilitating the patient; individuals to whom the patient has given consent to have information disclosed; persons legally representing the patient; persons authorized by a court order; persons doing research or maintaining health statistics, provided that the department establishes rules for the conduct of such research as will ensure the anonymity of the patient; and specified others. [*Id.*]

Prior to disclosing information to family members, the treating professional must interview the patient and determine whether disclosure is in that person's best interest. [*Id.*] The treating agency must record the name of any person to whom any information is given. [*Id.*]

ARKANSAS

In conjunction with an anticipated or ongoing legal proceeding, Arkansas statutorily grants a patient the right of access to his medical records that are in the possession of a physician, hospital or other medical institution. The state does not have a general, comprehensive statute protecting confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

Health Care Providers

In contemplation of, preparation for, or use in any legal proceeding, a patient, upon written request, has a right of access to and a copy of his medical records. [Ark. Code Ann. § 16-46-106.] This right of access applies to medical records maintained by a doctor, hospital, ambulance provider, medical health care provider or other medical institution. [*Id.*]

The patient must pay the expense of the copies prior to their receipt. [*Id.*] The cost of each photocopy, excluding X rays, may not exceed one dollar (\$1.00) per page for the first five (5) pages and twenty-five cents (25¢) for each additional page. There is a minimum charge of five dollars (\$5.00). A hospital or an ambulance provider may add a reasonable retrieval fee for stored records. [*Id.*]

A provider may deny a patient access to his medical records upon a determination that disclosure of the information would be detrimental to the patient's health. [Ark. Code Ann. § 16-46-106(b).] In this circumstance, another doctor designated by the patient may review the files and his determination as to whether the records should be released is binding. [*Id.*]

Remedies and Penalties

Right to Sue. If after a reasonable request has been made, and a reasonable amount of time has expired, a patient is compelled to use the subpoena process to obtain access to or a copy of his own medical records, then the court issuing the subpoena must also grant the patient reasonable attorney's fees plus court costs. [Ark. Code Ann. § 16-46-106(c).]

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 that person or from any provider without the enrollee's or applicant's express consent. [Ark. Code Ann. § 23-76-129(a).] Disclosure without the enrollee/applicant's consent is allowed only:

- 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 or discovery of evidence
- In a litigation claim between the person and the health maintenance organization, where the data is pertinent. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person who willfully violates this provision is guilty of a misdemeanor, punishable by a fine not to exceed \$1,000, one year imprisonment, or both. [Ark. Code Ann. § 23-76-105.] Additionally, the commissioner of insurance may issue an order directing an HMO to cease and desist from engaging in any act in violation of this provision. [*Id.*]

B. Insurers

1. Scope

The Arkansas Insurance Department adopted a privacy regulation (Insurance Consumer Financial and Health Privacy) 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 pursuant to the Arkansas Insurance Code) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [Ark. Reg. 054 00 074 § 4(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. [Ark. Reg. 054 00 074 § 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 of health care. [Ark. Reg. 054 00 074 § 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. [Ark. Reg. 054 00 074 § 4(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. [Ark. Reg. 054 00 074 § 20.]

2. Requirements

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Ark. Reg. 054 00 074 § 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. [Ark. Reg. 054 00 074 § 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; and actuarial, scientific, medical or public policy research. [Ark. Reg. 054 00 074 § 17.]

This regulation does not supercede existing Arkansas law related to medical records, health or insurance information privacy. [Ark. Reg. 054 00 074 § 21.]

3. Remedies and Penalties

Fines and Penalties. A violation of this regulation may be deemed to be an unfair method of competition or an unfair or deceptive act and practice in Arkansas, in violation of the Trade Practices Act (Ark. Code Ann. § 23-66-201, et seq.) [Ark. Reg. 054 00 074 § 24.]

C. Social Workers

Licensed certified social workers, master social workers, social workers and their employees are prohibited from disclosing any information they may have acquired from persons consulting them in their professional capacity without the consent of the individual (or their legal guardian or other specified representative). Disclosure without the patient's consent is permitted where the individual is contemplating a serious crime, where there is a reasonable belief that a child has been the victim of a crime, and when the patient has brought charges against the social worker. [Ark. Code Ann. § 17-103-107.]

D. State Government

In General. Medical records in the possession of the state or local governments are not considered to be public records under the state Freedom of Information Act, and are not open to public inspection unless the person they concern requests that they be made public. [Ark. Code Ann. §§ 14-14-110; 25-19-105(b).]

State Health Data Clearing House. Data collected as part of the State Health Data Clearing House program for studying the patterns and trends in the use and costs of

health care services may not be released in a format that identifies or could be used to identify any individual patient, and may not be subject to discovery pursuant to the Arkansas Rules of Civil Procedure or the Freedom of Information Act. [Ark. Code Ann. §§ 20-7-304; 20-7-305.]

Remedies and Penalties

Fines and Penalties. A person or entity that improperly discloses identifying information collected or maintained as part of the Health Data Clearing House is guilty of a misdemeanor, punishable by a \$100-\$500 fine, up to one-month imprisonment, or both. [Ark. Code Ann. § 20-3-307(a)(1).] Every day that a violation continues constitutes an individual offense. [*Id.*] Persons or entities that knowingly disclose confidential records may be fined up to \$500 per violation. [*Id.*]

State Hospital. All records, reports and other information which have been assembled or procured by the State Hospital and related divisions for the purpose of mental research and study and which contain patient identifying information may be used only for the purpose of research and study for which it was assembled or procured. [Ark. Code Ann. § 20-46-104.] It is unlawful for any person to disclose patient-identifying information to any person who is not engaged in the specified research. [*Id.*] This provision does not prevent a court from subpoenaing the medical records of any patient. [Ark. Code Ann. § 20-46-104(e).]

Remedies and Penalties

Fines and Penalties. Any person who discloses information in violation of this provision is guilty of a misdemeanor, punishable by up to six months imprisonment, a \$500 fine, or both. [Ark. Code Ann. § 20-46-104(d).]

E. Utilization Review Agents

Private review agents may not disclose confidential medical information obtained during utilization review activities without the following procedures for protecting the patient's confidentiality, except to the entity on whose behalf they are acting. [Ark. Code Ann. § 20-9-913.]

III. PRIVILEGES

Arkansas recognizes a number of health care provider-patient privileges, which allow a patient, in a legal proceeding, to refuse to disclose and to prevent others from disclosing confidential communications made with providers for the purpose of diagnosis and treatment. [Ark. Rules of Evidence 503 (physician and psychotherapist-patient); Ark. Code Ann. §§ 17-27-311 (marriage and family therapist-client); 17-406-107 (social worker-client); 17-97-105 (psychologist-patient).¹] HMOs are entitled to claim any statutory privileges against disclosure, which the provider of the information is entitled to claim. [Ark. Code Ann. § 23-76-129(b).]

¹ Although the term "privilege" often refers to a right an individual may exercise to prohibit disclosures in legal or quasi-legal proceedings, the term as it is used in portions of the Arkansas Code prohibits disclosure in a broader range of circumstances.

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer

Arkansas maintains a cancer registry. Identifying information may not be divulged except for purposes of such research as approved by the Arkansas Board of Health. [Ark. Code Ann. § 20-15-203.]

B. Genetic Test Results and Information

1. Employers

Under the Genetic Information in the Workplace Act, an employer may not seek to obtain, use or require genetic testing or information of an employee or prospective employee for the purposes of distinguishing between, discriminating against or restricting any right or benefit otherwise due or available to that employee. [Ark. Code Ann. § 11-5-403.]

For purposes of the Genetic Information in the Workplace Act, a “genetic test” is a laboratory test of an individual’s DNA, RNA or chromosomes 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. [Ark. Code Ann. §§ 11-5-402 (defining “genetic test”).] “Genetic information” is the information derived from the results of a genetic test. It does *not* include: family history; routine physical examination results; chemical, blood or urine analysis results; results of a test for drug use or the presence of HIV; or the results of any other test that is commonly accepted in clinical practice at the time it is ordered by the insurer. [*Id.* (defining “genetic information”).]

Remedies and Penalties

Fines and Penalties. An employer who violates this act is guilty of a misdemeanor, punishable by a maximum fine of \$25,000, by up to 1 year of imprisonment, or both. [Ark. Code Ann. § 11-5-404.]

2. Insurers

Under the Genetic Nondiscrimination in Insurance Act, an insurer (as defined by statute) generally may not require or request, directly or indirectly, any individual or the individual’s family member to obtain a genetic test and condition the provision of the insurance policy upon a requirement that the individual take the test for purposes of determining coverage eligibility, establishing premiums, and limiting, renewing or terminating coverage. [Ark. Code Ann. § 23-66-320.]

Remedies and Penalties

Right to sue. An individual who is damaged by an insurer's violation of this act has a right to file a civil action for equitable relief. [Ark. Code Ann. § 23-66-320.]

For purposes of the Genetic Nondiscrimination in Insurance Act, "genetic test" is a laboratory test of an individual's DNA, RNA or chromosomes 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. [Ark. Code Ann. § 23-66-320.] The term also includes the testing of enzyme activity for genetic disease.

3. Researchers

Under the "Genetic Research Studies Nondisclosure Act," the results of genetic research approved by an institutional review board may not be disclosed to employers or health insurers without the patient's informed written consent. [Ark. Code Ann. §§ 20-35-102; 20-35-103.] Informed written consent may not be included in a section of the consent for treatment, admission to a hospital or clinic, or permission for an autopsy. [Ark. Code Ann. § 20-35-103.] Genetic information may be disclosed per subpoena or discovery in civil suits in cases where the genetic information is the basis of the suit, or for educational purposes if the subjects are not identifiable from the results of the research studies. [*Id.*]

C. HIV/AIDS

Physicians, laboratories, and others must report patients who have AIDS or who test positive for HIV to the Department of Health. [Ark. Code Ann. § 20-15-906.] These reports must be treated as confidential by every person, body, or committee whose duty it is to obtain or otherwise handle such information. [Ark. Code Ann. § 20-15-904.] A prosecutor, however, may subpoena this information to enforce the reporting requirements. [*Id.*] Any information acquired pursuant to the subpoena may not be disclosed except to the courts for the purpose of enforcement. [*Id.*]

CALIFORNIA

California statutorily grants patients the right of access to their health care information from health care providers, HMOs, insurers, and state agencies. The State also has extensive rules governing the use and disclosure of health care information by these entities.

I. PATIENT ACCESS

A. Health Care Providers

Under the Patient Access to Medical Records Act [Cal. Health & Safety Code § 123110 et seq.], a patient has the right to see and copy information maintained by health care providers that relates to the patient's health condition. Patients also have the right to submit amendments to their health record, if they believe it is inaccurate or incomplete.

1. Scope

The Patient Access to Medical Records Act applies to patient records maintained by health care providers, a term which is defined as including the following licensed health care professionals: physicians; surgeons; podiatrists; dentists; optometrists; psychologists; marriage, family and child counselors; and clinical social workers. The definition of "health care providers" also encompasses licensed health facilities (such as hospitals), clinics and home health agencies. [Cal. Health & Safety Code § 123105 (defining "health care provider").] This Act does not apply to records maintained by a state agency, which are governed by the Information Practices Act (discussed below under "State and Local Government"). [See Cal. Health & Safety Code § 123410.]

The "patient records" covered by this right include records in any form maintained by, or in custody or control of, a health care provider relating to the health history, diagnosis, condition and treatment (or proposed treatment) of a patient. [Cal Health & Safety Code § 123105.] The term includes only records pertaining to the patient requesting the records. [*Id.*] Medical information transmitted during the delivery of health care via telemedicine is covered. [Cal. Health & Safety Code § 123149.5.] Although X-rays and tracings from other medical procedures fall within the definition of "patient records," they are subject to separate rules. [See Cal. Health & Safety Code § 123110(c) and (h).]

The persons entitled to access under these provisions include: adult patients, minor patients who are authorized by law to consent to medical treatment, and patient representatives, *i.e.*, parents or guardians of a minor who is a patient, the guardian or conservator of the person who is an adult patient, or the beneficiary or personal representative of a deceased person. [Cal. Health & Safety Code §§ 1233105(e)

(defining “patient’s representative”) and 123110(a).] Access rights to the records of minors are more fully discussed below.

2. Requirements

a. Requirements for Requesting and Providing Access

In order to review his records, a patient must submit a written request to the health care provider. Within five working days of receiving such a request, a health care provider must allow the patient to inspect his records. [Cal. Health & Safety Code § 123110(a).] A patient also has a right to a copy of his record. [Cal. Health & Safety Code § 123110(b).] To obtain a copy, the patient must submit a written request specifying the records to be copied. A provider must furnish the patient a copy of his record within 15 days of receiving the written request. [*Id.*]

Fees. The provider may require the payment of reasonable clerical costs incurred in locating and making the records available. [*Id.*] In addition, the provider may require the advance payment of copying fees, which are statutorily set at 25¢ per page for a regular photocopy and 50¢ for microfilm copies. [Cal. Health & Safety Code § 123110(a) and (b).] There are separate rules on fees that may be charged for requests for portions of records that are needed to support an appeal regarding eligibility for a public benefit program. [Cal. Health & Safety Code § 123110(d) and (e).]

The patient may be required to provide reasonable verification of identity prior to inspection or copying of records. [Cal. Health & Safety Code § 123110(g).] Providers may not condition access to patient records on the payment of unpaid bills for health services. [Cal. Health & Safety Code § 123110(j).]

At his option, a health care provider may prepare a summary of a patient’s record (or a relevant portion requested) rather than providing access to the entire record. [Cal. Health & Safety Code § 123130.] Generally, the summary must be available to the patient within ten working days of a request. [*Id.*] If additional time is needed, the patient must be notified, and the summary must be provided no more than 30 days from the request. [*Id.*] The general contents of the summary are specified in the statute. [*Id.*] The provider may charge a reasonable fee based on actual time and cost for the summary, and is encouraged to keep charges low. [*Id.*]

Denial of Access. Mental health records may be withheld if the provider determines there is a “substantial risk of significant adverse or detrimental consequences to the patient.” [Cal. Health & Safety Code § 123115(b).] The provider must inform the patient of this denial and include a written record in the patient’s file of the reasons for denial. [*Id.*] Additionally, if a patient is denied access, the provider must inform the patient of his right to designate another licensed provider (of a type specified in the statute) to review the records. That designee is prohibited from turning the records over to the patient. [*Id.*]

The records of minors are accorded distinct treatment. Generally, a parent of a minor has the right of access to the minor’s patient records. [Cal. Health & Safety Code § 123110(a).] However, where the minor is authorized by law to consent to treatment,

the right of access with respect to those records rests with the minor, *not* the parent. [Cal. Health & Safety Code §§ 123110(a) and 123115.] Additionally, a health care provider can deny a parent or the other representative of a minor access to the minor's records where the provider determines that access would have a detrimental effect either on the provider's professional relationship with the minor or on the minor's physical safety or psychological well-being. [Cal. Health & Safety Code § 123115.]

Right to Amend. Adult patients who have reviewed their medical records have the right to provide to the health care provider a written addendum, with respect to any item or statement in the record that the patient believes to be incomplete or incorrect. [Cal. Health & Safety Code § 123111.] The addendum can be no longer than 250 words per alleged incomplete or inaccurate item. [*Id.*] The provider must attach the addendum to the patient's record and must include the addendum whenever a disclosure of the allegedly incomplete or incorrect portion of the patient's record is made to any third party. [*Id.*]

b. Other Requirements

When certain providers – licensed health care clinics, health care facilities, adult day care facilities and home health agencies – cease operations, they have an obligation to preserve records for a minimum of seven years following discharge of the patient. [Cal. Health & Safety Code § 123145.]

3. Remedies and Penalties

Right to Sue. Any patient or representative who is denied access to patient records in violation of the Patient Access to Medical Records Act may bring an action against the health care provider to obtain the records, and may recover costs and reasonable attorney's fees. [Cal. Health & Safety Code § 123120.] In the event a patient is unable to obtain access to his records because a health care clinic, health care facility, adult day care facility or home health agency ceased operations and failed to preserve patient records for the requisite amount of time, the patient may sue the persons who were the principle officers of the respective corporation or partnership at the time of dissolution. [Cal. Health & Safety Code § 123145.]

Fines and Penalties. A willful violation of the access and amendment provisions may subject the health care provider to disciplinary action by the appropriate state licensing agency, board, or commission, including suspension or revocation of license or certificate. [Cal. Health & Safety Code § 123110(i).] A willful violation will constitute unprofessional conduct or be considered to be an infraction depending on the type of provider involved. [*Id.*]

B. HMOs

Under the Knox-Keene Health Care Plan Act (Knox-Keene Act), health maintenance organizations (HMOs) must have policies under which patients may obtain access to and copies of their medical information that was created by and is in the possession of the plan. [Cal. Health & Safety Code § 1364.5.]

C. Insurers

California has adopted a modified version of the National Association of Insurance Commissioners' model Insurance Information and Privacy Protection Act (IIPPA), which governs an individual's right of access to his personal information held by insurers.

1. Scope

The IIPPA applies to life, disability (including health), property and casualty insurers, insurance agents, insurance associations, and others who are engaged in the business of insurance, as well as insurance support organizations. [Cal. Ins. Code §§ 791.13 and 791.02 (defining "insurance institution" and "insurance support organization").] (This summary will refer to these covered entities collectively as "insurance entities.") The IIPPA does *not* cover HMOs [Cal Ins. Code § 791.02(K).]

This Act covers "personal information" including "medical record information," that is gathered in connection with an insurance transaction. [Cal. Ins. Code §§ 791.08(a) and 791.01 (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 (including a pharmacist) or medical care institution, from the individual, or from the individual's spouse, parent, or legal guardian. [Cal. Ins. Code § 791.02 (defining "medical record information" and "medical professional").] It does not grant access to information that relates to or was collected in reasonable anticipation of a claim or civil or criminal proceeding concerning the individual. [Cal. Ins. Code § 791.08(f).]

The persons entitled to access under the Act include natural persons (as opposed to businesses or corporations) who are past or present applicants, claimants, policyowners, named or principal insureds and certificate holders. [Cal. Ins. Code §§ 791.02 (defining "individual") and 791.08.]

2. Requirements

In order to review or receive a copy of his personal insurance information, an individual should submit a written request, along with proper identification, to the insurance entity. [Cal. Ins. Code § 791.08(a).] Within 30 days, the insurance entity must, among other things, permit the individual to see and copy recorded personal information pertaining to him in person or receive such copies by mail, whichever the individual prefers. If the information is stored in coded form, the individual must be given an accurate translation in plain language. [*Id.*]

Additionally, the covered entity must provide an accounting of those who have received disclosure of such personal information within two years of the request. [*Id.*]

Fees. The insurance entity may charge a reasonable fee to cover copying costs, unless the information is being provided to explain an adverse underwriting decision. [Cal. Ins. Code §§ 791.08(d) and 791.10.]

Medical record information that the insurance entity obtained from a medical professional or medical care institution, may, at the option of the individual, be

supplied either directly to the individual or to a medical professional designated by the individual. The designated medical professional must be licensed to provide medical care with respect to the condition to which the information relates. [Cal. Ins. Code § 791.08(c).]

Mental health record information may be supplied directly to the individual only with the approval of the treating mental health professional. [Cal. Ins. Code § 791.08(c).]

Right to Amend. Individuals have the right to request the insurance entity to correct, amend or delete their personal information. [Cal. Ins. Code § 791.09(a).] Within 30 business days from the receipt of such a request, the insurance entity must either correct, amend or delete the information at issue or notify the individual of their refusal to take such action. [*Id.*] The notice must also include the reasons for the refusal and a statement advising the individual of their rights. [*Id.*]

If the insurance entity takes the requested action, it must notify the individual and furnish the correction, amendment or deletion to any person specifically designated by the individual and to insurance support organizations that meet specified criteria. [Cal. Ins. Code § 791.09(b).]

When the individual disagrees with a refusal to correct, amend or delete, he has the right to file a concise statement of his position, which must be furnished to anyone reviewing the disputed information. [Cal. Ins. Code § 791.09(c).] Additionally, the statement must be furnished to other specified persons who may have already received the disputed information. [*Id.*]

3. Remedies and Penalties

Right to Sue. An individual may bring a suit for equitable relief against any insurance institution, agent or insurance-support organization that fails to comply with the access and correction provisions of the IIPPA. [Cal. Ins. Code § 791.20.] Although monetary damages are not available in such suits, the court may award the cost of the action and reasonable attorney's fees to the prevailing party. [Cal. Ins. Code § 791.20.]

Fines and Penalties. The insurance commissioner may hold hearings to determine if an insurance entity has violated the IIPPA and may issue a cease and desist order to prevent further violations. [Cal. Ins. Code §§ 791.14; 791.15; 791.16.] Should the covered insurance entity fail to comply with the cease and desist order, the commissioner may, after a hearing, impose a monetary fine which generally may not exceed \$10,000 for each violation. [Cal. Ins. Code § 791.19.] If the violations are found to constitute a general business practice, the penalty escalates to a maximum of \$50,000. [*Id.*] Alternatively, the commissioner can suspend or revoke an insurance institution's or agent's license if the entity knew or should have known it was violating the IIPPA. [*Id.*]

D. State Government

The Information Practices Act (IPA or "the Act") governs the collection, use and disclosure of personal information – including medical information – held by State agencies. Essentially, it is the state equivalent of the Federal Privacy Act.

1. Scope

The IPA applies to state agencies, offices, officers, departments, divisions, bureaus, boards, and commissions. [Cal. Civ. Code § 1798.3 (defining “agency”).] It does not apply to the State Compensation Insurance Fund. Neither does the IPA apply to city or county agencies. [Cal. Civ. Code §§ 1789.3 and 1798.14 and Cal. Govt. Code § 6252 (defining “local agency”).]

The Act covers “personal information” which is any information that is maintained by an agency that identifies or describes an individual including, but not limited to, name, address, social security number, physical description and medical history. [Cal. Civ. Code § 1798.3 (defining “personal information”).] Generally, in order to be subject to the access provisions of the Act, the information must be maintained by reference to an “identifying particular,” such as the individual’s name, photograph, or a number or symbol assigned to the individual. [Cal. Civ. Code § 1798.34.]

The individuals entitled to access under these provisions include only the natural person who is the subject of an agency record. [Cal. Civ. Code §§ 1798.32, 1798.44 and 1798.3 (defining “individual”).]

2. Requirements

Within 30 days of receiving a request and proper identification, an agency must permit an individual to inspect his personal information. [Cal. Civ. Code § 1798.34(a).] If the information is geographically dispersed or is contained in inactive files, the agency has 60 days to comply with the request. [*Id.*] In certain circumstances, the agency may require more identifying information than the individual’s name. [Cal. Civ. Code § 1798.34(d).]

In addition to his personal information, an individual has the right of access to an accounting of certain specified disclosures made to third parties. [Cal. Civ. Code §§ 1798.34 and 1798.25.]

Upon request, an individual is entitled to a copy of his personal information within 15 days of the inspection. [Cal. Civ. Code § 1798.34(b).]

Copying fees. The agency may charge a copying fee, not to exceed 10¢ per page (unless the agency fee for copying is set by another statute). [Cal. Civ. Code § 1798.33.]

Denial of access. An agency may decline to grant access to records pertaining to a physical or psychological condition if the agency determines that disclosure would be detrimental to the individual. [Cal. Civ. Code § 1798.40(f).] In this event, the individual has the right to designate a licensed medical practitioner or psychologist to examine the records. [*Id.*]

Right to amend. Individuals have the right to request that the agency amend or correct their personal record. [Cal. Civ. Code § 1798.35.] Within 30 days of the receipt for such a request, the agency must either take the requested action or notify the individual of their refusal to do so and the reason for the refusal. [*Id.*]

If the individual disagrees with the refusal, he has the right to request a review of the decision by the head of the agency (or a designated official). [*Id.*] Generally, the agency has 30 days after receiving such a request to make a final determination. [Cal. Civ. Code § 1798.36.]

If the agency still declines to amend or correct after review, the individual then has the right to file a statement of his reasons for disagreement. [Cal. Civ. Code § 1798.36.] The agency must note the portion of the record under dispute and make a copy of the individual's statement available to any one to whom the information has been or is disclosed. [Cal. Civ. Code § 1798.37.]

3. Remedies and Penalties

Right to Sue. An individual has the right to sue an agency that : (1) refuses to comply with his request to inspect his personal information; or (2) fails to comply with other provisions of the IPA in such a way as to have an adverse impact on the individual. [Cal. Civ. Code § 1798.45.] In an action brought for failure to allow inspection, the court may determine the matter de novo, and may order the production of the records improperly withheld. [Cal. Civ. Code § 1798.46.] In a suit brought for failure to comply with other provisions of the IPA (*e.g.*, failure to provide a correction to a third party) the agency may be liable for actual damages sustained by the individual, including damages for mental suffering. [Cal. Civ. Code § 1798.48.] In either type of action, if the individual prevails, he is entitled to reasonable attorney's fees and other litigation costs. [Cal. Civ. Code §§ 1798.46 and 1798.48.]

Fines and Penalties. The intentional violation of any provision of the IPA by an officer or employee of an agency constitutes a cause for discipline, including termination of employment. [Cal. Civ. Code § 1798.55.]

II. RESTRICTIONS ON USE AND DISCLOSURE

A. Employers

The use and disclosure of medical information by employers is governed by portions of the Confidentiality of Medical Information Act (CMIA). [Cal. Civ. Code § 56 et seq.]

1. Scope

The Confidentiality of Medical Information Act governs the use and disclosure of medical information by a variety of different entities including employers, who are covered by a separate chapter of the Act. [Cal. Civ. Code § 56.20 et seq.] The term "employer" is not defined in the statute.

In general, the CMIA protects "medical information," *i.e.*, individually identifiable information, in electronic or physical form in the possession of or derived from a provider of health care or a health care service plan regarding a patient's medical history, mental or physical condition, or treatment which the employer possesses and which pertains to one of its employees. [Cal. Civ. Code §§ 56.05 (defining "medical information") and 56.02(c).] Many types of medical information, such as mental

health, alcohol or drug abuse and industrial accidents, are not covered by the CMIA, but are governed by other specific statutes. [Cal. Civ. Code § 56.30.]

With respect to employers, the Act covers medical information which the employer possesses “pertaining to its employees.” [Cal. Civ. Code § 56.20.] The scope of whose information is protected by the Act is somewhat ambiguous because the CMIA does not define the term “employee.”

2. Requirements

a. Authorization Requirements and Exceptions

Generally, an employer may not use or disclose the medical information of its employees without the patient’s written authorization. [Cal. Civ. Code § 56.20(c).] Neither may the employer knowingly permit its employees or agents to engage in these activities. [*Id.*] Furthermore, if an employer agrees in writing or maintains a written policy that restricts the use or disclosure of certain medical information, the employer must obtain an authorization for such uses or disclosures even if it otherwise would be allowed by the CMIA. [Cal. Civ. Code § 56.20(d).] The content and format of an authorization for an employer to disclose medical information is specified in the statute. [Cal. Civ. Code § 56.21.] In order for the authorization to be valid, it must (among other things): be signed by the patient or an authorized representative; meet size requirements; be separate from other language on the same page; identify the party authorized to receive the information; and state the expiration date of the authorization. [Cal. Civ. Code § 56.21.] Upon demand, the patient has the right to receive a copy of the authorization. [Cal. Civ. Code § 56.22.]

A patient who is a minor has the power to sign an authorization for the release of medical information related to health services to which the minor has lawfully consented. [Cal. Civ. Code § 56.21 (c)(1).]

A patient has the right to restrict the use and type of medical information to be disclosed pursuant to his authorization. Such limitations must be included in the authorization form. [Cal. Civ. Code § 56.21(d).] The employer has the obligation to communicate any limitations in the authorization to the recipient of the medical information. [Cal. Civ. Code § 56.23.]

The individual has the right to revoke or modify the authorization, and such change is effective only after the provider actually receives written notice. [Cal. Civ. Code § 56.24.]

The recipient of medical information from an employer pursuant to an authorization may not redisclose the information unless a new authorization is obtained or such a disclosure is specifically required or permitted by law. [Cal. Civ. Code § 56.245.] The CMIA provides that “[n]o” employee shall be discriminated against in terms or conditions of employment due to that employee’s refusal to sign an authorization.” [Cal. Civ. Code § 56.20(b).] However, this provision does not prohibit an employer from “taking such action as is necessary in the absence of medical information due to an employee’s refusal to sign an authorization.” [*Id.*] Under these provisions, an employer may reject a job applicant who refuses to authorize disclosure of the results of an

employment-related drug test. *Loder v. City of Glendale*, 14 Cal. 4th 846, 927 P.2d 1200, 59 Cal. Rptr.2d 696 (1997).

Exceptions to authorization requirement. There are a few exceptions to the authorization requirement including:

- **Health plan administration purposes:** An employer may disclose an employee's medical information without patient authorization for purposes of administering and maintaining employee benefit plans, for workers' compensation and for determining eligibility for leave from work for medical reasons; and to health care professionals where the patient is unable to authorize the disclosure. [Cal. Civ. Code § 56.20.]
- **Judicial or administrative process:** An employer may disclose medical information without the employee's authorization if the disclosure is compelled by judicial or administrative process or by any other specific provision of law. [Cal. Civ. Code § 56.2(c)(1).] Additionally, employee authorization is not required for an employer to disclose medical information in a lawsuit, arbitration or other proceeding to which the employer and employee are parties and the employee has placed in issue his or her health. [Cal. Civ. Code § 56.20(c)(2).] In this circumstance, the employer may disclose only medical information that is relevant to that proceeding. [*Id.*]
- **Treatment:** If an employee or his representative is unable to authorize disclosure, an employer may share medical information to a health care provider or facility to aid the diagnosis or treatment of the patient/employee. [Cal. Civ. Code § 56.20(c)(4).]

b. Other Requirements

An employer who receives medical information must establish appropriate procedures to ensure the confidentiality of that information. Such procedures may include training and establishing security systems restricting access to files containing medical information. [Cal. Civ. Code § 56.20(a).]

3. Remedies and Penalties

Right to Sue. A patient may bring a suit against anyone, including an employer, who has negligently released confidential information in violation of the CMIA for nominal damages of \$1,000 and/or actual damages sustained. [Cal. Civ. Code § 56.36(b).] Additionally, a patient whose medical information has been used or disclosed by an employer in violation of the CMIA and who has suffered economic loss or personal injury has the right to file a civil suit against the alleged violator and may recover compensatory damages, a maximum of \$3,000 in punitive damages, attorneys' fees (\$1,000 maximum) and litigation costs. [Cal. Civ. Code § 56.35.]

Fines and Penalties. Any violation of the CMIA that results in economic loss or personal injury to a patient is punishable as a misdemeanor. [Cal. Civ. Code § 56.36(a).] Additionally, the CMIA provides for the imposition of either administrative fines or civil penalties (but not both) for violations of the Act. [Cal. Civ. Code § 56.36.] The fines and penalties range from a maximum of \$2,500 for the negligent disclosure

of medical information to a maximum of \$250,000 for improperly obtaining or using health information for financial gain. [*Id.*]

B. Health Care Providers and HMOs

The Confidentiality of Medical Information Act (CMIA) governs the disclosure of medical information by providers of health care (such as doctors and hospitals), health care plans (HMOs) and contractors. [Cal. Civ. Code § 56 et seq.]

1. Scope

The CMIA applies to health care service plans and such providers as: physicians, nurses, pharmacists, counselors, acupuncturists and other licensed professionals, as well as licensed clinics and other health care facilities. [Cal. Civ. Code §§ 56.05(d) (defining “health care plans”); 56.05(h) (defining “provider of health care”).]

Corporations that maintain medical information in order to make the information available to a patient or to a provider at the patient’s request are considered to be providers solely for the purpose of the CMIA. [Cal. Civ. Code § 56.06.] This provision would appear to cover some Internet sites that maintain medical information online. The statute also encompasses contractors such as medical groups or pharmaceutical benefits managers that are not technically health care service plans or providers of health care. [Cal. Civ. Code §§ 56.05(c) (defining “contractor”) and 56.10.]

The CMIA protects individually identifiable information, in electronic or physical form in the possession of or derived from a provider of health care or a health care service plan regarding a patient’s medical history, mental or physical condition, or treatment. [Cal. Civ. Code § 56.05 (defining “medical information”).] However, many types of medical information, such as mental health, alcohol or drug abuse, patient discharge data, and industrial accidents, are not covered by the CMIA, but are governed by other specific statutes. [Cal. Civ. Code § 56.30.]

The patients who have rights under the CMIA include any living or deceased natural person who received health care services from a provider of health care and to whom the medical information pertains. [Cal. Civ. Code §§ 56.05(g) (defining “patient”); 56.10.]

2. Requirements

a. Authorization requirements and exceptions

In general, the CMIA prohibits providers of health care, health care plans, and contractors from disclosing medical information regarding a patient or enrollee without first obtaining the authorization of the individual, except as specifically provided by statute. [Cal. Civ. Code § 56.10.] The statute also prohibits these entities from selling, intentionally sharing or otherwise using medical information for any purpose not necessary to provide health care services to the patient, unless authorized by the patient or specifically permitted by the CMIA. [Cal. Civ. Code § 56.10(d).]

The content and format of a patient’s authorization is specified in the statute. In order for a patient’s authorization to be valid, it must (among other things): be signed by the patient or an authorized representative; meet size requirements; be separate from

information, and state the expiration date of the authorization. [Cal. Civ. Code § 56.11.] Upon demand, the patient has the right to receive a copy of the authorization. [Cal. Civ. Code § 12.]

A patient who is a minor has the power to sign an authorization for the release of medical information related to health services to which the minor has lawfully consented. [Cal. Civ. Code § 56.11(c)(1).]

A patient has the right to restrict the use and type of medical information to be disclosed pursuant to his authorization. Such limitations must be included in the authorization form. [Cal. Civ. Code § 56.11(d).] The providers of health care, health care plans and contractors have the obligation to communicate any limitations in the authorization to the recipient of the medical information. [Cal. Civ. Code § 56.14.] The individual has the right to revoke or modify the authorization, and such change is effective only after the provider actually receives written notice. [Cal. Civ. Code § 56.15.]

The provision of health care generally may not be conditioned upon the requirement that a patient sign an authorization permitting the disclosure of medical information that otherwise may not be disclosed under the CMIA or other law. [Cal. Civ. Code § 56.37.]

Generally, recipients of medical information pursuant to a patient's authorization are prohibited from redisclosing the medical information unless they obtain a new authorization or would otherwise be allowed to disclose the information under the CMIA. [Cal. Civ. Code § 56.13.]

Authorization Exceptions. There are many exceptions to the authorization requirement. Some of the major exceptions are:

- **Directory information:** Upon an inquiry concerning a specific patient, a provider may, at its discretion, release certain information, such as the patient's name, address, age, sex, general reason for treatment, general nature of the injury or condition and general condition without the patient's authorization. [Cal. Civ. Code § 56.16.]
- **Disease management:** Medical information may be disclosed without patient consent for purposes of chronic disease management programs provided such services and care are authorized by a treating physician. [Cal. Civ. Code § 56.10(c)(17).]
- **Employment-related health care services:** Providers and plans who create medical information as a result of employment-related health care services paid for by the employer, at times may disclose limited medical information to that employer without the patient's authorization. [Cal. Civ. Code § 56.10(c)(8).] First, disclosure can be made of information relevant to a lawsuit, grievance or other employment-related claim in which the employee has placed in issue his or her health. [*Id.*] Additionally, health information may be disclosed to an employer to the extent it describes functional limitations of the employee that

may entitle the employee to leave work for medical reasons or limit the patient's fitness to perform his present employment, but no statement of medical cause may be listed. [*Id.*]

- **Health care operations:** Medical information may be disclosed without patient authorization to peer review committees and other entities specified in the CMIA for purposes of: reviewing the competence or qualifications of professionals; or reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges. [Cal. Civ. Code § 56.10(c)(4).] This provision has been interpreted as allowing a health care provider to disclose medical information to an insurer without the patient's authorization when a provider is at risk of medical malpractice exposure. *Heller v. Norcal Mutual Insurance Co.*, 8 Cal. 4th 30, 876 P.2d. 999, 32 Cal. Rptr.2d 200 (1994).
- **Judicial and administrative proceedings:** Health Care providers, health care service plans and contractors *must* disclose medical information if compelled by: a court, pursuant to an order of the court; by an administrative agency for purposes of adjudication pursuant to its authority; to a party pursuant to subpoena or other authorized discover device; when lawfully required by law and; other means specified in the statute. [Cal. Civ. Code § 56.10(b).]
- **Law enforcement agencies:** Generally, health care providers, health care plans and contractors may disclose medical information without patient authorization to law enforcement agencies as part of a fraud investigation (involving the record-holder). Otherwise, such a disclosure requires the consent of the patient, a lawfully issued search warrant or an order of a court of competent jurisdiction. [Cal. Civ. Code § 56.10(b)(6); Cal. Penal Code §§ 1524 and 1543.] Special procedures must be followed in securing the records of a physician or psychoanalyst where the health care provider is not the target of the investigation. [Cal. Penal Code § 1524.] Court orders mandating disclosure to law enforcement agencies may be issued only upon a showing of good cause, the elements of which are set forth in the statute. [Cal. Penal Code § 1543.]
- **Payment:** A patient's authorization is generally not required for the disclosure of medical information for payment purposes. The statute allows such disclosures to insurers, employers or any one responsible for paying for health care services rendered to the patient. Disclosure is limited to that information necessary to allow responsibility for payment to be determined and for payment to be made. [Cal. Civ. Code § 56.10(c)(2).] Additionally, the CMIA permits disclosures to those who perform billing, claims management, and other administrative services for health care providers and health care plans. [Cal. Civ. Code § 56.10(c)(3).] The entities that perform these services may not redisclose medical information unless they obtain patient authorization or unless otherwise permitted by the CMIA. [*Id.*]
- **Research:** Medical information may be disclosed without patient authorization to public agencies, clinical investigators, health care research organizations, and accredited public or private nonprofit educational or health care institutions for "bona fide research purposes." [Cal. Civ. Code § 56.10(c)(7).]

There is no requirement that the research be subject to an Institutional Review Board (IRB) or equivalent. [*Id.*]

- **Treatment:** Medical information may be disclosed without the patient's authorization to providers of health care, health care service plans, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient. [Cal. Civ. Code § 56.10(c)(1).]

Many of the entities who receive medical information pursuant to the section 56.10(c) exceptions (*i.e., without* patient authorization), are prohibited from redisclosing that medical information unless they obtain an authorization from the patient, or are otherwise authorized by law. [Cal. Civ. Code §§ 56.10(c) and 56.13.]

b. Other Requirements

Medical records must be created, maintained, stored and disposed of in a manner that preserves the confidentiality of those records. [Cal. Civil Code § 56.101.]

Licensed health care clinics, health care facilities, adult day care facilities and home health agencies that utilize electronic record-keeping systems only must ensure the safety and integrity of those records at least to the extent of hard copy records. [Cal. Health and Safety Code § 123149.] These providers must store patient records by employing an offsite backup storage system, an image mechanism that is able to copy signature documents, and a mechanism to ensure that once a record is input, it is unalterable. [*Id.*] Additionally, any of these listed providers that chooses to utilize an electronic record-keeping system must develop and implement policies and procedures to include safeguards for: prevention against unauthorized access to electronically stored patient records; authentication by electronic signature keys; and systems maintenance. [*Id.*]

3. Remedies and Penalties

Right to Sue. A patient may bring a suit against a healthcare provider, a health care service plan, contractor or anyone else who has negligently released confidential information in violation of the CMIA for nominal damages of \$1,000 and/or actual damages sustained. [Cal. Civ. Code § 56.36(b).] In addition to any other remedies available at law, a patient whose medical information has been used or disclosed in violation of Section 56.10 and who has suffered economic loss or personal injury has the right to file a civil suit against the alleged violator and may recover compensatory damages, a maximum of \$3,000 in punitive damages, attorneys' fees (\$1,000 maximum) and litigation costs. [Cal. Civ. Code § 56.35.]

Fines and Penalties. Any violation of the CMIA that results in economic loss or personal injury to a patient is punishable as a misdemeanor. [Cal. Civ. Code § 56.36(a).] Additionally, the CMIA provides for the imposition of either administrative fines or civil penalties (but not both) for violations of the Act. [Cal. Civ. Code § 56.36.] The fines and penalties range from a maximum of \$2,500 for the negligent disclosure of medical information to a maximum of \$250,000 for improperly obtaining or using health information for financial gain. [*Id.*] A health care service plan (generally, an HMO) also may have its license suspended or revoked for violations of the CMIA. [Cal. Health and Safety Code § 1386(b)(15).]

C. Insurers

California has adopted a modified version of the National Association of Insurance Commissioners' model Insurance Information and Privacy Protection Act (IIPPA), which governs an individual's right of access to his personal information held by insurers.

1. Scope

The IIPPA applies to life, disability (including health), property and casualty insurers, insurance agents, insurance associations, and others who are engaged in the business of insurance, as well as insurance support organizations. [Cal. Ins. Code §§ 791.13 and 791.02 (defining "insurance institution" and "insurance support organization").] (This summary will refer to these covered entities collectively as "insurance entities.") The IIPPA does *not* cover HMOs. [Cal. Ins. Code § 791.02(k).]

This Act covers "personal information" including "medical record information," that is gathered in connection with an insurance transaction. [Cal. Ins. Code §§ 791.08(a) and 791.02 (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 (including a pharmacist) or medical care institution, from the individual, or from the individual's spouse, parent, or legal guardian. [Cal. Ins. Code § 791.02 (defining "medical record information" and "medical professional").] It does not apply to information that relates to or was collected in reasonable anticipation of a claim or civil or criminal proceeding concerning the individual. [Cal. Ins. Code § 791.08(f).]

The persons with rights under this Act include natural persons (as opposed to businesses or corporations) who are past or present applicants, claimants, policyowners, named or principal insureds and certificate holders. [Cal. Ins. Code §§ 791.02 (defining "individual") and 791.08.]

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. [Cal. Ins. Code § 791.06.] 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, identify who is authorized to receive the information and specify the purposes for which the information is collected. [*Id.*] 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

Generally, an insurance institution, agent, or insurance-support organization (referred to herein as “covered insurance entities”) may not disclose an individual’s medical information obtained in connection with an insurance transaction without the individual’s written authorization. [Cal. Civ. Code §§ 791.13; 791.02(s) (defining personal information as including medical record information); and 791.02(q) (broadly defining medical record information). Authorizations submitted by those other than insurance entities must be in writing, signed and dated. These authorizations are effective for one year. [Cal. Civ. Code § 791.13.]

An insurance entity may not disclose personal information to another insurance entity pursuant to an authorization form unless that form meets the detailed requirements of the statute. [Cal. Ins. Code § 791.06.] See Authorizations for Obtaining Health Information from Others, above.

Authorization Exceptions. There are a number of exceptions to the authorization requirement. Some of the major exceptions are listed below:

- **Law enforcement and judicial and administrative proceedings:** Patient authorization is not required for a covered insurance entity to provide medical information in response to a facially valid administrative or judicial order, including a search warrant or subpoena. [Cal. Ins. Code § 791.13(h).]
- **Marketing purposes:** A covered insurance entity may disclose medical information for marketing purposes only if the individual has been given an opportunity to opt out of such disclosures and has not chosen to do so. [Cal. Ins. Code § 791.13(k).] There is no opt out requirement for disclosures to affiliates for the marketing of insurance products. [Cal. Ins. Code § 791.13(l).]
- **Payment:** A covered insurance entity may disclose medical information without patient authorization to a medical professional or facility in order to verify insurance coverage or benefits. [Cal. Ins. Code § 791.13(d).] Additionally, a covered insurance entity may disclose medical information to a self-insurer, such as an employer, in connection with an insurance transaction involving the individual. [Cal. Ins. Code § 791.13(c).] Furthermore, disclosure to a certificate holder or policyholder for the purpose of providing information regarding the status of an insurance transaction does not require the authorization of the patient. [Cal. Ins. Code 791.13(q).]
- **Research:** The IIPPA allows covered insurance entities to disclose medical information for the purpose of conducting actuarial or research studies, provided: (1) no individual may be identified in any resulting report; (2) materials allowing the individual to be identified are returned or destroyed as soon as they are no longer needed, and; (3) the organization agrees not to disclose the information unless the disclosure would otherwise be permitted by this section if made by a covered insurance entity. [Cal. Ins. Code § 791.13(i).]

- **Treatment:** A covered insurance entity may disclose medical information to a medical facility or medical professional for the purpose of informing an individual of a medical problem of which the individual may not be aware. [Cal. Ins. Code § 791.13(d).]

c. Notice Requirements

An insurance institution or agent must provide to all applicants and policyholders written notice of its information practices. [Cal. Ins. Code § 791.04.] The notice must include, among other things: the types of information that may be collected; circumstances under which the disclosures may be made without prior authorization; and a statement that an individual has the right of access to medical information and a right to correct that information. [*Id.*]

3. Remedies and Penalties

Right to Sue. An individual whose medical information is improperly disclosed by an insurance institution, agent or insurance-support agency may bring a civil suit against the insurance entity. [Cal. Ins. Code § 791.20.] The individual may recover only actual damages sustained as a result of the disclosure plus costs and attorney’s fees. [*Id.*]

Fines and Penalties. The insurance commissioner may hold hearings to determine if a covered insurance entity has violated the disclosure provisions and may issue a cease and desist order to prevent further violations. [Cal. Ins. Code §§ 791.14; 791.15; 791.16.] Should the covered insurance entity fail to comply with the cease and desist order, the commissioner may, after a hearing, impose a monetary fine which generally may not exceed \$10,000 for each violation. [Cal. Ins. Code § 791.19.] If the violations are found to constitute a general business practice, the penalty escalates to a maximum of \$50,000. [*Id.*] Alternatively, the commissioner can suspend or revoke an insurance institution’s or agent’s license if the entity knew or should have know it was violating IIPPA. [*Id.*]

D. State Government

The California Public Records Act and the Information Practices Act of 1977 (IPA) govern how state and local agencies may use and disclose personal information, including medical information. [Cal. Civ. Code §§ 1798; 1798.3 (defining “personal information”).]

1. Public Records Act

The Public Records Act generally applies to both state and local agencies. [Cal. Gov’t. Code §§ 6252 (defining “public agencies” and “local agencies” and “public records” and 6253.) It governs public access to “public records” which are defined as including any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. [Cal. Gov’t. Code § 6252.] If the disclosure of medical or similar files would constitute an unwarranted invasion of personal privacy, these records are exempt from disclosure requests under the Public Records Act. [Cal. Gov’t. Code § 6254; [Cal. Civ. Code § 1798.24(g).]

2. Information Practices Act

a. Scope

The IPA applies to state agencies, offices, officers, departments, divisions, bureaus, boards, and commissions. [Cal. Civ. Code § 1798.3 (defining “agency”).] It does not apply to the State Compensation Insurance Fund. Neither does the IPA apply to city or county agencies. [Cal. Civ. Code §§ 1798.3 and 1798.14 and Cal. Gov’t. Code § 6252 (defining “local agency”).]

The IPA covers “personal information” which is any information that is maintained by an agency that identifies or describes an individual including, but not limited to, name, address, social security number, physical description and medical history. [Cal. Civ. Code § 1798.3 (defining “personal information”).]

b. Restrictions on Disclosure

Under the IPA, agencies are generally prohibited from disclosing medical information unless the individual has provided a written voluntary consent. [Cal. Civ. Code § 1798.24.] Such a consent is only valid for 30 days or for the time period agreed to by the individual in the consent. [*Id.*]

Exceptions to Consent Requirement. There are a number of exceptions to the requirement that disclosure be made only with the consent of the individual who is the subject of the personal information. some of the major exceptions include:

- **Agency operations:** Disclosure of a state agency’s records may be made without individual consent to employees, attorneys, or volunteers of that agency to the extent the disclosure is relevant and necessary in the ordinary course of the performance of official duties and is related to the purpose for which the information was acquired. [Cal. Civ. Code § 1798.24(d).]
- **Judicial and administrative proceedings:** A state agency may disclose an individual’s medical information to any person pursuant to a subpoena, court order, or other compulsory legal process. [Cal. Civ. Code § 1798.24(k).] The agency is generally required to make a reasonable attempt to notify the individual prior to disclosure. [*Id.*]
- **Law enforcement:** A state agency may disclose medical information without the individual’s consent to any person pursuant to a search warrant. [Cal. Civ. Code § 1798.24(l).]
- **Research:** Individual consent is not required for a state agency to disclose medical information to a nonprofit educational institution conducting research. The request for information for research purposes must state the need for identifying information, provide procedures for protecting the information’s confidentiality and assure that the information will not be further disclosed in individually identifiable form. [Cal. Civ. Code § 1798.24(t).]

c. Notice Requirements

State agencies must provide individuals with a notice of information practices, which, among other things, must include: the principal purpose for which the information is collected; any known or foreseeable disclosures to other governmental agencies required by law; and a statement about the individual's right of access to records. [Cal. Civ. Code § 1798.17.]

III. PRIVILEGES

California recognizes a privilege with respect to patients and their physicians, psychotherapists, psychologists, social workers, nurses, sexual assault counselors, or domestic abuse counselors. This privilege allows a patient, in a legal proceeding to refuse to disclose and to prevent others from disclosing, a confidential communication (as defined in Cal. Evid. Code § 992). [Cal. Evid. Code §§ 990 through 1037.7.]

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

The Department of Health Services maintains a birth defects monitoring program for the purpose of conducting studies on the causes of birth defects, stillbirths, and miscarriages and to determine and evaluate preventive measures. [Cal. Health & Safety Code § 103825 et seq.] All identifying information collected by the monitoring program is confidential and may be used only for the public health purposes for which it has been collected. [Cal. Health & Safety Code §§ 103825 and 103850.] Access to the information is limited to authorized program staff and to persons (who meet qualifications developed by the Department) with a valid scientific interest who are and who agree, in writing, to maintain confidentiality. [*Id.*]

Disclosures made under this provision must be limited to the amount of information necessary for the stated purpose of the requested disclosure, and may be made only upon written agreement that the information will be kept confidential, used for the approved purpose, and not be further disclosed. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any person who, in violation of a written agreement to maintain confidentiality, improperly discloses or uses information provided by the monitoring program may be denied further access to any confidential information maintained by the Department. Additionally, a civil penalty of \$500 may be imposed. This penalty is not exclusive and does not restrict any other penalty provided by law for the benefit of the Department or any person. [Cal. Health & Safety Code §103850.]

B. Cancer

California maintains a statewide system for collecting information for the purpose of identifying cancer hazards to the public health and potential remedies. [Cal. Health & Safety Code § 103875 et seq.] All identifying information collected by the monitoring program is confidential and may be used only for specified purposes, including determining the source of malignancies and evaluating measures designed to

eliminate, alleviate or ameliorate their effect. [Cal. Health & Safety Code § 103885(g).] Confidential information may be shared with other states' cancer registries, federal cancer control agencies, local health officers, or health researchers for the purposes of determining the sources of cancer and evaluating prevention and treatment measures. [*Id.*] Before confidential information can be disclosed to any of these groups or persons, the requester must agree in writing to maintain the confidentiality of the information. Researchers must also obtain approval from their institutional review board and provide documentation that demonstrates that they have established procedures to maintain the confidentiality of the information.

Disclosures made under this provision must be limited to the amount of information necessary for the stated purpose of the requested disclosure, be used only for the approved purpose, and not be further disclosed. [*Id.*]

A record must be maintained of all persons who are given access to this information and the purpose for which the information is to be used. [*Id.*]

Confidential information collected through the cancer registries may not be available for subpoena, and may not be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative or other proceeding and is not admissible evidence in any such proceeding. [*Id.*]

C. Genetic Information and Test Results

There are a number of statutory provisions governing the manner in which HMOs and health insurers may obtain, use, and share genetic information and the results of genetic tests.

1. HMOs, Multiple Employer Welfare Arrangements (MEWAs) and Self-insured Welfare Benefit Plans

Health care service plans (HMOs), MEWAs and self-insured welfare benefit plans may not disclose the results of a test for a genetic characteristic which are contained in an applicant or enrollee's medical records to any third party, except pursuant to written authorization. [Cal. Civ. Code § 56.17; Cal. Ins. Code §§ 742.407 and 10123.35.] The requirements for the authorization form are specified in the statute. [Cal. Civ. Code § 56.11; Cal Ins. Code §§ 742.407 and 10123.35.]

Remedies and Penalties

Right to Sue. A test subject whose genetic information is disclosed in violation of any of these provisions has the right to bring a civil action and may be awarded actual damages including damages for economic, bodily or emotional harm. [Cal. Civ. Code § 56.17(e); Cal. Ins. Code §§ 742.407 and 10123.35.]

Fines and Penalties. A person who improperly discloses the results of a genetic test may be assessed a civil penalty ranging from a maximum of \$1,000 for negligent disclosure to a maximum of \$10,000 for disclosures that result in economic, bodily or emotional harm to the test subject. [Cal. Civ. Code § 56.17(e); Cal. Ins. Code §§ 742.407 and 10123.35.]

2. Life & Disability Insurers

Life and disability insurers may require individuals to take a genetic characteristic test for the purpose of determining insurability where the policy is contingent on review or testing for other diseases and medical conditions. [Cal. Ins. Code § 10146.] There are detailed restrictions on how the insurer may use the information. [Cal. Ins. Code § 10148.] The results of a test for genetic characteristics performed at the request of a life or disability insurer that identify the subject of the test may not be disclosed to third parties without the written authorization of the test subject. [Cal. Ins. Code § 10149.1.]

Remedies and Penalties

Right to Sue. A person whose genetic test results have been disclosed in violation of this section has a right to sue the person who improperly disclosed his information and to recover actual damages, including economic, bodily and emotional harm. [Cal. Ins. Code § 10149.1.]

Fines and Penalties. A willful disclosure of genetic test results in violation of the statute can result in civil penalties ranging from \$1,000 - \$5,000, which is to be paid to the test subject. [*Id.*] A willful or negligent improper disclosure of genetic test results that causes economic, bodily or emotional harm to the test subject is a misdemeanor, punishable by up to one year in prison, a fine of up to \$10,000 or both. [*Id.*]

D. HIV/AIDS

California has enacted a number of HIV/AIDS specific confidentiality laws, covering testing, reporting, partner notification, and discovery in court proceedings. The results of an HIV/AIDS test may not be disclosed in a form that identifies an individual without obtaining patient consent for each disclosure, except in limited circumstances. For instance, a physician or local health officer may disclose HIV test results to the sex or needle-sharing partner of a patient without consent, but only after the patient refused or was unable to make the notification. Specifically, an individual's health care provider may not disclose to another provider or health plan without written authorization, unless to a provider for the direct purposes of diagnosis, care, or treatment of the individual. [Cal. Health & Safety Code §§ 120975 to 21020.]

Remedies and Penalties

Right to Sue. A person whose HIV test results have been disclosed in violation of the statute has the right to bring a civil action and may be awarded actual damages including damages for economic, bodily or emotional harm. [Cal. Health & Safety Code § 120980.]

Fines and Penalties. A person who improperly discloses the results of an HIV test may be assessed a civil penalty ranging from a maximum of \$1,000 for negligent disclosure to \$10,000 for a disclosure that results in economic, bodily or emotional harm to the test subject. Any person who negligently discloses the results of an HIV test shall be fined up to \$1,000, which must be paid to the subject of the HIV test. [Cal. Health & Safety Code § 120980.]

E. Mental Health

The Lanterman-Petris-Short Act imposes specific restrictions on information obtained or generated by mental health services provided in an institutional setting or pursuant to a community mental health treatment program. [Cal. Welf. & Inst. Code §§ 5328 and 5540.] This information is generally considered to be confidential and only may be released in accordance with the restrictions listed in the statute. [Cal. Welf. & Inst. Code § 5328.] For instance, a mental health facility must obtain the affirmative consent of the patient before information can be disclosed for treatment purposes to someone outside of the mental health facility who does not have the medical or psychological responsibility for the patient's care. [Id.] Information can be shared with researchers only for research approved by an institutional review board. Additionally, the researcher must sign an oath of confidentiality. [Id.] There are a number of other disclosures that are permitted without patient authorization. [Id.]

Remedies and Penalties

Right to Sue. A person may bring an action against an individual who has released confidential information concerning him in violation of the Act. [Cal. Welf. & Inst. Code § 5330.] For willful and knowing violations the maximum amount of damages is the greater of \$10,000 or three times the amount of actual damages, if any, sustained. [Id.] For negligent disclosures, the patient may recover \$1,000 (regardless of whether he has suffered any actual damages) plus the amount of any actual damages. [Id.] A patient also has the right to bring an action to enjoin the release of confidential information in violation of the Act. [Id.] In any of these suits the patient may recover court costs and reasonable attorney's fees as determined by the court. [Id.]

1. Psychotherapy Information

Special procedures must be followed in order for a health care provider, health care plan or contractor to release information related to a patient's outpatient treatment for psychotherapy without the patient's authorization. [Cal. Civ. Code § 56.104.] The entity requesting such information must submit to the patient and the holder of the information a written request specifying: the intended use of the information; the length of time during which the information will be kept before being destroyed or disposed of; that the information will not be used for any purpose other than its intended use; and that the information will be destroyed or returned in the time period specified. [Id.] This provision generally does not apply to the use or disclosure of medical information by a law enforcement or regulatory agency. [Id.]

F. Substance Abuse

Generally, the identity and records of the diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse treatment or prevention effort assisted by the State Department of Alcohol and Drug Programs are confidential and may not be disclosed without the written consent of the individual. [Cal. Health & Safety Code § 11977.] Exceptions to this general rule include disclosure to qualified medical persons in a bona fide medical emergency, by court order and to qualified personnel for the purpose of conducting scientific research as long as the individual client cannot be identified, among others. [*Id.*]

COLORADO

Colorado statutorily grants a patient the right of access to his medical records in the possession of hospitals and other health care facilities and physicians and other health care providers. The state also restricts disclosure of confidential health care information by these entities. Additionally, there are other statutes governing specific entities or conditions that protect health care information.

I. PATIENT ACCESS

A. Health Care Coverage Cooperatives

An individual has the right to examine and copy his identifiable health information maintained or collected by a health care coverage cooperative. [Colo. Rev. Stat. Ann. § 6-18-103(3)(b).] Health care coverage cooperatives are essentially cooperative associations of employers formed in order to pool their purchasing power for health insurance and for contracting with providers for health care services. [See Colo. Rev. Stat. Ann. §§ 6-18-101 (legislative declaration) and 6-18-102 (defining “cooperative” and “member”).] “Health information” is defined as “any information contained in the medical record or any information pertaining to the medical and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician-patient privilege established by Colo. Rev. Stat. Ann. section 13-90-107 (1) (d).” [Colo. Rev. Stat. Ann. §§ 6-18-102 and 18-4-412.] Health information also includes information that relates to the past, present, or future physical or mental health of and the payment for the provision of health care to a member of the cooperative and its employees. [Colo. Rev. Stat. Ann. § 6-18-102 (defining “health information”).]

An individual also has the right to make suggestions for amendments or corrections to the health information and have these suggestions noted in the maintained information. [*Id.*]

B. Health Care Facilities

1. Scope

Health care facilities, including hospitals, psychiatric hospitals, rehabilitation centers and others, must allow a person to have access to his patient records through the patient’s attending health care provider or the provider’s designated representative. [Colo. Rev. Stat. Ann. §§ 25-1-107 (enumerating health care facilities subject to licensing); 25-1-801.] The records encompassed include X-rays and other films, which are subject to distinct rules. [Colo. Rev. Stat. Ann. § 25-1-801.] Medical information

transmitted during the delivery of health care via telemedicine is part of the patient's medical record maintained by the facility. [*Id.*]

With respect to a minor who has consented to the diagnosis or treatment of venereal disease or addiction to or use of drugs without parental consent, the health care facility may not release the related medical records of the minor to a parent, guardian, or any person other than the minor or his designated representative. [Colo. Rev. Stat. Ann. § 25-1-801(1)(d).]

2. Requirements and Exceptions

A patient's medical record must be available for a patient or the patient's designated representative at reasonable times upon reasonable notice. [Colo. Rev. Stat. Ann. § 25-1-801(1)(a).] A patient's request for inspection of his medical records must be noted with the time and date of his request and the time and date of inspection. The patient must acknowledge the fact of his inspection by dating and signing his record file. [Colo. Rev. Stat. Ann. § 25-1-801.]

In addition to inspection, after a patient has been treated or undergone a procedure at a health care facility, he is entitled to a copy of his records upon submission of a written request and payment of reasonable costs. [Colo. Rev. Stat. Ann. § 25-1-801.] A request must be dated and signed by the patient. [*Id.*] In certain circumstances, a patient is entitled to the release of the original X-ray or other film, and must return it upon request to the lending facility within 30 days. [*Id.*]

An exception to access is made for records pertaining to mental health problems or notes by a physician that, in the opinion of a licensed physician who practices psychiatry and is an independent third party, would have significant negative psychological impact. [*Id.*] With regards to these records, a summary pertaining to the patient's mental health problems may be made available following termination of the treatment program. [*Id.*]

C. Health Care Providers, Including Physicians, Dentists, Nurses, and Others

1. Scope

Upon receipt of a patient's request, a health care provider must provide access to and a copy of patient records, including X-rays, to the patient. [Colo. Rev. Stat. Ann. § 25-1-802(1)(a).] Access must be provided within a reasonable time. [*Id.*] This directive is applicable to physicians, podiatrists, chiropractors, dentists, osteopaths, nurses, optometrists, audiologists, acupuncturists, direct entry midwives, physical therapists, and psychotherapists. [*Id.*] Neither a patient's mental health records nor a doctor's office notes are available to the patient under this provision. [*Id.*]

2. Requirements and Exceptions

The patient's request to inspect must be in writing, and must be dated and signed by the patient. [Colo. Rev. Stat. Ann. § 25-1-802(1)(a).] A patient's request for inspection of his medical records must be noted with the time and date of the request and the time and date of inspection. [Colo. Rev. Stat. Ann. § 25-1-802(4).] Additionally, the

patient must acknowledge the fact of his inspection by dating and signing his record file. [*Id.*]

Similarly, to obtain a copy of his medical records, a patient must submit a written, dated, signed authorization-request. [Colo. Rev. Stat. Ann. § 25-1-802(1)(b).] The patient must pay reasonable costs. [*Id.*] In certain circumstances, a patient is entitled to the release of the original X-ray or other film. Original films must be returned upon request to the lending practitioner within 30 days. [*Id.*]

Although a patient is not entitled to inspect or copy records pertaining to mental health problems, a summary of such records may be made available to the patient, upon written request, following termination of the treatment program. [Colo. Rev. Stat. Ann. § 25-1-802(1)(a).]

D. Optometrists

Optometrists are specifically directed to “release to a patient all medical records pursuant to section 25-1-802.” [Colo. Rev. Stat. Ann. § 12-40-117.] Furthermore, upon written request, an optometrist must release to a patient a valid, written contact lens prescription at the time the optometrist would otherwise replace a contact lens without any additional preliminary examination or fitting. [*Id.*]

Remedies and Penalties

Fines and Penalties. The board of optometrists may enter an order requiring an optometrist to provide medical records, and may seek enforcement of such an order in court. [Colo. Rev. Stat. Ann. § 12-40-123.] The state attorney general may also bring an action against the optometrist. [*Id.*] Failing to provide a patient with copies of his medical records as required by section 25-1-802 is considered “unprofessional conduct” which may serve as the grounds for revocation or refusal to renew a license. [Colo. Rev. Stat. Ann. §§ 12-40-118; 24-40-119.] Additionally, a person who violates the access provisions commits a class 3 misdemeanor, punishable by a \$50 - \$750 fine, 6 months imprisonment, or both. [Colo. Rev. Stat. Ann. §§ 12-40-124; 18-1-106 (specifying sentences for misdemeanors).] A person who commits a second offense may be prosecuted for a class 1 misdemeanor, punishable by a \$500 - \$5,000 fine, 6 -18 months imprisonment, or both. [*Id.*]

E. State Government

Medical and mental health data must be made available to the subject of the information. [Colo. Rev. Stat. Ann. § 24-72-204(3)(a).]

II. RESTRICTIONS ON DISCLOSURE

A. Chiropractors

Chiropractors and their associates and employees are prohibited from disclosing confidential communications made between the chiropractor and a patient in the course of a professional relationship unless the patient gives his consent prior to the disclosure. [Colo. Rev. Stat. Ann. § 12-33-126.]

Disclosure may be made without the patient's consent when a patient files a complaint or suit against the chiropractor related to his care or treatment; or when a review of the services of the chiropractor is conducted by the review board, the governing board of a hospital where the chiropractor practices, or a professional review committee. [*Id.*] Any board reviewing these records must ensure that the identity of the patient remains confidential. [*Id.*]

Remedies and Penalties. A chiropractor who violates this provision may be subject to discipline by the state board of chiropractors. [Colo. Rev. Stat. Ann. §§ 12-33-117; 12-33-119.]

B. Health Care Coverage Cooperatives

The privacy of individually identifiable health information collected for or by a health care coverage cooperative must be protected and generally may not be disclosed without the individual's consent. [Colo. Rev. Stat. Ann. § 6-18-103(1).] Health care coverage cooperatives are essentially cooperative associations of employers formed in order to pool their purchasing power for purchasing health insurance and contracting with health care services. [See Colo. Rev. Stat. Ann. §§ 6-18-101 (legislative declaration) and 6-18-102 (defining "cooperative" and "member").] "Health information" is defined as "any information contained in the medical record or any information pertaining to the medical and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician-patient privilege established by Colo. Rev. Stat. Ann. section 13-90-107(1)(d)." [Colo. Rev. Stat. Ann. §§ 6-18-102 and 18-4-412.] Health information also includes information that relates to the past, present, or future physical or mental health of and the payment for the provision of health care to a member of the cooperative and its employees. [Colo. Rev. Stat. Ann. § 6-18-102 (defining "health information").]

Disclosure without the individual's consent is permitted to law enforcement agencies for lawful purposes and to researchers for bona fide research projects. [*Id.*] Disclosures must be limited to the minimum amount of information necessary to complete the purpose of the disclosure. [Colo. Rev. Stat. Ann. § 6-18-103(2).] Health care coverage cooperatives are required to implement administrative, technical and physical safeguards for the security of identifiable health information. [*Id.*]

Notice. Individuals have a right to know whether the health care cooperative uses or maintains individually identifiable health information about them and for what purposes their information may be used or maintained. [Colo. Rev. Stat. Ann. § 6-18-103(3)(a).]

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 patient's or applicant's express consent. [Colo. Rev. Stat. Ann. § 10-16-423]. Disclosure is allowed without consent 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 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. The commissioner of insurance may issue an order directing an HMO to cease and desist from engaging in any act or practice in violation of this provision. [Colo. Rev. Stat. Ann. § 10-16-420.] If he elects not to issue a cease and desist order, or an HMO is not complying with an order, the commissioner may institute a proceeding to obtain injunctive relief or other appropriate relief through the attorney general. [*Id.*] The commissioner also may impose an administrative penalty of \$100 - \$500 upon an HMO that does not remedy violations of this provision upon reasonable notice. [*Id.*]

D. Insurers, including HMOs

1. Scope

Under the authority of Colorado's HMO Act, the commissioner of insurance issued rules that govern the practices of "insurer or brokers," (*i.e.*, all insurers, producers or other persons licensed or required to be licensed, authorized or registered under the Colorado Insurance Code) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. 1 § 4 (Q)(1) (defining "insurer or broker").] 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.).

"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. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. § 4(U) (defining "health information" and "nonpublic personal health information").] Insurance "consumers" are individuals who seek to obtain, obtain, or have obtained an insurance product or service from a insurer or broker to be used primarily for personal, family or household purposes. "Customers" are generally consumers who have a continuing relationship with the insurer or broker. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. §§ 4(F); 4(I) (defining "consumer" and "customer.".)]

Insurer or brokers are required to comply with the requirements of these rules with respect to health information by January 1, 2003.

2. Requirements

The rules generally prohibit the disclosure of any nonpublic personal health information about a consumer or customer without authorization. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. 5 § 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, and 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 insurer or broker 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. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. 5 § 18.]

These regulations do not supercede existing Colorado law related to medical records, health or insurance information privacy. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. 6 § 22.]

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 including the imposition of fines and/or suspension or revocation of license. [3 Colo. Code Regs. 702-6, R. 6-4-1 Art. 6 § 24.]

E. Nurses

A nurse who violates the confidentiality of information as prescribed by law concerning any patient may be subject to board disciplinary action. [Colo. Rev. Stat. Ann. § 12-38-117(k).]

F. Psychologists, Social Workers and Professional Counselors

A licensed psychologist, social worker, marriage and family therapist, or professional counselor may not disclose any confidential communications made by the client, or advice given to the client, in the course of their professional relationship without the client’s consent. [Colo. Rev. Stat. Ann. §§ 12-43-201 (defining “licensee”); 12-43-218(1).] Neither may any person who participates in any therapy conducted under the supervision of one of these professionals, such as group therapy, disclose any knowledge gained during the course of such therapy without the consent of the person to whom the knowledge relates. [Colo. Rev. Stat. Ann. § 12-43-218.] There are a number of circumstances where disclosure without the patient’s consent is permitted such as to defend against claims and lawsuits filed against the professional. [*Id.*]

G. State Government

Generally, the custodian of public records may not allow the inspection of medical or mental health data on individual persons. [Colo. Rev. Stat. Ann. § 24-72-204(3).]

Remedies and Penalties. Any person who willfully and knowingly violates this provision is guilty of a misdemeanor, punishable by up to a 90-day imprisonment, a fine not to exceed \$100, or both. [Colo. Rev. Stat. Ann. § 24-72-206.]

III. PRIVILEGES

Colorado recognizes a number of health care provider-patient privileges that 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. [Colo. Stat. Ann. § 13-90-107.] This privilege extends to the patients of physicians, surgeons and registered nurses [Colo. Stat. Ann. § 13-90-107(d)] and the clients of licensed psychologists, professional counselors, marriage and family therapists, social workers and psychotherapists [Colo. Stat. Ann. § 13-90-107(g).] HMOs are entitled to claim any statutory privileges against disclosure that the provider, who furnished the information to the HMO, is entitled to claim. [Colo. Rev. Stat. Ann. § 10-16-423.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Genetic Testing

Information derived from genetic testing is confidential and privileged. [Colo. Rev. Stat. Ann. § 10-3-1104.7(3)(a).] “Genetic testing” is defined as “any laboratory test of human DNA, RNA, or chromosomes that is used to identify the presence or absence of alterations in genetic material which are associated with disease or illness.” [Colo. Rev. Stat. Ann. § 10-3-1104.7(2)(b) (defining “genetic testing”).]

Generally, any release of patient-identifying information requires the specific written consent of the person tested. [*Id.*] Disclosure of this information without the patient’s consent is allowed for limited circumstances, including: for diagnosis, treatment, or therapy and for scientific research purposes to any research facility so long as the test subject’s identity is not released to a third party; to courts for establishing parentage and others. [Colo. Rev. Stat. Ann. § 10-3-1104.7(3)(a) and (5).] Any entity that receives information derived from genetic testing may not seek, use or keep the information for any nontherapeutic purpose for any underwriting purpose connected with the provision of health care insurance, group disability insurance, or long-term care insurance coverage. [Colo. Rev. Stat. Ann. § 10-3-1104.7(3)(b).]

Remedies and Penalties

Right to Sue. A person whose genetic testing information has been disclosed in violation of this provision has the right to bring a civil action seeking equitable relief and actual damages suffered as a result of the violation. [Colo. Rev. Stat. Ann. § 10-3-1104.7(12).] In such an action, the court may award costs and reasonable attorney’s fees to the prevailing party. [*Id.*]

B. HIV/AIDS

Colorado requires physicians and other health care professionals to report to the state department of public health and environment or local department of health every individual known to have a diagnosis of AIDS, HIV-related illness, or HIV infection. [Colo. Rev. Stat. Ann. § 25-4-1402.] These public health reports are strictly confidential information and may not be released, shared with any agency or institution, or made public upon subpoena, search warrant, discovery proceedings, or otherwise, except in very limited circumstances. [Colo. Rev. Stat. Ann. § 25-4-1404(1).]

Information regarding AIDS or HIV infection in medical records held by a facility that provides ongoing health care is considered medical information, not public health reports and is protected from unauthorized disclosure by Colo. Rev. Stat. Ann. section 18-4-412, which sets penalties for the theft of medical records or medical information. [Colo. Rev. Stat. Ann. § 25-4-1404(3).]

Remedies and Penalties

Fines and Penalties. A person, firm or corporation that releases or makes public confidential public health reports in violation of this provision is guilty of a misdemeanor, punishable by imprisonment, fine or both. [Colo. Rev. Stat. Ann. § 25-4-1409.]

C. Mental Health

The information obtained and the records prepared in the course of providing services to the mentally ill are confidential and privileged. [Colo. Rev. Stat. Ann. § 27-10-120(1).] This information may be disclosed in a number of enumerated circumstances including: in communication between qualified professional personnel in the provision of services or referrals; to the extent necessary to make claims on behalf of a recipient of insurance; to the courts, as necessary for the administration of the laws governing the treatment of the mentally ill; to adult family members upon admission of a mentally ill person for inpatient or residential care and treatment, and in others. [*Id.*] Colorado has detailed procedures for determining whether, and to what extent, health information about a mentally ill patient may be released to family members. [Colo. Rev. Stat. Ann. § 27-10-120.5.] If the patient disagrees with the treating facility's decision to release information to his family, the patient has the right to seek administrative and judicial review of that determination. [*Id.*]

D. Reportable Conditions including Cancer, Communicable Diseases and Venereal Diseases

Colorado requires physicians and others to report incidents of cancer, communicable diseases, venereal diseases and other specified conditions to the health authorities. [Colo. Rev. Stat. Ann. §§ 25-1-107; 25-1-122; and 25-4-402.] These reports and associated records are "strictly confidential" and 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 specified in the statute. [Colo. Rev. Stat. Ann. § 25-1-122.]

Remedies and Penalties

Fines and Penalties. Any officer, employee or agent of the state department of public health and environment or local department of health who releases or makes public confidential public health reports or records, or otherwise breaches the confidentiality provisions of the Colo. Rev. Stat. Ann. section 25-1-122 is guilty of a class 1 misdemeanor, punishable by imprisonment, a fine, or both.

CONNECTICUT

Connecticut statutorily grants patients the right of access to their medical records maintained by health care providers, health care institutions, insurance entities and other specified entities. 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. Employers

Within a reasonable time after receipt of a written request from an employee, an employer must permit an inspection of any medical records pertaining to the employee that the employer maintains. [Conn. Gen. Stat. § 31-128c.] The inspection must take place during regular business hours at a location at or reasonably near the employee's place of employment. Access must be given to either a physician chosen by the employee or by a physician chosen by the employer with the employee's consent. An employer must allow the inspection of any particular employee's medical records no more than twice during a calendar year. [Conn. Gen. Stat. § 31-128h.]

Similarly, an employer must provide an employee's physician with a copy of the employee's medical records within a reasonable time after receipt of a written request from the employee. The request must be in writing and reasonably identify the materials to be copied. [Conn. Gen. Stat. § 31-128g.] The employer may charge a fee for copying the records. [*Id.*] The fee must be reasonably related to the cost of supplying the requested documents. [*Id.*]

If an employee disagrees with any of the information contained in his medical records, he may request that the employer remove or correct the information. [Conn. Gen. Stat. § 31-128e.] If the employer does not agree to the removal or correction, the employee may submit a written statement explaining his position. The statement must be maintained as part of the employee's medical records and must accompany any transmittal or disclosure made to a third party. [*Id.*]

B. Health Care Providers, Including Physicians, Dentists and Pharmacists

1. Scope

The Health Care Records Act applies to health care providers, including physicians, dentists, pharmacists, chiropractors, and certain other licensed health care providers.

[Conn. Gen. Stat. §§ 20-7c; 20-7b (defining “provider” as “any person or organization that furnishes health care services and is licensed or certified to furnish such services pursuant to chaps. 370 to 373 (inclusive) 375 to 384a (inclusive), 388, 389, 399 or is licensed or certified under 368d”).]

The records encompassed by the Act include bills, x-rays, copies of lab reports, contact lens specifications, records of prescriptions and other technical information used in assessing the patient’s health condition. [Conn. Gen. Stat. § 20-7c.] These provisions do not apply to health care information related to a psychiatric or psychological condition. [Conn. Gen. Stat. § 20-7c(d).]

2. Requirements

Upon request, a health care provider is generally required to supply to a patient complete and current information concerning any diagnosis, treatment and prognosis of the patient that the provider possesses. A provider is also required to notify a patient of any test result in the provider's possession that indicates a need for further treatment or diagnosis. [Conn. Gen. Stat. § 20-7c(a).]

A patient (his attorney or authorized representative) may submit a written request for a copy of his health record. The provider must furnish the copy within 30 days of receipt of the request. [Conn. Gen. Stat. § 20-7c.]

Copying fees. The maximum charge for furnishing copies is 45 cents per page (which includes any research fees, handling fees or related costs) plus postage. [Conn. Gen. Stat. § 20-7c(b).] The provider may charge a patient the amount necessary to cover the cost of necessary materials for furnishing a copy of an x-ray. [*Id.*]

Denial of Access. Access may be denied if the provider reasonably determines that the information is detrimental to the physical or mental health of the patient, or is likely to cause the patient to harm himself or another. [Conn. Gen. Stat. § 20-7c(c).] In this circumstance, the information may be provided to an appropriate third party or another provider who may release the information to the patient. [*Id.*]

3. Remedies and Penalties

Right to Sue. When a patient is denied access to his information because it has been determined that his access may be detrimental to his health or likely to cause harm, the patient has the right to file a petition within 30 days of the refusal with the superior court for an order requiring the provider to disclose the information. [Conn. Gen. Stat. § 20-7c(c).]

C. Health Care Institutions, including Hospitals, Nursing Homes and others

Upon the written request of a patient, his attorney or authorized representative, all licensed health care institutions, including hospitals, nursing homes and others must furnish to the patient a copy of his health record. [Conn. Gen. Stat. § 19a-490b. See also “Hospitals Receiving State Aid,” below.] The health records covered by this

requirement include, but are not limited to, copies of bills, laboratory reports, prescriptions and other technical information used in assessing the patient's health. [*Id.*] A patient also has the right to designate a health care provider to review original tissue slides or pathology blocks. [*Id.*]

The maximum charge for furnishing copies is 65 cents per page plus postage and retrieval expenses. [*Id.*] The health care institution may not deny the patient access to his records due to his inability to pay the required fees. [*Id.*] A patient generally may show inability to pay by presenting an affidavit attesting to his inability to pay the fees.

D. Hospitals Receiving State Aid

Upon the demand of any patient who has been discharged, his physician or authorized attorney, a hospital that receives state aid must permit the patient to examine and copy his hospital records, including the history, bedside notes, charts, pictures and plates. [Conn. Gen. Stat. § 4-104.]

Remedies and Penalties

Right to Sue. If a patient who has been discharged is denied access to his hospital records, he may file a written motion in the Superior Court seeking disclosure and production of the records before the judge. [Conn. Gen. Stat. § 4-105.] The custodian of the hospital records may be imprisoned, fined, or both if he fails to comply with any resulting judicial order to produce the records. [*Id.*]

E. Insurance Entities, Including HMOs

1. Scope

The Connecticut Insurance Information and Privacy Protection Act applies to insurance entities including fee for service insurers, HMOs, insurance agents and insurance support organizations. [Conn. Gen. Stat. §§ 38a-175 (defining "health care center" as including HMOs); 38a-977 (detailing entities and persons covered); 38a-976 (defining "insurance institutions" as including health care centers).]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [Conn. Gen. Stat. § 38a-976 (defining "personal information").] "Medical record information" is personal information that (1) relates to the physical, mental or behavioral health condition, medical history or medical treatment of an individual or his family member, and (2) is obtained from a medical professional, medical care institution, pharmacy, pharmacist or an individual, the individual's spouse, parent or legal guardian, or from the provision of or payment for health care to or on behalf of the individual or his family. [Conn. Gen. Stat. § 38a-976 (defining "medical record information").] The Act does not apply to medical information that has had all personal identifiers removed. [Conn. Gen. Stat. § 38a-976(r).]

With respect to health insurance, the rights granted by the Act extend to Connecticut 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. [Conn. Gen. Stat. § 38a-977.]

2. Requirements

An insurance company, HMO, or other insurance entity must permit the individual to inspect and copy his personal information in person or to 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. [Conn. Gen. Stat. §§ 38a-983; 38a-976.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Conn. Gen. Stat. § 38a-983(a).]

Copying fees. The insurance entity can impose a reasonable fee to cover copying costs. [Conn. Gen. Stat. § 38a-983(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 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. [Conn. Gen. Stat. § 38a-983(a).]

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. [Conn. Gen. Stat. § 38a-983(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. [Conn. Gen. Stat. § 38a-984.] 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.*]

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. [Conn. Gen. Stat. § 38a-995.] 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 impose administrative remedies, including, in the case of intentional violations, monetary fines. [Conn. Gen. Stat. §§ 38a-990 through 38a-993.] A cease and desist order and

fine not to exceed \$2,000 per violation or \$20,000 for multiple negligent violations may be imposed. [Conn. Gen. Stat. § 38a-993.]

F. Mental Health Facilities

The Patients' Bill of Rights applies to any hospital, clinic, ward, psychiatrist's office or other facility, public or private, which provides inpatient or outpatient services relating to the diagnosis or treatment of a patient's mental condition. [Conn. Gen. Stat. §§ 17a-548; 52-146d (defining "mental health facility").]

Under the Patients' Bill of Rights, following discharge from a mental health facility (or in connection with litigation related to hospitalization), any patient treated by a psychiatrist for diagnosis or treatment has the right to inspect and make copies of his records. [Conn. Gen. Stat. §§ 17a-548(b); 17a-540(a) and (b) (defining "patient" and "facility").] The patient must submit a written request to view or copy his records. [Conn. Gen. Stat. § 17a-548(b).]

Generally, the facility may deny access to any portion of a patient's record if it determines that disclosure would: create a substantial risk that the patient would inflict life-threatening injury to self or others; cause a severe deterioration in mental state of the patient; constitute an invasion of privacy of another person; or violate an assurance of confidentiality furnished to another person. [Conn. Gen. Stat. § 17a-548(b).] A patient who is seeking access to his records in connection with any litigation related to hospitalization is not subject to the above restrictions on access. [*Id.*]

Remedies and Penalties

Right to sue. Any patient aggrieved by a facility's refusal to grant access to his records may petition the Superior Court for relief in accordance with specified procedures. [Conn. Gen. Stat. §§ 17a-548(b); 4-105.]

G. State and Local Government

1. Scope

The Personal Data Act [Conn. Gen. Stat. §§ 4-190 through 4-198) imposes on state agencies a variety of duties related to the personal data that they maintain. The Act applies to every state or municipal board, commission, department or officer, courts, Governor, Lieutenant Governor, Attorney General, and town or regional board of education, that maintains a personal data system. [Conn. Gen. Stat. §§ 4-190 (defining "agency") and 4-193. It does not apply to the state legislature. [Conn. Gen. Stat. § 4-190.]

The Act applies to "personal data," including information about a person's medical or emotional condition or history which because of name, identifying number, mark or description can be readily associated with a particular person.

Persons who have rights under the Personal Data Act include an individual of any age concerning whom personal data is maintained, or a person's attorney or authorized representative. [Conn. Gen. Stat. § 4-190 (defining “person”).]

2. Requirements

State agencies may maintain only that information about a person that is relevant and necessary to accomplish the lawful purposes of the agency. [Conn. Gen. Stat. § 4-193(e).] Upon written request, an agency must inform an individual whether it maintains personal data (including medical and mental health information) concerning him and must provide access to that information. [*Id.*] The state agency must respond to the request in writing and in a format that is understandable to the requestor. [Conn. Gen. Stat. § 4-193(f).]

Agencies must have procedures that allow a person to contest the accuracy, completeness or relevancy of his personal data, and must have procedures to have it corrected. [Conn. Gen. Stat. § 4-193(h).]

An agency may refuse to disclose medical, psychiatric or psychological data to a person if it determines that disclosure would be detrimental to that person, or that nondisclosure is otherwise required or permitted by law. [Conn. Gen. Stat. § 4-194.] The agency must advise the person of his right to seek judicial relief in response to such a refusal. [*Id.*] The person has the right to request that a medical doctor be permitted to review the personal data to determine whether it should be disclosed. The agency must comply with the doctor’s determination. [*Id.*]

3. Remedies and Penalties

Right to Sue. A person has the right to file a civil action for equitable relief, such as an injunction, and for damages against an agency that violates these provisions. [Conn. Gen. Stat. § 4-197.] The court may award court costs and reasonable attorney’s fees to a person who prevails in such an action. [*Id.*]

When an agency specifically refuses to disclose personal information because of potential endangerment under Section 4-194, the person may petition the superior court within 30 days of the denial for an order requiring the agency to disclose the requested data. [Conn. Gen. Stat. § 4-195.]

II. RESTRICTIONS ON DISCLOSURE

A. Employers

In general, an employer may not disclose individually identifiable information in the medical records of any employee without the written authorization of the employee. [Conn. Gen. Stat. § 31-128f.] There are a number of exceptions to this general rule. Disclosure without the employee’s authorization is permitted to other persons employed by or affiliated with the employer; in response to an apparent medical emergency; to apprise the employee’s physician of a medical condition of which the

employee may not be aware; pursuant to subpoena, court order, summons, warrant, discovery or grand jury request; to comply with federal, state, or local laws or regulations, or where the information is disseminated pursuant to the terms of a collective bargaining agreement. [*Id.*]

With respect to authorizations to disclose medical records, an employer must inform the employee of his right to inspect and correct the information, his right to withhold the authorization, and the effect such withholding has on the employee. [*Id.*]

B. Government

1. Freedom of Information Act

Medical files maintained by any public agency are exempt from disclosure under the state's Freedom of Information Act. [Conn. Gen. Stat. § 1-210(b)(2).]

2. Department of Public Health

All information, records of interviews, written reports, and statements, including data concerning a person's medical or emotional condition or history, procured by the Department of Public Health in connection with studies of morbidity and mortality, or pursuant to statutory reporting requirements are confidential and may be used solely for the purposes of medical or scientific research or for disease prevention and control. [Conn. Gen. Stat. § 19a-25.]

This information is not admissible as evidence in any action in any kind in any forum. [*Id.*] Confidential medical information may not be disclosed except as may be necessary for the purpose of furthering the research project to which it relates. [*Id.*] The department may exchange personal data with other governmental agencies or private research organizations for the purpose of medical research provided that they do not further disclose the data. [*Id.*]

C. Health Care Professionals, Medical Care Centers, Pharmacies, and Pharmaceutical Companies

Health care professionals, medical care centers, pharmacies, pharmaceutical companies and their contractors, agents and employees are prohibited from selling medical record information and from disclosing such information for marketing purposes without the prior written consent of the individual. [Conn. Gen. Stat. § 38a-988a.] "Medical-record information" is defined as information which: relates to the physical, mental or behavioral health condition, medical history or medical treatment of an individual or a member of the individual's family; and which is obtained from a medical professional or institution, from a pharmacy or pharmacist, from the individual, or from the individual's spouse, parent or legal guardian or from the provision of or payment for health care to or on behalf of an individual or a member of the individual's family. [Conn. Gen. Stat. §§ 38a-988a; 38a-976 (defining "medical-record information").] The term does not include information that does not identify the patient. [Conn. Gen. Stat. § 38a-976.] This restriction does not prohibit the transfer of

individually identifiable medical record information to another as part of a sale or merger of a business. [Conn. Gen. Stat. § 38a-988a.]

Remedies and Penalties

Right to Sue. A person whose medical record information is improperly sold or disclosed for marketing without his authorization in violation of this section may bring an action for equitable relief, damages or both. [Conn. Gen. Stat. § 38a-988a.] A person who violates these provisions is liable for double damages, costs and reasonable attorneys' fees.

D. Hospitals Receiving State Aid

Generally, a hospital that receives state aid may not disclose a patient's hospital records to any person or entity without patient authorization. [Conn. Gen. Stat. § 4-104.] Records may be disclosed without authorization upon a subpoena or an order by a judge of the court. [*Id.*]

E. Insurance Entities, Including HMOs

1. Scope

The Connecticut Insurance Information and Privacy Protection Act (IIPPA) applies to insurance entities including fee for service insurers, HMOs, insurance agents and insurance support organizations. [Conn. Gen. Stat. §§ 38a-175 (defining "health care center" as including HMOs); 38a-977 (detailing entities and persons covered); 38a-976 (defining "insurance institutions" as including health care centers).]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [Conn. Gen. Stat. § 38a-976 (defining "personal information").] "Medical record information" is personal information that (1) relates to the physical, mental or behavioral health condition, medical history or medical treatment of an individual or his family member, and (2) is obtained from a medical professional, medical care institution, pharmacy, pharmacist or an individual, the individual's spouse, parent or legal guardian, or from the provision of or payment for health care to or on behalf of the individual or his family. [Conn. Gen. Stat. § 38a-976 (defining "medical record information").] The Act does not apply to medical information that has had all personal identifiers removed. [Conn. Gen. Stat. § 38a-976(r).]

With respect to health insurance, the protections afforded by the Act extend to Connecticut 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. [Conn. Gen. Stat. § 38a-977.]

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. [Conn. Gen. Stat. § 38a-981.] 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. [Conn. Gen. Stat. § 38a-988.] Authorizations submitted by those *other* than insurance entities must be in writing, signed and dated. [Conn. Gen. Stat. § 38a-988(a).] 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 prohibits insurance entities from selling medical record information or from disclosing this type of information for marketing purposes without the prior written consent of the subject of the information. [Conn. Gen. Stat. § 38a-988a.]

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; and others. [Conn. Gen. Stat. § 38a-988.]

c. Notification Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Conn. Gen. Stat. § 38a-979.] 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. [Conn. Gen. Stat. § 38a-995.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*] A person whose medical record information is improperly sold or disclosed for marketing without his authorization may bring an action for equitable relief, damages or both. [Conn. Gen. Stat. § 38a-988a.]

Fines and Penalties. The Insurance Commissioner may hold hearings and may impose administrative remedies, including, in the case of intentional violations, monetary fines. [Conn. Gen. Stat. §§ 38a-990 through 38a-993.] A cease and desist order and fine not to exceed \$2,000 per violation or \$20,000 for multiple negligent violations may be imposed. [Conn. Gen. Stat. § 38a-993.] For intentional violations of the restrictions on selling and marketing medical record information, the Commissioner may impose a cease and desist order and fine not to exceed \$20,000 per violation or \$100,000 for multiple violations. [*Id.*] 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. [Conn. Gen. Stat. §§ 38a-997.]

F. Nursing Home Facilities and Chronic Disease Hospitals

Any person admitted as a patient to a nursing home facility or chronic disease hospital must be assured confidential treatment of his personal and medical records. The patient may approve or refuse the release of these records to any individual outside the facility, except in the case of his transfer to another health care institution or as required by law or third-party payment contract. [Conn. Gen. Stat. § 19a-550.]

Remedies and Penalties

Right to sue. A facility that negligently deprives a patient of his right is liable to the patient in a private cause of action for injuries suffered as a result of such deprivation. Willful or reckless disregard of a patient's right may result in punitive damages. The patient also may bring an action for any other type of relief permitted by law, including injunctive and declaratory relief. [*Id.*]

G. Pharmacists

A pharmacist may not reveal any records about pharmaceutical services rendered to a patient without the patient's written or oral consent. [Conn. Gen. Stat. § 20-626.] When oral consent is given it must be noted in the pharmacist's records. [*Id.*] A patient's pharmaceutical information may be disclosed without the patient's consent to: the patient; the prescribing practitioner; third party payors who pay claims on behalf of the patient; any governmental agency with statutory authority to review the information; any person or agency pursuant to subpoena; and to anyone with a written contract with a pharmacy to access the pharmacy's database provided the

information accessed is limited to data which does not identify specific individuals.
[*Id.*]

III. PRIVILEGES

Connecticut recognizes a number of health care provider-patient privileges, which prohibit a health care provider from disclosing communications made by or to a patient relating to his diagnosis and treatment. [Conn. Gen. Stat. §§ 52-146c (psychologist-patient); 52-146d through 52-146j (psychiatrist-patient); 52-146k (battered women's or sexual assault counselor-victim); 52-146o (physician-patient); 52-146p (marital and family therapist); 52-146(q) (social worker); 52-146(s) (professional counselor).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Connecticut maintains a birth defects surveillance program to monitor the frequency and types of birth defects. [Conn. Gen. Stat. § 19a-56a.] The Commissioner of Public Health must establish a system to collect information regarding birth defects and other adverse reproductive outcomes. [*Id.*] The Commissioner may not use any patient identifying information contained in hospital discharge records to which he may have access for any use that is not related to the monitoring system. [Conn. Gen. Stat. §§ 19a-56a; 19a-56b.] All patient identifying information collected must remain confidential. [Conn. Gen. Stat. § 19a-56b.] Access to such information is limited to the Department of Public Health and other persons who have a valid scientific interest and qualifications and who are engaged in demographic, epidemiologic or other similar studies related to health. In addition, prior to receiving any identifiable information the person must agree, in writing, to maintain confidentiality as prescribed in this section. The commissioner must maintain an accurate record of all persons who are given access to the information in the system. [*Id.*]

Remedies and Penalties

Any person who, in violation of a written agreement to maintain confidentiality, discloses any information provided pursuant to this section, or who uses information provided pursuant to this section in a manner other than that approved by the department, may be denied further access to any confidential information maintained by the program.

B. HIV/AIDS

A person who receives confidential HIV-related information may not disclose or be compelled to disclose that information without the subject's authorization except in limited circumstances. [Conn. Gen. Stat. § 19a-583.] Disclosure without the subject's authorization is permitted to: health officers when disclosure is mandated or authorized by law; a health care provider to provide treatment to the subject or the subject's child; those who, in the course of their professional duties have had a

significant exposure to HIV infection; and others. [*Id.*] A statement must accompany each disclosure, advising individuals to whom disclosure is authorized by this statute that they are prohibited from further disclosing the information. [Conn. Gen. Stat. § 19a-585.] With a few specified exceptions, a record of all disclosures must be placed in the medical record. [*Id.*]

Remedies and Penalties

Right to Sue. A person has a civil right of action for damages against a person who willfully violates these provisions. [Conn. Gen. Stat. § 19a-590.] In such a suit, damages are to be assessed in an amount sufficient to compensate an individual for the injuries he sustained as a result of the violation. [*Id.*]

C. Drug Abuse

Connecticut maintains programs to treat individuals, who are alcohol dependent, drug dependent or intoxicated as defined by Conn. Gen. Stat. § 680. [Conn. Gen. Stat. § 673.] Treatment facilities and hospital may not disclose or allow the disclosure of information that identifies alcohol or drug dependent individuals. [Conn. Gen. Stat. §§ 17a-688.] Information regarding the treatment of an alcohol dependent, drug dependent or intoxicated minor may not be disclosed to the minor's parent or guardian. [*Id.*] The Commissioner of Public Health may disclose alcohol and drug related treatment information to researchers as long as no patient identifying information is released. [*Id.*]

D. Genetic Test Results

An employer, employment agency or a labor organization may not request or require genetic information from an employee, person applying for employment, or a labor organization member or otherwise discriminate against an individual on the basis of genetic information. [Conn. Gen. Stat. § 46a-60.]

E. Mental Health

All communications and records of communications relating to diagnosis or treatment of a patient's mental condition between a patient and a psychiatrist are confidential. [Conn. Gen. Stat. §§ 52-146d; 52-146e.] Except as expressly provided by statute, no person may disclose or transmit any communications and records that identify a patient to anyone else without the patient's consent. [Conn. Gen. Stat. § 52-146e.]

The consent must specify to whom the information is to be disclosed and to what use it will be put. [*Id.*] Future treatment generally cannot be conditioned on the patient's signing a consent to disclose his mental health information. [*Id.*] The patient may withdraw the consent at any time, in writing addressed to the person or office in which the original consent was filed. [*Id.*]

Disclosure without the patient's consent may be made: to others involved in the diagnosis or treatment of the patient; when the psychiatrist determines there is a substantial risk of imminent physical injury by the patient to himself or others; as necessary to place the patient in a mental health facility; to a limited extent, to collect fees; and in other situations. [Conn. Gen. Stat. § 52-146f.]

A person engaged in research may have access to patient identifying mental health records where needed for research if the research plan is submitted to and approved by the director of the mental health facility. [Conn. Gen. Stat. § 52-146g.] Records containing identifiable data may not be removed from the mental health facility. [*Id.*]

Remedies and Penalties

Right to sue. A person aggrieved by a violation of these provisions may petition the superior court for appropriate relief, including temporary and permanent injunctions. [Conn. Gen. Stat. § 52-146i.] Such a petition is privileged with respect to assignment for trial. Additionally, a person who is injured may bring a civil action against those who violate these provisions. [*Id.*]

DELAWARE

Delaware does not have a general, comprehensive statute granting a patient access to his medical records or protecting his confidential medical information. Rather, these privacy protections are contained in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

Rest Homes and Nursing Homes

The attending or resident physician of a rest home or nursing home must give each patient of the facility complete and current information concerning the patient's diagnosis, treatment, and prognosis in terms and language the patient can reasonably be expected to understand, unless medically inadvisable. [Del. Code Ann. tit. 16, § 1121(4).] Additionally, a patient or resident of such a facility has the right to inspect all of that facility's records pertaining to him upon oral or written request. [Del. Code Ann. tit. 16, § 1121(19).] The facility must provide the requested access within 24 hours. [*Id.*] The patient or resident has the right to purchase copies of such records or any portion of them, at a cost not to exceed the community standard, upon written request and two working days advance notice to the facility. [*Id.*]

Remedies and Penalties

Fines and Penalties. The Department of Health and Social Services may impose a maximum penalty of \$5,000 per violation of this provision. [Del. Code Ann. tit. 16, § 1109.] Each day of continuing violation constitutes a separate violation, with a maximum penalty of \$1,250 per day beyond the initial day. [*Id.*]

II. RESTRICTIONS ON DISCLOSURE

A. Dental Plan Organizations

A dental plan organization may not disclose any data or information relating to the diagnosis, treatment or health of any enrollee obtained from that person or from any dentist without the express consent of the enrollee. [Del. Code Ann. tit. 18, § 3820.] Disclosure without the enrollee's consent is allowed only to the extent necessary to carry out the statutory provisions governing dental plans; pursuant to statute or court order for the production of evidence or the discovery thereof; or to the extent the data is pertinent in the event of a claim or litigation between the enrollee and the dental plan organization. [*Id.*]

Remedies and Penalties

Fines and Penalties. A dental plan organization that violates this provision is liable for a civil penalty of no more than \$1,000 per violation. [Del. Code Ann. tit. 18, § 3817.] The Insurance Commissioner has the authority to suspend or revoke the certificate of authority of a dental plan that fails to comply with this provision. [Del. Code Ann. tit. 18, § 3815.] Additionally, the Insurance Commissioner may issue a cease and desist order directing a dental plan organization to discontinue any violation of the provisions. [Del. Code Ann. tit. 18, § 3816.]

B. Licensed Clinical Social Workers

A licensed clinical social worker is prohibited from disclosing any information acquired from persons consulting with him in a professional capacity without that person's written consent except in cases where there is threatened imminent violence, suspected child abuse or if the patient brings charges against the social worker. [Del Code Ann. tit. 24, § 3913.]

C. Managed Care Organizations

Managed care organizations, including HMOs, may not disclose any data or information relating to the diagnosis, treatment or health of any enrollee or applicant obtained from that person or from any health care provider without the express consent of the enrollee/applicant or his physician. [Del Code Ann. tit.16, §§ 9102(4) (defining "managed care organization"); 9113.] Disclosure without the enrollee's consent is allowed pursuant to statute or court order for the production of evidence or the discovery thereof; or to the extent the data is pertinent in the event of claim or litigation between the enrollee and the managed care organization. [Del Code Ann. tit.16, § 9113.]

D. Rest Homes and Nursing Homes

Patients and residents of rest homes or nursing homes have the right to privacy in their medical care program. [Del. Code Ann. tit. 16, § 1121(6).] Case discussion, consultation, examination and treatment are confidential and must be conducted discreetly. [*Id.*] At the patient's discretion, persons not directly involved in the patient's care may not be permitted to be present during such discussions, consultations, exams, and treatment except with the consent of the patient or resident. [*Id.*]

The medical records of a resting or nursing home patient are confidential and may not be disclosed to the public unless the patient or resident consents to disclosure. Records may be disclosed without consent as needed for a patient's transfer to another health care institution or as required by law or third party payment contract. [*Id.*] No medical records may be released to any person inside or outside the facility who has no demonstrable need for the records. [*Id.*]

Additionally, nursing homes must follow confidentiality guidelines for patient records to be set by the Division of Long-Term Care Resident Protection. [Del. Code Ann. tit. 29, § 7907(g)(4).]

E. State Government

Medical files in the possession of a public body, the disclosure of which would constitute an invasion of personal privacy, are not “public records” accessible to the general public under the state Freedom of Information Act. [Del Code Ann. tit. 29, § 10002(d).]

III. PRIVILEGES

Delaware recognizes a number of health care provider-patient privileges, which allow a patient, in legal proceedings to refuse to disclose and to prevent others from disclosing confidential communications made with the professional for the purpose of treatment or diagnosis. [Del. Code Ann. tit. 24, § 3019 (mental health counselor-client); § 3913 (licensed clinical social worker-client); Del. Uniform Rules of Evidence, Rule 503 (physician-patient and psychotherapist-patient).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Alcoholism

The records of an alcoholism treatment facility are confidential in accordance with the confidentiality requirements of the federal substance abuse statute and regulations (42 C.F.R. Part II) and privileged. [Del. Code Ann. tit. 16, § 2214.] Information from patients’ records may be available for purposes of research into the causes and treatment of alcoholism, but recipients of the information are prohibited from publishing identifying information. [*Id.*]

B. Birth Defects

Delaware maintains a birth defects surveillance system and registry for children under the age of five with any structural or biochemical abnormality that requires medical or surgical intervention or that interferes with normal growth or development. [Del. Code Ann. tit. 16, §§ 201; 202 (defining “birth defect” and “surveillance”).] Health care practitioners and hospitals that diagnose and treat children under age five with birth defects, and clinical laboratories that perform the tests must report to the Department of Health and Social Services any occurrence of birth defects. These reports may not be made public in any way that could disclose the identity of either the child or his family members. [Del. Code Ann. tit. 16 § 204.] However, patient identifying information may be disclosed among agencies authorized by the Department upon receipt of assurances by those agencies that patient confidentiality will be maintained. [*Id.*]

C. Cancer Registry

Delaware maintains a cancer registry and requires certain health care practitioners and all hospitals, clinical laboratories and cancer treatment centers in Delaware to report information contained in the medical records of patients who have cancer or benign tumors to the state Department of Health and Social Services. [Del. Code Ann. tit. 16, § 3202.] These reports, which contain patient identifying information, are generally confidential and may not be divulged in any way that would tend to disclose

the identity of the persons to whom they relate. [Del. Code Ann. tit. 16, § 3205.] However, this information may be shared between cancer control agencies as authorized by the department of health upon receipt of satisfactory assurances that the patient's confidentiality will be maintained. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person or entity that violates this provision is subject to a \$100 fine for each violation. [Del. Code Ann. tit. 16, § 3207.]

D. Genetic Information

1. General Rules

Delaware has detailed provisions governing genetic tests and genetic information. For purposes of these provisions, “genetic information” is defined as information about an individual's inherited genes or chromosomes, whether obtained from the individual or family member, that is believed to predispose the individual to a disease, disorder or syndrome or be associated with an increased risk of developing a disease, disorder or syndrome. [Del. Code. Ann. tit. 16, § 1220 (defining “genetic information”).] “Genetic test” is defined as a test to determine the presence or absence of an inherited genetic characteristic including tests of DNA, RNA, chromosomes, mitochondrial DNA, and proteins to identify a predisposing genetic characteristic associated with a disease, disorder or syndrome. [Del. Code. Ann. tit. 16, § 1220 (defining “genetic test”).]

Access and amendment. Upon request, an individual may inspect, request the correction of and obtain genetic information from his own records. [Del. Code. Ann. tit. 16, § 1223.]

Restrictions on obtaining and retaining genetic information. No person may obtain an individual's genetic information without first obtaining the individual's informed consent. [Del. Code. Ann. tit. 16, § 1221.] An informed consent to obtain genetic information must include a description of genetic test(s) to be performed, its purpose(s), potential uses and limitations, the meaning of its results, and a statement that the individual will receive the results unless he directs otherwise. [Del. Code. Ann. tit. 16, § 1220.]

This consent requirement does not apply to genetic information obtained: by law enforcement to identify a person in the course of a criminal investigation or prosecution; to determine paternity; pursuant to the requirements of the state DNA database for convicted criminals; to identify deceased individuals; for anonymous research where the identity of the individual will not be released; pursuant to state and federal newborn screening requirements; or as authorized by federal law for the identification of persons. [*Id.*; see also Del. Code Ann. tit. 29, § 4713 (establishing state DNA data bank).]

In addition, no person may *retain* an individual's genetic information without informed consent. [Del. Code. Ann. tit. 16, § 1222.] An informed consent to retain genetic information must include a description of the information to be retained, its potential uses and its limitations. [Del. Code. Ann. tit. 16, § 1220.] Prior consent is not required where retention is: necessary for purposes of a criminal or death investigation or

proceeding; necessary to determine paternity; authorized by court order; made pursuant DNA analysis and data bank requirements of Del. Code. Ann. tit. 29, § 4713; or for anonymous research where the identity of the individual will not be released. [Del. Code. Ann. tit. 16, § 1222.] The sample from which genetic information has been obtained must be destroyed promptly unless retention is: authorized by the individual; necessary for purposes of a criminal or death investigation or proceeding; authorized by court order; or for anonymous research where the identity of the individual will not be released. [*Id.*]

Restrictions on disclosures. A person may not disclose or be compelled, by subpoena or other means, to disclose the identity of an individual upon whom a genetic test has been performed or to disclose an individual's genetic information in a manner that permits identification of the individual without the individual's informed consent. An informed consent to disclose genetic information must include a description of information to be disclosed and to whom. [Del. Code. Ann. tit. 16, § 1220.] Disclosures without consent are permitted, however, for a number of specified purposes, including: to determine paternity; pursuant to court order; medical diagnosis of a decedent's blood relatives; and pursuant to state and federal newborn screening requirements. [Del. Code. Ann. tit. 16, § 1224.]

A single signed informed consent to obtain, retain and disclose genetic information is permitted for purposes of obtaining insurance. The statute specifies additional elements that must be included in this consent. [Del. Code. Ann. tit. 16, § 1220.]

Remedies and Penalties

Right to Sue. A person who willfully discloses an individual's genetic information in violation of these provisions is liable to the individual for all actual damages, including damages for economic, bodily or emotional harm that is proximately caused by the disclosure. [Del. Code. Ann. tit. 16, § 1227.]

Fines and Penalties. A person who willfully retains an individual's genetic information or sample in violation of these provisions will be fined not less than \$1,000 or more than \$10,000. [Del. Code. Ann. tit. 16, § 1227.] A person who willfully obtains or disclosed genetic information in violation of these provisions will be fined not less than \$5,000 or more than \$50,000.

2. Employers

Employers, employment agencies, labor unions, and joint labor-management committees controlling apprenticeship or other training or retraining may not intentionally collect, directly or indirectly, any employee's or applicant's genetic information or the information of any member of his family. [Del. Code Ann. tit. 19, § 711.] Genetic information may be collected if: (1) it can be shown that the information is job related and consistent with business necessity; or (2) the information or access to the information is sought in connection with the employer's retirement policy or the underwriting or administration of a bona fide employee welfare or benefit plan. [*Id.*] These entities are also prohibited from discriminating against employees based on genetic information. [*Id.*]

For purposes of these provisions governing employers, “genetic information” is defined as the results of a test for determining the presence or absence of an inherited genetic characteristic, including tests of DNA, RNA, mitochondrial DNA, chromosomes, and proteins in order to identify a predisposing genetic characteristic associated with disease, disorder or syndrome. [Del. Code Ann. tit. 19, § 710 (defining “genetic information” as the results of a genetic test as defined in Del. Code Ann. tit. 18, § 2317) and Del Code Ann. tit 18, § 2317 (defining “genetic test”).]

Remedies and Penalties

Fines and Penalties. The state department of labor has the authority to prevent and take action to stop a person from engaging in an unlawful employment practice. An unlawful employment practice includes intentionally collecting an employee’s or applicant’s genetic information that is not job related and consistent with business necessity. [Del. Code Ann. tit. 19, § 712.]

The attorney general also may bring civil action in the Court of Chancery if there is reasonable cause to believe that a person or group of persons is engaged in a pattern or practice that denies individuals full enjoyment of their employment rights. [Del. Code Ann. tit. 19, § 713.]

E. HIV/AIDS

1. General Rules

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 to anyone else without the consent of the subject or the subject’s guardian. [Del. Code Ann. tit. 16, § 1203(a).]

There are a number of exceptions to this general rule, primarily designed to assure treatment of the individual and to protect others. Patient information related to HIV tests or results may be disclosed without patient consent to: health care providers who need test results for emergency treatment of the patient; a health facility that procures, processes, or distributes blood; health care review organizations for quality assessment purposes; accreditation or oversight review organizations for accreditation of the facility; and others. [Del. Code Ann. tit. 16, § 1203(b).] 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. Court proceedings to determine whether disclosure should be made employ a variety of protective measures including the use of pseudonyms. [*Id.*]

Persons who receive HIV-related information are generally prohibited from further disclosing this information. [Del. Code Ann. tit. 16, § 1203(b).]

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. [Del. Code Ann. tit. 16, § 1205.] He may recover liquidated damages of \$1,000 or actual damages, whichever is greater, for a negligent violation. If the disclosure was an intentional or reckless violation, the

person is entitled to liquidated damages of \$5,000 or actual damages, whichever is greater. The court may also award reasonable attorney's fees and grant such other relief, including an injunction, as the court may consider appropriate. [*Id.*]

Fines and Penalties. The Attorney General also may bring a civil action to enforce these provisions. [Del. Code Ann. tit. 16, § 1205.] The court may order damages or any other relief it may consider appropriate. [*Id.*]

2. Insurers

Patient access to HIV test results. Under the HIV Testing for Insurance Act, an insurer who fails to issue a policy to an applicant due to the results of an HIV test must notify the applicant in writing of the decision to deny based upon the results of the applicant's medical examination and testing, but may not disclose the specific results of the medical examination or test to the applicant. [Del. Code Ann. tit. 18, § 7405.] The insurer must inform the applicant that the results of the examination and testing will be sent to a physician designated by the applicant and that the applicant should contact the physician for the examination and test results. If the applicant fails to designate a physician, the insurer must report the HIV test result and sufficient information to locate and inform the patient to the Department of Health and Social Services. [*Id.*] All reports made pursuant to the HIV Testing for Insurance Act are confidential and protected from release. They may be used only for the sole purpose of locating and informing the applicant of the applicant's positive HIV test result. [*Id.*]

Disclosure. Under the HIV Testing for Insurance Act, no insurer may request or require an applicant to take an HIV test unless the insurer obtains the applicant's prior written informed consent; reveals to the applicant of the potential uses of the test results and entities to whom the test results may be disclosed; and provides the applicant with written information approved by the state department of health and social services. [Del. Code Ann. tit. 18, § 7403.] Insurers are required to maintain strict confidentiality regarding HIV test results, and generally may not disclose them unless authorized by the applicant or otherwise expressly permitted by the Act. [Del. Code Ann. tit. 18, § 7404.]

An insurer may, with the applicant's written informed consent, disclose an applicant's HIV test result to reinsurers and medical personnel or insurance affiliates who are involved in the applicant's claims or underwriting provided that disclosure is necessary to make underwriting or claims decisions. An insurer may also report a confirmed positive HIV test result to a medical information exchange agency, such as the Medical Information Bureau, provided that the applicant's informed consent explains that such disclosures may be made; and the results are reported in a manner that only indicates that the applicant has had an abnormal blood test result, or in a manner that uses a neutral identifier to keep the individual's identity confidential and anonymous to the agency. [Del. Code Ann. tit. 18, §§ 7403; 7404.]

F. Mental Health Hospitals or Residential Centers

Patient access. A hospital or residential center that admits persons for the treatment of mental illness must release its records to the patient or the patient's guardian where the patient is a minor. [Del. Code Ann. tit. 16, § 5161(13).] Access to specific records may be refused when a clinical determination has been made and documented

in the patient's treatment plan that such access would be seriously detrimental to the patient's health or treatment progress. [*Id.*] In cases where access would be detrimental to treatment progress, the records may be made available to a licensed mental health professional selected by the patient. That professional may, in exercising professional judgment, provide the patient with access to any or all parts of the records or disclose information contained in the records. [Del. Code Ann. tit. 16, § 5161(13).]

Disclosures. The clinical records of patients in mental health hospitals or residential centers are not public records and generally may not be released to any person or agency without the consent of the patient (or his parent or legal guardian). [*Id.*] Disclosure without the patient's consent may be made: pursuant to a court order; to attorneys representing the patient; to rights-protection agencies; to departmental contractors to the extent necessary for professional consultation or services; to the State Bureau of Identification; and as otherwise required by law. [*Id.*]

G. Sexually Transmitted Diseases

Delaware maintains mandatory reporting provisions for identifying and preventing the spread of sexually transmitted diseases. [Del. Code Ann. tit. 16, §§ 701; 702.] The mandatory reports maintained by the Division of Public Health are "strictly confidential" and may not be released without the individual's consent to the public, even pursuant to subpoena, except in very narrow circumstances. [Del. Code Ann. tit. 16, §§ 702; 711; 712.] The fact of consultation, examination or treatment of a minor is strictly confidential and may not be disclosed by health care facilities or professionals, except to: (1) persons authorized to give consent for treatment of the minor (the minor himself if married or 18 years or older, the parent or guardian of the minor, or an authorized caregiver); (2) the Division of Public Health to comply with STD reporting requirements; or (3) as necessary to comply with requirements related to child abuse investigations. [Del. Code Ann. tit. 16, § 710; Del. Code Ann. tit. 13, §§ 707; 708; Del. Code Ann. tit. 9.]

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DISTRICT OF COLUMBIA

The District of Columbia statutorily grants a patient the right of access to his mental health records and has extensive restrictions on the disclosure of such information. The District of Columbia does not have a general, comprehensive statute restricting the disclosure of confidential medical information. Rather, these protections are addressed in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

The District of Columbia does not have a general statute that grants patients access to their health information or medical records. The jurisdiction does statutorily grant access to mental health records. [See Section IV below.]

II. RESTRICTIONS ON DISCLOSURE

A. Bill of Rights

The D.C. Bill of Rights provides that individual privacy regarding health records must be protected by laws prohibiting disclosure that may result in a violation of individual privacy. [D.C. Code Ann., Art. I, Bill of Rights § 4.]

B. Health Professionals

A health professional who willfully breaches a statutory, regulatory, or ethical requirement of confidentiality with respect to a person who is a patient or client of the health professional, unless ordered by a court, may be subject to disciplinary action by the pertinent licensing board. [D.C. Code Ann. § 3-1205.14(a)(16).]

C. HMOs

Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant without the express consent of that person. [D.C. Code Ann. § 31-3426(a).]

Exceptions to the general rule allow disclosures without the person's consent to carry out the purposes of the statutory provisions governing HMOs; when needed for the conduct of the HMO's business (including to state licensing and certifying agencies); pursuant to statute or court order for the production of evidence or the discovery thereof; and, to the extent pertinent, in the event of a claim or litigation between an enrollee/applicant and the HMO. [*Id.*]

Patient identifying information that is considered by a health care review committee retains its confidential nature. [*Id.*]

HMOs are required to have an internal quality assurance program to monitor its health care services that includes a written quality assurance plan describing the HMO's policies and procedures regarding confidentiality. [D.C. Code Ann. § 31-3406.]

Remedies and Penalties

Right to Sue. HMOs and their employees who wrongfully disclose confidential health care information while acting in good faith and without negligence may not be liable for civil damages. [D.C. Code Ann. § 31-3426(c).]

Fines and Penalties. If the commissioner of insurance 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 or impose an administrative penalty ranging up to \$1,000 a day for each cause of suspension or revocation. [D.C. Code Ann. § 31-3419.] Additionally, if the commissioner determines that an HMO has violated these provisions, the commissioner may, after notice and hearing, order the HMO to take such action as reasonably necessary to rectify the condition. 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. [D.C. Code Ann. § 31-3421.] In lieu of suspension or revocation, the commissioner of insurance may issue an order directing an HMO to cease and desist from engaging in any act or practice in violation of this provision. [D.C. Code Ann. § 31-3423.] A \$10,000 - \$50,000 administrative penalty may be imposed if the HMO fails to correct the violation within a reasonable time of receiving written notice. [*Id.*]

D. State Government

Information which is specifically exempted from disclosure by another statute is not subject to disclosure under the D.C. Freedom of Information Act. [D.C. Code Ann. § 2-534(a)(6).] Similarly, information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy is also exempt from disclosure under this Act. [D.C. Code Ann. § 2-534(a)(2).]

III. PRIVILEGES

The District of Columbia recognizes a physician and mental health care professional-patient privilege which allows a patient, in a legal proceeding, to refuse to disclose and to prevent others from disclosing confidential information that the professional acquired in his professional capacity that was necessary to enable him to act in that capacity. [D.C. Code Ann. §§ 7-1201.01 (defining mental health professional as including psychiatrists, psychologists, social workers, and others); 14-307.] An HMO is entitled to claim any statutory privilege against disclosure that the provider who furnished the information is entitled to claim. [D.C. Code Ann. § 31-3426.]

FLORIDA

Florida statutorily grants patients the right of access to medical records maintained by health care practitioners. The disclosure of patient information by providers is generally prohibited without the patient's consent, subject to specified exceptions. Florida also has numerous laws protecting the confidentiality of health information held by a variety of entities and government agencies.

I. PATIENT ACCESS

A. Health Care Practitioners

Individuals have a right to receive copies of reports and records relating to their examination or treatment, including x-rays and insurance information, from their health care practitioners. [Fla. Stat. Ann. § 456.057.] Health care practitioners include licensed physicians, acupuncturists, chiropractors, osteopaths, psychologists and psychotherapists. [Fla. Stat. Ann. § 456.057 (defining "health care practitioner").] The term does *not* include pharmacists, dental hygienists, and others. [*Id.*]

In general, health care practitioners must, upon request, furnish "in a timely manner, without delays for legal review" a patient's records and reports to the patient or the patient's legal representative. If the patient requests psychiatric, psychological, or psychotherapeutic records, the practitioner may provide a report of the examination and treatment instead of copies of the records. [*Id.*] Upon a patient's written request, the practitioner must provide complete copies of the patient's psychiatric records to a subsequent treating psychiatrist. [*Id.*; see section IV for information on patient access to mental health clinical records.]

Furnishing the report or record cannot be conditioned on payment of the fee for services rendered. [*Id.*] The health care practitioner or record owner may not charge more than the actual cost of copying, including staff time, or the amount specified by rule of the appropriate licensing board or the Florida Department of Health. [*Id.*]

B. Hospitals and Other Licensed Facilities

Florida statutorily grants individuals the right to see and obtain copies of patient records in the possession of hospitals, ambulatory surgical centers and mobile surgical facilities. [Fla. Stat. Ann. § 395.002 (defining "licensed facility") and 395.3025.] This access requirement does *not* apply to psychiatric facilities, to records of mental health treatment, or to the records of substance abuse impaired persons. [Fla. Stat. Ann. § 395.3025.]

“Patient records” are records relating to the examination or treatment of the patient, including x-rays and insurance information. [*Id.*]

The persons entitled to access under these provisions include: patients, guardians, curators and personal representatives, and in the absence of one of those persons, to the next of kin of a deceased patient, the parent of a minor, or anyone designated by the patient in writing. [*Id.*]

After the discharge of a patient, a hospital and other licensed facility must, upon written request furnish an accurate copy of all patient records to the patient. [Fla. Stat. Ann. § 395.3025.] The response to the request must be “in a timely manner, without delays for legal review.” [*Id.*]

The hospital or other facility may impose a fee for copying the record. [*Id.*] The maximum charge for paper copies is \$1 per page and may include sales tax and actual postage. A maximum of \$2 per page for copies which are not in paper form may be charged. Additionally, the hospital may impose a fee of \$1 per year of records requested. These fees apply whether the records are provided directly from the hospital or from a copy service. [Fla. Stat. Ann. §§ 395.3025; 28.24.] A patient whose records are copied for purposes of continuing to receive medical care is not required to pay the copying or search fee. [*Id.*]

II. RESTRICTIONS ON USE AND DISCLOSURE

A. Employers

Employers who provide or administer health insurance benefits or life insurance benefits to their employees must maintain the confidentiality of information relating to the medical condition or status of any person covered by such insurance benefits. [Fla. Stat. Ann. § 760.50(5).] Such information in the possession of a public employer is exempt from disclosure under the Public Records Act. [*Id.*]

Remedies and penalties

Right to sue. An employer may be liable in damages to any person damaged by its failure to implement procedures to maintain the confidentiality of medical information. [*Id.*] Any person aggrieved by a violation of this section has a right of action in the circuit court and may recover for each violation against any person who violates a provision of this section, liquidated damages of \$1,000 or actual damages, whichever is greater. [Fla. Stat. Ann. § 760.50(6).] If a violation is intentional or reckless, the employee may recover liquidated damages of \$5,000 or actual damages, whichever is greater. Additionally, the aggrieved person may recover reasonable attorney’s fees.

B. Health Care Facilities and Providers

1. Scope

Under the Florida Patient’s Bill of Rights and Responsibilities, patients have the general right to privacy in health care. [Fla. Stat. Ann. § 381.026.] The provisions apply to licensed health care facilities, physicians, osteopathic physicians, and podiatric physicians. These health care providers and facilities are required to respect the patients’ right to privacy “to the extent consistent with providing adequate medical care to the patient and with the efficient administration of the health care facility or provider’s office.” [Id.] The right does not preclude “necessary and discrete discussion of a patient’s case or examination by appropriate medical personnel.” [Id.]

Health care providers and facilities are required to give patients a written summary of their rights, including their right to privacy. [Id.] Additionally, health care facilities are required to adopt policies and procedures to ensure that inpatients are given the opportunity during admission to receive information about their rights and how to file complaints with the facility and appropriate state agencies. [Fla. Stat. Ann. § 381.0261.]

Remedies and penalties.

Fines and penalties. A health care facility or health care provider that fails to make available to patients a summary of their rights under these provisions may be subject to corrective action and may be subject to an administrative fine by the appropriate agency or regulatory board. Initial nonwillful violations are subject only to corrective actions. Subsequent violations may incur fines. Each intentional and willful violation constitutes a separate violation and is subject to a separate fine. [Fla. Stat. Ann. § 381.0261.]

C. Health Care Practitioners

1. Scope

Florida statutorily restricts the manner in which health care practitioners can disclose health information. [Fla. Stat. Ann. § 456.057.] The restrictions apply to any licensed health care practitioner who makes a physical or mental examination of, or administers treatment or dispenses legend drugs to any person. [Id.] Certain providers, such as pharmacists, opticians, and hospitals are expressly excluded from these provisions. [Id.]

2. Authorization Requirements and Exceptions

In general, medical records may not be furnished to and the medical condition of a patient may not be discussed with any person other than the patient, the patient’s legal representative, or other health care practitioners and providers involved in the care and treatment of the patient without the patient’s written authorization. [Fla. Stat. Ann. § 456.057.]

Use of patient information for solicitation or marketing the sale of goods or services without a specific written release or authorization from the patient is expressly prohibited. [*Id.*]

There are a number of exceptions to the general rule requiring patient authorization prior to disclosure. Medical records may be furnished by a health care practitioner *without* the patient's written authorization under the following circumstances:

- **Treatment:** To any person, firm, or corporation that has procured or furnished the examination or treatment with the patient's consent;
- **Judicial and civil procedures:** When a compulsory examination is made pursuant to Florida's Rule of Civil Procedure, in which case copies of the medical records must be furnished to both the defendant and the plaintiff;
- **Other legal process:** Upon the issuance of a subpoena in any civil or criminal action unless otherwise prohibited by law, provided that proper notice has been given to the patient or the patient's representative by the person who is seeking the records;
- **Research:** For statistical or scientific research if the information is abstracted to preserve the identity of the patient;
- **Health oversight:** To the department of health pursuant to subpoena if the department has reasonable cause to believe the practitioner is providing inadequate care; and when the department has probable cause to believe the provider has engaged in fraud. [*Id.*]

The recipient of medical record information is generally prohibited from further disclosing this information without expressed written consent from the patient or the patient's legal representative. [Fla. Stat. Ann. § 456.057(10).]

Information provided to the Department and appropriate regulatory boards remains confidential and may be used solely for the investigatory or disciplinary purpose specified. [Fla. Stat. Ann. § 456.057.] These records are exempt from public disclosure under the Public Records Act. [*Id.*]

3. Other Requirements

All "records owners," *i.e.*, any health care practitioner who generates a medical record, receives medical records from a previous record owner, or the practitioner's employer, if the employer is designated as the records owner, [Fla. Stat. Ann. § 456.057(1) (defining "records owner.")] are required to develop and implement policies, standards and procedures to protect the confidentiality and security of medical records. Employees of the record owners must be trained in these policies, standards and procedures. [Fla. Stat. Ann. § 456.057(9).]

In addition, record owners must maintain a record of all disclosures of information in a medical record to a third party, including the purpose of the disclosure request. [*Id.*]

4. Remedies and Penalties

Fines and penalties. Licensed health care practitioners and others who violate these provisions must be disciplined by the appropriate licensing authority. [Fla. Stat. Ann. § 456.057.] The Attorney General is authorized to enforce these provisions for record

owners not otherwise licensed by the state. [*Id.*] The relief may include injunctive relief and fines not to exceed \$5,000 per violation. [*Id.*]

D. HMOs

HMOs and prepaid health clinics must maintain strict confidentiality against unauthorized or inadvertent disclosure of confidential information to persons inside or outside their organization regarding psychotherapeutic services or the records and reports related to such services. [Fla. Stat. Ann. § 641.59.] When the Department of Insurance examines the business records of HMOs, medical records are generally not subject to audit, though they may be subject to subpoena or furnished as authorized by Fla. Stat. Ann. § 456.057 (summarized above). [Fla. Stat. Ann. § 641.27.]

E. Hospitals and Other Licensed Facilities

Hospitals and licensed entities are subject to restrictions on disclosure of patient records and information similar to those applicable to health practitioners. [Fla. Stat. Ann. § 395.3025.] In general their patient records may not be disclosed without the patient's consent, except under the circumstances specified in the statute. [*Id.*] These include: to licensed facility personnel and attending physicians for use in connection with the treatment of the patient; to licensed facility personnel for administrative purposes or risk management and quality assurance functions; pursuant to a subpoena in any civil or criminal action, unless otherwise prohibited by law; and to various state agencies and other entities for purposes specified in the statute. [*Id.*] The Health Department is explicitly authorized to examine a licensed facility's patient records, whether held by the facility or the Agency for Health Care Administration, to conduct epidemiological investigations. [*Id.*] Recipients of information lawfully disclosed may use it only for the purpose for which it was provided and may not further disclose it, except upon the written consent of the patient. [*Id.*] A general authorization for the release of medical information does not authorize re-disclosure. [*Id.*]

Remedies and Penalties

Fines and Penalties. Unauthorized disclosure of any information that would identify an individual by agents of the Health Department is a misdemeanor of the first degree, punishable as specified by statute. [*Id.*]

F. Insurers

1. Florida State Insurance Law

Insurers must maintain strict confidentiality against unauthorized or inadvertent disclosure of confidential information to persons inside or outside the insurer's organization regarding claims for payment of psychotherapeutic services or the records related to such claims. [Fla. Stat. Ann. § 627.4195.] When the Department of Insurance examines the business records of prepaid health clinics or prepaid limited health service organizations, medical records are generally not subject to audit,

though they may be subject to subpoena. [Fla. Stat. Ann. § 641.418 (prepaid health clinics); Fla. Stat. Ann. § 636.039 (prepaid limited health service organizations).]

2. Florida State Insurance Department Regulations

a. Scope

The Florida Insurance Department 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 pursuant to the Florida Insurance Code) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [Fla. Admin. Code Ann. r. 4-128.002(16) (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. [Fla. Admin. Code Ann. r. 4-128.002(20) (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. [Fla. Admin. Code Ann. r. 4-128.002(14) (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. [Fla. Admin. Code Ann. r. 4-128.002(5) & (8) (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. [Fla. Admin. Code Ann. r. 4-128.020.]

b. Requirements

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Fla. Admin. Code Ann. r. 4-128.017.] 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. [Fla. Admin. Code Ann. r. 4-128.018.]

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 activity otherwise permitted by law, required pursuant to governmental reporting authority or to comply with legal process. [Fla. Admin. Code Ann. r. 4-128.017.] Nonpublic health information may be disclosed for scientific, medical or public policy research in accordance with federal law regardless of whether the research is conducted by or on behalf of the licensee. [*Id.*]

This regulation does not supercede existing Florida law related to medical records, health or insurance information privacy. [Fla. Admin. Code Ann. r. 4-128.021.]

G. Nursing Homes

The personal and medical records of residents of nursing homes are confidential and exempt from the public access provisions of Florida’s Public Records Act. [Fla. Stat. Ann. § 400.022.] The nursing home, however, must provide access to a resident’s records to the spouse, guardian, surrogate, proxy, or attorney in fact of the resident, unless the resident has expressly prohibited such access. [Fla. Stat. Ann. § 400.145.] Conditions of access by these individuals are specified in the statute. [*Id.*] The records generally include medical and psychiatric records as well as other records concerning the resident’s care and treatment. [*Id.*]

Remedies and Penalties

Right to Sue. Any resident whose rights are violated may file a civil action for damages. The action may be brought by the resident or his guardian, by a person or organization on behalf of the resident with the resident’s consent, or by the personal representative of the estate of a deceased resident. [Fla. Stat. Ann. § 400.023.]

Fines and Penalties. Violations of a resident’s rights are also grounds for action by the Agency for Health Care Administration as specified by statute. [Fla. Stat. Ann. §§ 400.022; 400.121.]

H. Prepaid Limited Health Service Organizations

Information pertaining to the diagnosis, treatment, or health of any enrollee of a prepaid limited health service organization is confidential and not subject to public disclosure under the Public Records Act. [Fla. Stat. Ann. § 636.064.] Release of the information is permitted only with the enrollee’s written consent or as provided by law. [*Id.*] A prepaid limited health service organization is any person or entity that provides or arranges for, or provides access to a limited health service through an exclusive panel of health care providers in return for a prepayment. [Fla. Stat. Ann. § 636.003 (defining “prepaid limited health service organization”).]

I. State Government

Records held by state agencies are generally available for public inspection, subject to certain exemptions. [Fla. Stat. Ann. § 119.07.] All personal identifying information related to an individual’s personal health or eligibility for health-related services made or received by the department of health or its service providers are confidential and exempt from public examination. Such information, however, may be disclosed: with

the individual's express written consent; pursuant to a court order; in a medical emergency; or to a health research entity for research approved by the department. [Fla. Stat. Ann. § 119.07(3)(dd).]

Although records held by state agencies are generally publicly available, there are numerous exemptions, including: an exemption for medical information pertaining to prospective, current, or former officers or employees of an agency if the information would identify the individual. [Fla. Stat. Ann. § 199.07(3)(v).] Disclosure requires the subject's written permission or a court order. [*Id.*] There is also an exemption for medical history records, personal financial information, and information related to health or property insurance furnished by an individual to any agency pursuant to federal, state, and local housing assistance programs. [Fla. Stat. Ann. § 199.07(3)(cc).] There are additional exemptions from disclosure for other types of information made confidential by other statutory provisions.

III. Privileges

Florida recognizes a privilege for communications between patients and psychotherapists. [Fla. Stat. Ann. § 90.503.] "Psychotherapist" is broadly defined to include physicians who are engaged in the diagnosis or treatment of a mental or emotional condition, psychologists, clinical social workers, marriage and family therapists, mental health counselors, and others. [Fla. Stat. Ann. § 90.503.] The psychotherapist may claim the privilege on behalf of the patient. Communications between patients and psychiatrists and between patients and persons providing psychological services and clinical, counseling or psychotherapy services are confidential. [Fla. Stat. Ann. § 456.059 (psychiatrists); Fla. Stat. Ann. § 490.0147 (psychological services); Fla. Stat. Ann. § 491.0147 (clinical, counseling and psychotherapy services).] A psychiatrist may disclose patient communications to the extent necessary to warn potential victims or to communicate the threat to a law enforcement agency. [Fla. Stat. Ann. § 456.059.] Similarly, the privilege may be waived when there is a clear and immediate probability of physical harm to the patient, to other individuals or to society, and the person providing psychological services discloses the information only to the potential victim, an appropriate family member, law enforcement or other appropriate authorities. [Fla. Stat. Ann. § 490.0147.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer

Information reported to the statewide cancer registry that discloses or could lead to the disclosure of the identity of any person is confidential and not subject to disclosure under Florida's Public Records Act. [Fla. Stat. Ann. § 385.202.] Disclosure is only permitted without the individual's written consent: to the department of health or a contractual designee to contact individuals for the purpose of epidemiologic investigation and monitoring; or to another governmental agency or contractual designee for medical or scientific research, provided that in either exception the recipient of the information agrees not to further disclose the information. [*Id.*]

B. Genetic Testing

1. Generally

DNA analysis generally may be performed only with the informed consent of the person to be tested. [Fla. Stat. Ann. § 760.40.] The results of the DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested. [*Id.*] If the information was used to deny insurance or for another purpose, the tested person must be so notified, the analysis must be repeated to verify the accuracy of the first analysis, and any denial must be reviewed if the first analysis is found to be inaccurate. [*Id.*]

DNA analysis may be performed without the consent of the person to be tested only for purposes of criminal prosecution, determining paternity in certain circumstances, and acquiring specimens from persons convicted of certain offenses. [*Id.*]

Remedies and Penalties

Fines and penalties. A person who violates this statute is guilty of a misdemeanor of the first degree, punishable by a term of imprisonment not to exceed one year.

2. Health Insurers

Health insurers may not require or solicit genetic information, use genetic test results or consider a person's decisions or actions relating to genetic testing for any insurance purpose. [Fla. Stat. Ann. § 627.4301.]

C. HIV/AIDS

1. Generally

In general, HIV testing requires the informed consent of the individual to be tested, except in circumstances specified by statute. [Fla. Stat. Ann. § 381.004.] The identity of the tested person and the test results are confidential and not subject to release under the public records access provisions of the Public Records Act, except to the person and in the circumstances specified in the statute. [*Id.*] The statute permits disclosure under specified conditions to: the subject of the test or his legally authorized representative; any person, including third party payers, designated in a legally effective release of test results executed prior to or after the test by the subject or his representative; (a general release without prior written authorization to release HIV test results is not sufficient); an authorized agent or employee of a health care facility or health care provider under certain circumstances; health care providers consulting among themselves or with health care facilities to determine diagnosis and treatment; to certain state agencies and entities specified in the statute; to authorized medical or epidemiological researchers who may not further disclose any identifying characteristics or information; to persons obtaining a court order issued in compliance with specified statutory requirements; and to certain medical and nonmedical personnel who have been subject to significant exposure. [*Id.*] In addition, under certain conditions, health care practitioners may disclose information that would

otherwise be confidential to a sexual partner or a needle-sharing partner of a patient who has tested positive for HIV. [Fla. Stat. Ann. § 456.061.]

The results of a serologic test conducted under the auspices of the Department of Health cannot be used to determine if a person may be insured for disability, health, or life insurance or for making certain employment decisions. [Fla. Stat. Ann. § 381.004.] This is the only provision of Fla. Stat. Ann. § 381.004 that applies to insurers and others participating in activities relating to the insurance application and underwriting process. However, insurers and HMOs are subject to other statutes regarding their use and disclosure of HIV test information. (See below.)

Remedies and Penalties

Fines and Penalties. Violations of Fla. Stat. Ann. § 381.004 by facilities or a licensed health care provider are grounds for disciplinary action against the licensee. [Fla. Stat. Ann. § 381.004(6)(a).] Any person who violates the confidentiality provisions of the statute commits a misdemeanor of the first degree, punishable by imprisonment up to 1 year and a maximum fine of \$1,000. [Fla. Stat. Ann. §§ 381.004(6); 775.082; 775.083.] A person who obtains information that identifies an individual having any sexually transmissible disease, including HIV, who maliciously or for monetary gain disseminates the information or otherwise makes it known, (except to certain authorized persons), commits a felony of the third degree, punishable by imprisonment up to 5 years and a maximum fine of \$5,000. [*Id.*]

2. Insurers

Insurers are subject to a specific statute governing the use and disclosure of HIV tests. [Fla. Stat. Ann. § 627.429.] They must obtain the person's written informed consent prior to testing. [*Id.*] They must maintain strict confidentiality regarding medical test results and may not disclose the information outside the insurance company or its employees, insurance affiliates, agents, or reinsurers, except to the person tested and persons designated in writing by the person tested. [*Id.*] They may not furnish specific test results to an insurer industry data bank if the information would identify the individual and the specific test results. [*Id.*]

3. HMOs

HMOs are subject to a similar but separate statute that requires them to obtain the subject's informed written consent prior to HIV testing, to maintain strict confidentiality in the same manner as insurers, and not to furnish test results to an insurance industry or HMO data bank if the information would identify the individual and the specific test results. [Fla. Stat. Ann. § 641.3007.]

4. Employers

Employers may not require an individual to take a HIV-related test as a condition of hiring, promotion, or continued employment unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification for the job in question. [Fla. Stat. Ann. § 760.50.]

Remedies and penalties

Right to sue. Any person aggrieved by a violation of this section has a right of action in the circuit court and may recover for each violation against any person who violates a provision of this section, liquidated damages of \$1,000 or actual damages, whichever is greater. [Fla. Stat. Ann. § 760.50(6).] If a violation is intentional or reckless, the employee may recover liquidated damages of \$5,000 or actual damages, whichever is greater. Additionally, the aggrieved person may recover reasonable attorney's fees.

D. Mental Health Conditions

The Florida Mental Health Act governs the disclosure of clinical records by facilities that provide mental health treatment. [Fla. Stat. Ann. § 394.451; § 394.455 (defining “facility”); and § 394.4615.] “Clinical records” include all medical records, progress notes, charts, admission and discharge data, and all other information recorded by a facility pertaining to a patient’s hospitalization and treatment. [Fla. Stat. Ann. § 394.455 (defining “clinical record”).]

These records are confidential and exempt from the disclosure requirements of the Florida Public Records Act. [Fla. Stat. Ann. § 394.4615.] The confidential status of the record cannot be waived except by the express and informed consent of the patient or his guardian. [Fla. Stat. Ann. § 394.4615.]

The clinical record *must* be released in the following circumstances: when the patient or his guardian authorizes the release; when the patient is represented by counsel and the records are needed by the counsel for adequate representation; when the court orders release; and when the patient is committed to, or returned to, certain state-run facilities. [*Id.*] For purposes of monitoring and investigation, the Department of Health and the Agency for Health Care Administration must have access to the clinical records of patients of specified facilities. [Fla. Stat. Ann. § 394.90.]

When the patient has declared an intention to harm another person, sufficient information to provide adequate warning to the person threatened may be released without the patient’s authorization. [Fla. Stat. Ann. § 394.4615.] Information may also be released without patient authorization to qualified researchers under certain circumstances. [*Id.*]

Any person, agency, or entity receiving information must maintain it as confidential. [*Id.*]

In addition, patients must have reasonable access to their clinical records unless such access is deemed to be harmful to the patient. [*Id.*] If the patient’s right to inspect their clinical record is restricted by the facility, written notice must be provided to the patient and the patient’s guardian, guardian advocate, attorney and representative. The restriction of a patient’s right to inspect his records must be recorded in the clinical record along with reasons for the restriction. [*Id.*]

E. Reportable Diseases

Doctors and certain other health care practitioners, hospitals and laboratories must report infectious and noninfectious diseases of public health significance, as specified by the Department of Health. [Fla. Stat. Ann. § 381.0031; Fla. Admin. Code Ann. r. 64D-3.002 (listing diseases that must be reported including, but not limited to, AIDS, anthrax, lyme disease, and tuberculosis).] Information contained in the reports is confidential, not subject to the public disclosure requirements of the Florida Public Records Act (Fla. Stat. Ann. § 119.07), and may be made public only when necessary to protect public health. [*Id.*]

F. Sexually Transmitted Diseases

Persons who diagnose or treat an individual with a sexually transmissible disease and laboratories that perform tests that are positive for a sexually transmissible disease are required to report that information to the Department of Health. [Fla. Stat. Ann. § 384.25.] All information held by the department or its authorized representatives relating to known or suspected cases of sexually transmissible diseases is strictly confidential and not subject to public disclosure requirements of Florida's Public Records Act. [Fla. Stat. Ann. § 384.29.] The information may not be released or disclosed except under the circumstances specified in the statute. [*Id.*]

A minor may obtain treatment for sexually transmissible diseases without the consent of his parents or guardians. [Fla. Stat. Ann. § 384.30.] The fact of consultation, examination and treatment of the minor is confidential, not subject to the disclosure requirements of the Florida Public Records Act, and cannot be divulged in any direct or indirect manner except as authorized by statute. This prohibition includes sending a bill to the parent or guardian. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any person who violates the confidentiality provisions is guilty of a misdemeanor of the first degree, punishable by a maximum term of imprisonment of one year. Any person who obtains identifiable information about an individual with a sexually transmissible disease, who knew or should have known the nature of the information and maliciously or for monetary gain, makes an unauthorized disclosure is guilty of a felony of the third degree, punishable by imprisonment of up to five years and a maximum fine of \$5,000. [Fla. Stat. Ann. §§ 384.34; 775.082; 775.083.]

G. Substance Abuse

The records of service providers pertaining to the identity, diagnosis, prognosis, and provision of service to any individual substance abuse client are confidential and exempt from the public access provisions of Florida's Public Records Act. [Fla. Stat. Ann. § 397.501.] In general these records may not be disclosed without the written consent of the client.

With respect to minors, written consent for disclosure may be given only by the minor client because the minor acting alone has the legal capacity to voluntarily apply for

and obtain substance abuse treatment. [*Id.*] This restriction on disclosure applies to releasing client identifying information to the parent or guardian for purposes of obtaining financial reimbursement. [*Id.*]

There are a few circumstances under which substance abuse records may be disclosed including the following: to medical personnel in an emergency; pursuant to a court order based on an application showing good cause; to the Secretary of Health or a designee for scientific research in accordance with federal confidentiality requirements, but only upon written agreement that the client's name and identification will not be disclosed; and a few others. [*Id.*] Additionally, the appropriate department may have access to the records of clients of licensed service providers, but only for purposes of licensing, monitoring, and investigation. [Fla. Stat. Ann. § 397.411.]

Remedies and Penalties

Fines and Penalties. A person who causes or conspires with or assists another person to cause the denial to any client of his rights (including his right to confidentiality) is guilty of a first degree misdemeanor punishable by imprisonment and a fine not exceeding \$5,000. [Fla. Stat. Ann. § 397.581.]

GEORGIA

Georgia statutorily grants a patient the right of access to his medical records in the possession of health care providers, insurance companies and others. The state does not have comprehensive provisions 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 including Physicians, Hospitals, and HMOs

A patient must be provided access to his health records including, but not limited to, evaluations, diagnoses, laboratory reports, prescriptions and X-rays maintained by a health care provider. [Ga. Code Ann. §§ 31-33-2; 31-33-1 (defining “record” for purposes of this chapter).] This requirement is applicable to all physicians, pharmacists, hospitals, special care units, including kidney disease treatment centers, intermediate care facilities, ambulatory surgical and obstetrical facilities, health maintenance organizations, home health agencies, osteopaths, physician assistants, dentists and dental hygienists, nurses, podiatrists, and others. [Ga. Code Ann. § 31-33-1 (defining “provider” for purposes of this chapter).] It does not apply to psychiatric, psychological or other mental health records of a patient. [Ga. Code Ann. § 31-33-4.]

Upon written request, a patient is entitled to a complete and current copy of his health record maintained by a health care provider. [Ga. Code Ann. §§ 31-33-2; 31-33-3.] The record must be provided to the patient or any provider or person designated by the patient within a reasonable period of time. [Ga. Code Ann. § 31-33-2.] When dealing with a patient’s agent appointed under a durable power of attorney, a health care provider must give the agent the same right as the patient to examine and copy any part or all of the patient’s medical records that are relevant to the exercise of the agent’s powers. [Ga. Code Ann. § 31-37-7.]

The provider may require that copying and mailing costs be paid prior to furnishing the records. As of 2002, providers may charge a fee of up to \$20 for search, retrieval and other administrative costs associated with providing the copy, and up to \$7.50 for certifying the copy. Additionally, the provider can impose copying costs as follows: 75¢ for the first 20 pages, 65¢ for pages 21-100, and 50¢ for each page beyond page 100. [Ga. Code Ann. § 31-33-3.] When a medical record is not in paper format, the provider may charge the reasonable costs of copying the item. [*Id.*]

If the provider reasonably determines that disclosure of the record to the patient would be detrimental to the physical or mental health of the patient, he may refuse to

disclose the record. [Ga. Code Ann. § 31-33-2.] However, the patient then has the right to designate in writing another provider to receive his health records. [*Id.*]

B. Insurance Entities, Including HMOs

1. Scope

Georgia insurance law requires insurers and others to provide persons access to their own information, including health information. The statute applies to insurance institutions including any entity or person engaged in the business of insurance, medical service corporations, hospital service corporations, health care plans, health maintenance organizations (HMOs), agents and insurance-support organizations. [Ga. Code Ann. § 33-39-2; (detailing entities and persons covered); 33-39-3(12)(defining “insurance institutions”).]

The provisions cover “personal information,” including most “medical record information,” which is gathered in connection with an insurance transaction. [Ga. Code Ann. § 33-39-3(20) (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, or an individual, the individual’s spouse, parent or legal guardian. [Ga. Code Ann. § 33-39-3 (18) (defining “medical record information”).] The Act does not apply to medical information that has had all individually identifiable information removed. [Ga. Code Ann. § 33-39-3(20).]

With respect to health insurance, the rights granted by the Act extend to Georgia residents who are the subject of the information collected, received or maintained in connection with insurance transactions and those who engage in or seek to engage in insurance transactions. [Ga. Code Ann. § 33-39-2.]

2. Requirements

An insurance company, HMO or other insurance entity must permit the individual to inspect and copy his personal information, including medical record information, that is reasonably locatable and retrievable. Within 30 business days of receiving a written request and proper identification from an individual, the insurer must permit the individual to review the information in person or obtain a copy of it by mail, whichever the individual prefers. [Ga. Code Ann. § 33-39-9(a).] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Ga. Code Ann. § 33-39-9(a)(2).]

Fees. The insurance entity can impose a reasonable fee to cover copying costs. [Ga. Code Ann. § 33-39-9(d).]

In addition to giving the individual a copy of his personal information, the insurance entity must also give the individual a list, if recorded, 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. [Ga. Code Ann. § 33-39-9(a)(3).]

Right to Amend. An individual has a statutory right to request the correction, amendment or deletion of his personal information, in accordance with stated procedures. [Ga. Code Ann. §§ 33-39-10; 33-39-9(a)(4).] 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. [*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 (such as the Medical Information Bureau) 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. [Ga. Code Ann. § 33-39-10(c).]

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. [Ga. Code Ann. § 33-39-21.] The court may award the cost of the action and reasonable attorney's fees to the prevailing party. [*Id.*] The statutory remedy is the sole legal remedy for these violations. [*Id.*]

Fines and Penalties. Additionally, the Insurance Commissioner may hold hearings and impose administrative remedies, including, issuing cease and desist orders. [Ga. Code Ann. § 33-39-16.] Where a hearing results in a finding of a knowing violation, the Commissioner may also order payment of a monetary penalty of up to \$500 per violation, not to exceed \$10,000 in the aggregate for multiple violations. [Ga. Code Ann. § 33-39-19.] A person who violates a cease and desist order may be subject to: a monetary fine of not more than \$10,000; a fine not more than \$50,000 for violations the Commissioner finds have occurred with such frequency as to constitute a general business practice; or the suspension or revocation of the insurance institution's or agent's license. [*Id.*]

II. RESTRICTIONS ON DISCLOSURE

A. HMOs

Generally, health maintenance organizations (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. [Ga. Code Ann. § 33-21-23.] Disclosure 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 or the discovery of evidence, 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. The Insurance Commissioner may suspend or revoke an HMO's certificate of authority for violation of this provision. [Ga. Code Ann. § 33-21-5.] In lieu of suspension or revocation, the Commissioner may place the HMO on probation or impose a fine. He may also issue a cease and desist order. [Ga. Code Ann. § 33-21-27.]

B. Hospitals, Physicians, Health Care Facilities and Pharmacists

Georgia has a physician shield law that protects physicians and others from liability when they disclose medical information in compliance with the statute. [Ga. Code Ann. § 24-9-40.] Under the terms of this statute, physicians, hospitals, health care facilities and pharmacists generally may not be required to release any medical information concerning a patient except upon written authorization. [*Id.*] This section does not apply to psychiatrists or hospitals in which the patient is being or has been treated for mental illness. [*Id.*]

A provider may disclose medical information to the extent a patient has waived his right to confidentiality by placing his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding. [*Id.*] Disclosure *without* prior authorization is also permitted to the Department of Human Resources when required to administer the public health programs that require the reporting of certain diseases; where authorized or required by law, statute or lawful regulation; or pursuant to court order or subpoena. [*Id.*] Persons who receive confidential or privileged medical information pursuant to a limited consent to disclosure, under a law requiring disclosure, or in order to evaluate claims for reimbursement may use the information only for the purpose(s) for which they received the information. They are generally prohibited from redisclosing this information, except where otherwise authorized by law. [Ga. Code Ann. §§ 24-9-42; 24-9-43.] These provisions do not prevent the customary and usual audit, discussion, and presentation of cases in connection with medical and public education. [Ga. Code Ann. § 24-9-45.]

Research. Any hospital, health care facility, medical or skilled nursing home, or other organization rendering patient care may provide information, reports and other data related to an individual's condition and treatment to: research groups approved by the medical staff of the institution; governmental health agencies; medical associations and societies; or to any in-hospital medical staff committee, to be used in any study for the purpose of reducing morbidity or mortality rates. [Ga. Code Ann. § 31-7-6(a).] The recipients of the information may use or publish it only for the purpose of advancing medical research or medical education or to achieve the most effective use of health manpower and facilities. [Ga. Code Ann. § 31-7-6(b).] The identity of the individuals whose information has been studied must be confidential and may not be revealed under any circumstances. [Ga. Code Ann. § 31-7-6(c).]

C. Insurance Entities, Including HMOs

1. Scope

Georgia statutorily limits the disclosure of personal information, including medical record information, by insurers. The statute applies to insurance institutions including any entity or person engaged in the business of insurance, medical service corporations, hospital service corporations, health care plans, health maintenance organizations, agents and insurance-support organizations. [Ga. Code Ann. § 33-39-2; (detailing entities and persons covered); 33-39-3(12) (defining “insurance institutions”).]

The Act covers “personal information,” including most “medical record information,” which is gathered in connection with an insurance transaction. [Ga. Code Ann. § 33-39-3(20) (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, pharmacy, pharmacist or an individual, the individual’s spouse, parent or legal guardian. [Ga. Code Ann. § 33-39-3 (18) (defining “medical record information”).] The Act does not apply to medical information that has had all individually identifiable information removed. [Ga. Code Ann. § 33-39-3(20).]

With respect to health insurance, the rights granted by the Act extend to Georgia 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. [Ga. Code Ann. § 33-39-2.]

2. Requirements

a. Authorizations for Obtaining Health Information

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, specify the purposes for which the information is collected, and specify the length of time that the authorization shall remain valid. [Ga. Code Ann. § 33-39-7.] 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. [Ga. Code Ann. § 33-39-14.] Authorizations submitted by those *other* than insurance entities must be in writing, signed and dated. [Ga. Code Ann. § 33-39-14(1).] 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 above.

Authorization Exceptions. There are numerous circumstances under which an insurance entity can disclose information without the individual's authorization including: determining or verifying insurance coverage benefits or payment; 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; and others. [Ga. Code Ann. § 33-39-14.]

Medical record information generally may not be disclosed to third parties for marketing purposes without the individual's authorization. However, such information may be disclosed without authorization to an affiliate of the insurer for the marketing of an insurance product provided the affiliate agrees not to share the information with others. [Ga. Code Ann. § 33-39-14(12).]

c. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Ga. Code Ann. § 33-39-5.] 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. [Ga. Code Ann. § 33-39-21.] In such an action, the court may award the cost of the action and reasonable attorney's fees to the prevailing party. [*Id.*] If false information is disclosed with malice or willful intent to injure a person, a civil cause of action may arise. [Ga. Code Ann. § 33-39-22.]

Fines and Penalties. The Insurance Commissioner may hold hearings and impose administrative remedies, including, issuing cease and desist orders. [Ga. Code Ann. § 33-39-16.] Where a hearing results in a finding of a knowing violation, the Commissioner may also order payment of a monetary penalty of up to \$500 per violation, not to exceed \$10,000 in the aggregate for multiple violations. [Ga. Code Ann. § 33-39-19.] A person who violates a cease and desist order may be subject to: a monetary fine of not more than \$10,000; a fine not more than \$50,000 for violations the Commissioner finds have occurred with such frequency as to constitute a general business practice; or the suspension or revocation of the insurance institution's or agent's license. [*Id.*]

D. Insurers - Disclosure of Medical Information Obtained from Pharmacies

The Georgia Code imposes additional restrictions on certain insurers' disclosure of information obtained from pharmacies. [See Ga. Code Ann. § 33-24-59.4.] These restrictions apply to accident and sickness insurers, fraternal benefit societies, HMOs, provider sponsored health corporations, the administrators of these organizations and others. [Ga. Code Ann. § 33-24-59.4 (defining "insurer").] Generally, any medical information about a patient that was obtained by or released to an insurer from a pharmacy or pharmacists is confidential and privileged. [Id.] The information may not be released by the insurer to a third party without the explicit written consent of the patient. Prior to obtaining such an authorization, the insurer must provide notice to the patient of the purpose of the release, the party or parties to whom the information will be released, and any consideration paid or to be paid to the insurer for the release of the information. [Id.]

Medical information may be released to a third party without notice to or the written consent of the patient, however, for appropriate medical research, provided that it does not identify the patient, prescriber, pharmacy or pharmacist. [Ga. Code Ann. § 33-24-59.4.]

Remedies and Penalties

Fines and Penalties. A violation of this section constitutes an unfair trade practice. [Ga. Code Ann. § 33-24-59.4(d); see Ga. Code Ann. §§ 33-6-8; 33-6-9 (for specific penalties).] The Insurance Commissioner may, after a hearing, issue a cease and desist order. [Ga. Code Ann. §§ 33-6-8.] A person who violates a cease and desist order may be subject to additional penalties: a monetary penalty not more than \$10,000 for each violation, suspension or revocation of his license, or any other reasonable or appropriate relief. [Ga. Code Ann. § 33-6-9.]

E. Long-Term Care Facilities

Residents of long-term care facilities have a right to privacy in their medical, personal and bodily care programs. Residents' case discussions, consultations, examinations, treatments, and care are confidential and are to be conducted in privacy. Persons not directly involved in the resident's care must have the resident's permission to be present during these activities. [Ga. Code Ann. § 31-8-114(6).]

Additionally, residents have the right to the confidential treatment of their personal and medical records. [Ga. Code Ann. § 31-8-114(7).] Only a resident or his guardian may approve the release or disclosure of his records outside the facility, except in the case of: the resident's transfer to another facility; during a Medicare, Medicaid, licensure peer review survey; or as otherwise provided by law or a third party payment contract. [Id.]

F. State Government

Medical records prepared and maintained or received in the course of operation of a public office or agency are not subject to public inspection or disclosure. [Ga. Code Ann. § 50-18-72(a)(2).]

III. PRIVILEGES

Georgia recognizes a mental health care provider-patient privilege that allows a patient, in legal proceedings, to refuse to disclose and to prevent other persons from disclosing confidential communications made for the purpose of treatment and diagnosis. [Ga. Code Ann. § 24-9-21.] This privilege extends to the patients of psychiatrists, licensed psychologists, licensed clinical social workers, licensed marriage counselors and others who render psychotherapy. [*Id.*] An HMO is entitled to claim any statutory privileges against disclosures that the provider who furnished the information to the HMO is entitled to claim. [Ga. Code Ann. § 33-21-23; *see also*, Ga. Code Ann. § 24-9-21 (listing privileges).] Georgia does not recognize the physician-patient privilege.

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Alcohol and Drug Abuse

A patient receiving treatment for alcohol or drug abuse has the right to examine his medical information kept by the department or facility where the patient was hospitalized or treated. [Ga. Code Ann. § 37-7-167.] The patient has the right to request correction of any inaccurate notation. [*Id.*]

B. Genetic Testing

Information derived from genetic testing is confidential and may be released only to the individual tested and to persons specifically authorized by such individual in writing. [Ga. Code Ann. § 33-54-3.] Genetic testing includes laboratory tests of human DNA or chromosomes to identify the presence or absence of inherited alterations in genetic material that are associated with a disease or illness that is not yet symptomatic at the time of testing. For purposes of these provisions, genetic testing does not include routine physical measurements; chemical, blood, and urine analysis; tests for abuse of drugs; and tests for the presence of HIV. [Ga. Code Ann. § 33-54-3 (defining “genetic testing”).]

Insurers may not seek information derived from genetic testing, and any insurer that possesses such information may not release it to any third party without the explicit written consent of the individual tested. [*Id.*] An insurer that receives information derived from genetic testing may not use the information for any nontherapeutic purpose. [Ga. Code Ann. § 33-54-4.]

There are a few enumerated circumstances where genetic testing information may be disclosed without the test subject’s authorization. Information derived from genetic testing regarding the identity of any individual who is the subject of a criminal investigation or a criminal prosecution may be disclosed to appropriate legal authorities conducting the investigation or prosecution without authorization. [Ga. Code Ann. § 33-54-5.]

A research facility may conduct genetic testing and use the information derived from the tests for scientific research purposes as long as the identity of individuals is not

disclosed to a third party. The individual's identity may be disclosed to his physicians with the consent of the individual. [Ga. Code Ann. § 33-54-6.]

Remedies and Penalties

Right to Sue. An insurer that violates the provisions of this chapter is liable to the individual for actual damages. The court may award costs and reasonable attorney's fees. [Ga. Code Ann. § 33-54-8.] An individual who suffers injury or damages as a result of a violation of these provisions may bring an action against that person for equitable injunctive relief and general and exemplary damages. [*Id.*; Ga. Code Ann. § 10-1-399.]

Fines and Penalties. A violation of these provisions by an insurer constitutes an unfair trade practice under the Georgia Insurance Code. [Ga. Code Ann. § 33-54-8; *see* Ga. Code Ann. §§ 33-6-8; 33-6-9 (for specific penalties).] The Insurance Commissioner may, after a hearing, issue a cease and desist order. [Ga. Code Ann. §§ 33-6-8.] A person who violates a cease and desist order may be subject to additional penalties: a monetary penalty not more than \$10,000 for each violation, suspension or revocation of his license, or any other reasonable or appropriate relief. [Ga. Code Ann. § 33-6-9.]

A violation by any person other than an insurer constitutes an unfair practice under the Fair Business Practices Act of 1975. [Ga. Code Ann. §§ 33-54-8; 10-1-397.] The Office of the Administrator may impose administrative penalties, such as issuing a cease and desist order or imposing a civil penalty up to \$2,000 per violation. [*Id.*]

C. HIV/AIDS

A person or entity that is responsible for recording, reporting, or maintaining AIDS confidential information or that receives that information as permitted by law may not intentionally or knowingly disclose that information to another. [Ga. Code Ann. § 24-9-47(b).] Nor may they be compelled by subpoena, court order, or other judicial process to disclose that information. [*Id.*] The results of an HIV test may be released to the subject of the test. [Ga. Code Ann. § 24-9-47(f).] AIDS confidential information may be disclosed to a parent or guardian if the subject is a minor or is incompetent and to persons designated by the individual in writing. [Ga. Code Ann. § 24-9-47(c) and (d).] A person who receives AIDS confidential information that he knows was improperly disclosed is prohibited from redisclosing that information. [Ga. Code Ann. § 24-9-47(b).]

There are a number of enumerated circumstances when it is considered appropriate to disclose that an individual is infected with HIV, such as to the spouse, sexual partner or child of the infected patient if the physician reasonably believes they are at risk of being infected and the physician has made an attempt to notify the patient that disclosure is going to be made; or when the disclosure is authorized by other state or federal law. [Ga. Code Ann. § 24-9-47.]

Remedies and Penalties

Fines and Penalties. Any person who violates Ga. Code Ann. § 24-9-47(b) is guilty of a misdemeanor. [Ga. Code Ann. § 24-9-47(o).]

D. Mental Health Records

Patient Access. A patient receiving treatment from a mental health facility has the right of reasonable access to review his medical file unless it is determined that disclosure would be detrimental to his health and a notation of such a determination is entered in his record. [Ga. Code Ann. §§ 37-3-162; 37-3-167.] A patient also has the right to request that inaccurate information in his record be corrected. [Ga. Code Ann. § 37-3-167.] When dealing with a patient's agent appointed under a durable power of attorney, a health care provider must give the agent the same right as the patient to examine and copy any part or all of the patient's medical records that are relevant to the exercise of the agent's powers. [Ga. Code Ann. § 31-37-7.]

Restrictions on Disclosure. The clinical record is not a public record and may not be released except under circumstances specified in the statute, including, but not limited to:

- **Treatment.** To physicians or psychologists when and as necessary for treatment of the patient.
- **Patient Authorization.** To any person or entity designated in writing by the patient, or if appropriate, the parent of a minor, or legal guardian.
- **Emergency.** To the treating physician or patient's psychologist in a bona fide emergency.
- **Judicial and administrative proceedings.** Pursuant to a valid subpoena or court order, except for matters that are privileged under state law.
- **Law enforcement.** To law enforcement officers in the course of a criminal investigation. The officer is informed as to whether the individual is or has been a patient at the state facility and the patient's current address, if known.

Examination of mental health clinical records pursuant to an authorized release of the records must be conducted on hospital premises at reasonable times. [Ga. Code Ann. § 37-3-166.]

E. Sexually Transmitted Diseases

Reports to government agencies identifying persons with sexually transmitted diseases are confidential and are not open to the public. The department of health may release the information for valid research purposes. [Ga. Code Ann. §§ 31-12- 2; 31-17- 2.]

HAWAII

The Hawaii Revised Statutes contain a general statute granting a patient access to his medical records. The state does not have a general, comprehensive law prohibiting the disclosure of confidential medical information.² Rather, the privacy protections are addressed in statutes governing specific entities or medical conditions.

I. Patient Access

Upon request and payment of reasonable copying costs, a health care provider must make a copy of a patient's medical records available to him. [Haw. Rev. Stat. § 622-57.] This provision encompasses records maintained by physicians, surgeons, podiatrists, hospitals, nursing homes, extended care facilities, outpatient clinics, health maintenance organizations and others. [Haw. Rev. Stat. §§ 622-57; 671-1 (defining "health care provider"); 323D-2 (defining "health care facility").] If the health care provider believes that releasing the records to the patient would be detrimental to the health of the patient, he may decline the request, but must provide copies to the patient's attorney upon presentation of a proper authorization signed by the patient. [Haw. Rev. Stat. § 622-57.]

II. Restrictions on Disclosures

A. HMOs

Generally, under Hawaii's Health Maintenance Organization Act, 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. [Haw. Rev. Stat. § 432D-21.] Disclosure without 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. The insurance commissioner may suspend or revoke a certificate of authority for substantial failure to comply with the HMO Act. [Haw. Rev. Stat. § 432D-14.] In addition to or in lieu of these actions, the commissioner may levy administrative fines ranging from \$500 to \$50,000. [Haw. Rev. Stat. § 432D-18.] The commissioner may also issue an order directing the HMO to cease and desist from

² Hawaii repealed its comprehensive medical privacy statute in 2001. See 2001 Haw. Sess. Laws, Act 244, § 3.

engaging in the prohibited conduct or may institute a proceeding to obtain injunctive or other appropriate relief. [*Id.*]

B. Managed Care Plans

Managed care plans must ensure the confidentiality of records and may not disclose individually identifiable information pertaining to an enrollee's diagnosis, treatment or health, except as provided under law. [Haw. Rev. Stat. § 432E-10.]

C. Practitioners and Pharmacists – Prescription Information

A practitioner, pharmacist and any other person who transmits, maintains or receives prescriptions or prescription refills orally in writing or electronically must ensure the confidentiality of the prescription information. [Haw. Rev. Stat. § 328-16.]

D. State Government

The Uniform Information Practices Act (UIPA) applies to any unit of government in the State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of the State or any county, but does not include the non-administrative functions of the courts of the State. [Haw. Rev. Stat. § 92F-3.] Under the UIPA a unit of government is not required to disclose records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. [Haw. Rev. Stat. § 92F-13.] An individual is considered to have a significant privacy interest in government records containing information relating to his medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation. [Haw. Rev. Stat. § 92F-14.] This interest does not serve as an absolute bar to disclosure, however. A disclosure of medical, psychiatric or psychological records will not be considered to be a “clearly unwarranted invasion of privacy” if the public interest in disclosure outweighs the individual’s privacy interest. [*Id.*]

E. Utilization Review Agents

A review agent may not disclose or publish individual medical or psychological records or any other confidential medical or psychological information obtained in the performance of utilization review or managed care activities. [Haw. Rev. Stat. § 334B-5.]

Remedies and Penalties

Fines and Penalties. Persons violating these restrictions are guilty of a misdemeanor and may be fined up to \$1,000. [Haw. Rev. Stat. § 334B-6.]

III. PRIVILEGES

Hawaii recognizes a number of health provider-patient privileges **that** 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. [Haw. Rev. Stat. § 626-1, Rules of Evidence R. 504.] This same privilege applies to psychologists (Haw. Rev. Stat. § 626-1, Rule 504.1), and counselors of sexual assault and domestic violence. [Haw. Rev. Stat. § 626-1, Rule 505.5.] The provider, psychologist or counselor at the time of the communication is presumed to

have the authority to claim the privilege on behalf of the patient. [Haw. Rev. § 626-1, Rules of Evidence R. 504; R. 504.1; R. 505.5.] HMOs are entitled to claim any statutory privileges against disclosure that the provider of the information is entitled to claim. [Haw.Rev. Stat. § 432D-21.]

IV. CONDITION SPECIFIC REQUIREMENTS

A. Cancer

1. Hawaii Tumor Registry

Hawaii maintains a cancer registry. Physicians, hospitals, skilled nursing homes, intermediate care homes, free-standing radiation oncology facilities and other treatment or pathology facilities must report any individual admitted with or diagnosed as having cancer to the Hawaii Tumor Registry. [Haw. Rev. Stat. § 324-21.] Any person, public or private medical facility, or social or educational agency also may provide information, reports or other relevant material relating to individuals with cancer to the registry. [*Id.*] Identifying information is confidential and may not be revealed in any report or other matter prepared, released or published. [Haw. Rev. Stat. § 324-22.]

Researchers may only use the names of a person when requesting additional information for research studies approved by the cancer commission of the Hawaii Medical Association, and may only contact the patient directly after first obtaining approval from the patient’s attending physician. [Haw. Rev. Stat. § 324-22.]

Remedies and Penalties

Fines and Penalties. A violation of these confidentiality provisions is considered a “violation” (a penal offense) and is subject to a maximum fine of \$1,000. [Haw. Rev. Stat. §§ 324-24; 701-107 and 706-640.]

2. Department of Health

In addition, the Department of Health collects statistical data on the morbidity and mortality rate of cancers. [Haw. Rev. Stat. § 321-43.] All information collected must remain confidential other than the use of patients’ names by researchers when they are requesting additional information from providers for studies approved by the Hawaii Medical Association cancer commission. [*Id.*]

B. Communicable and Infectious Diseases

Physicians or health care professional and laboratory directors are required to report incidents of communicable diseases to the department of health. [Haw. Rev. Stat. § 325-2.] These reports are not available to the public and, generally, identifying information in them may not be disclosed except as necessary to safeguard the public health against those who disobey the rules relating to these diseases. [Haw. Rev. Stat. § 325-4.] Reports identifying persons who have any conditions transmittable by blood or blood products may be disclosed to any blood bank. [Haw. Rev. Stat. § 325-4.]

Remedies and Penalties

Fines and Penalties. Persons violating the confidentiality provisions may be charged with a misdemeanor, punishable by a fine of up to \$2,000. [Haw. Rev. Stat. §§ 325-14; 321-18; 706-640.]

C. Drug and Alcohol Abuse

1. In general

Records and reports that directly or indirectly identify individuals who reside in facilities providing substance abuse treatment must be kept confidential. They may only be disclosed: pursuant to the individual's or his legal guardian's consent; as necessary to carry out the statutory provisions on mental health, mental illness, drug addiction and alcoholism; or as directed by a court. [Haw. Rev. Stat. § 334-5.] Use of the information must be limited to the purpose for which the information was provided. [*Id.*]

Upon proper inquiry, a patient's information may be released to the patient, the patient's family, legal guardian, or relatives, provided that the disclosure is not clearly adverse to the interests of the patient. [*Id.*]

2. Pre-employment screening

Any information concerning a substance abuse test related to on-site screening for pre-employment purposes is strictly confidential. [Haw. Rev. Stat. §§ 329B-5.5; 329B-6.] The information may not be released to anyone without the informed written consent of the individual tested, and generally may not be made public upon subpoena or any other method of discovery. [Haw. Rev. Stat. § 329B-6.] However, information related to a positive test result of an individual must be disclosed to the individual, the third party, or the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual tested and arising from positive confirmatory test result. [*Id.*] Any person who receives or comes into possession of information related to an on-site pre-employment substance abuse test is bound by the same obligation of confidentiality as the party that released the information. [*Id.*]

Remedies and Penalties

Right to Sue. An aggrieved individual may bring an action for injunctive relief against a person, agency or entity that commits or proposes to commit any act in violation of these provisions. [Haw. Rev. Stat. § 329B-7.]

Fines and Penalties. Any person, agency or entity that willfully violates these provisions is fined not less than \$1,000 but not more than \$10,000 per violation, plus reasonable court costs and attorney's fees. [*Id.*] This payment is not to be construed as limiting the right of any person or persons to recover actual damages. [*Id.*]

D. Genetic Information

Insurers, with respect to individual health insurance policies, and HMOs may not request or require collection or disclosure of an individual's or his family member's genetic information. [Haw. Rev. Stat. §§ 431:10A-101 (defining applicability of chapter); 431:10A-118; and 432D-26.] They may not disclose genetic information without the

written consent of the individual. [Haw. Rev. Stat. §§ 431:10A-118; 432D-26.] Consent is required for each disclosure, and it must include the name of each person or organization to whom the disclosure will be made. Genetic information includes information about genes, gene products, inherited and hereditary characteristics. [Haw. Rev. Stat. §§ 431:10A-118(b); 432D-26(b)(defining “genetic information”).]

E. HIV/AIDS

Medical information that indicates that a person has HIV/AIDS is strictly confidential and may not be released even upon subpoena or any method of discovery. [Haw. Rev. Stat. § 325-101(a).] Redisclosure is also prohibited. [Haw. Rev. Stat. § 325-101(d).] These restrictions apply to records and data that are held or maintained by any state agency, health care provider or facility, physician, laboratory, clinic, blood bank, third party payer or others. [Haw. Rev. Stat. § 325-101(a).] There are a number of circumstances where disclosure is permitted without the individual’s prior written consent including: to medical personnel in an emergency to protect the health of the patient; to another health care provider for treatment of the patient; to the patient’s health insurer for reimbursement of services rendered to the patient, provided that the patient is first given the opportunity to make the reimbursement directly; to medical personnel, state and local agencies, blood banks, organ tissue banks, schools, and day care centers to enforce HIV regulations; and others. [Haw. Rev. Stat. § 325-101(a)(1) through (a)(13).]

Remedies and Penalties

Fines and Penalties. Any person or institution that releases an individual’s HIV/AIDS records in willful violation of these provisions will be fined not less than \$1,000 but not more than \$10,000 per violation, plus reasonable court costs and attorney’s fees. [Haw. Rev. Stat. § 325-102.]

F. Mental Health

1. In general

Records and reports that directly or indirectly identify individuals covered by the mental health system must be kept confidential. They may only be disclosed: pursuant to the individual’s or his legal guardian’s consent; as necessary to carry out the statutory provisions on mental health, mental illness, drug addiction and alcoholism; as directed by a court; or as necessary under the federal Protection and Advocacy for Mentally Ill Individuals Act to protect and advocate the rights of persons with mental illness residing in facilities that provide care or treatment. [Haw. Rev. Stat. § 334-5.] Use of the information must be limited to the purpose for which the information was provided. [*Id.*]

Upon proper inquiry, a patient’s information may be released to the patient, the patient’s family, legal guardian, or relatives, provided that the disclosure is not clearly adverse to the interests of the patient. [*Id.*]

2. In-patients

Patients in psychiatric facilities have a statutory right of access to their records and a right to confidentiality of these records. [Haw. Rev. Stat. § 334E-2.]

3. Research

Identifying information provided to the department of health for use in mental illness and mental retardation studies may not be revealed in reports or published under any circumstances. [Haw. Rev. Stat. § 324-12.] This information is not available in court proceedings unless it is unobtainable from the original source. A judicial officer must review the information in chambers and make the determination as to what factual information is available. [Haw. Rev. Stat. § 324-13.]

Remedies and Penalties

Fines and Penalties. Any person violating the confidentiality provisions related to research is guilty of a misdemeanor and may be fined not more than \$500. [Haw. Rev. Stat. § 324-14.]

IDAHO

Idaho statutorily grants a patient of a mental health facility the right of access to his mental health records. Patients also have a statutory right of access to their prescription records. The state does not have a general, comprehensive law prohibiting the disclosure of confidential medical information. Rather, the privacy protections are addressed in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

A. Mental Health Facilities

For access to mental health records, see Section IV below.

B. Pharmacists

A patient or his designee has a right of access to his own prescription records. [Idaho Code § 54-1727.]

II. RESTRICTIONS ON DISCLOSURE

A. Acupuncturists and Chiropractors

The state board of acupuncture may suspend or revoke an acupuncturist's license or certification if the acupuncturist fails to maintain the confidentiality of records or other information pertaining to an identifiable client, except as required or authorized by law. [Idaho Code § 54-4711.]

The state board of chiropractic physicians may restrict, suspend or revoke a chiropractor's license if the chiropractor fails to safeguard the confidentiality of chiropractic records or other chiropractic information pertaining to identifiable clients, except as required or authorized by law. [Idaho Code § 54-712.] The chiropractor may also be subject to an administrative fine not to exceed \$2,000 plus costs of prosecution and reasonable attorney fees. [*Id.*; Idaho Code § 54-713.]

B. Managed Care Organizations

All managed care organizations performing utilization management or contracting with third parties to conduct utilization management are required to adopt procedures that protect the confidentiality of patient health records. [Idaho Code § 41-3930.]

C. Mental Health Facilities

For restrictions on disclosure of mental health records, see Section IV below.

D. Pharmacists

All prescriptions, drug orders, records or any other prescription information that specifically identifies a patient must be held in the strictest confidence. [Idaho Code § 54-1727.] A person in possession of such information may release the information as specified by the statute, including to the practitioner who issued the prescription; to other licensed health care professionals who are responsible for the direct and acute care of the patient; to the patient's insurance benefit provider or health plan; to the U.S. Food and Drug Administration for purposes of monitoring adverse drug events; and to agents of the department of health and welfare under certain circumstances. [Id.] A person who receives prescription information under this statute may not divulge such information except to comply with Idaho Code § 54-1727.

Remedies and Penalties

Right to Sue. A person who fails to act in good faith may be subject to civil and criminal liability or a lawsuit brought by the patient. [Id.]

Fines and Penalties. Any person or entity found by the Idaho state board of pharmacy to be in violation of these provisions is subject to an administrative penalty, not exceeding \$3,000 for each violation. [Id.]

E. Physicians

Physicians, interns, residents, and physician assistants are subject to discipline from the medical board for failing to safeguard the confidentiality of medical records or other medical information pertaining to identifiable patients, except as required or authorized by law. [Idaho Code § 54-1814(13).]

Remedies and Penalties

Fines and Penalties. In a disciplinary action, the medical board may suspend, limit or revoke the physician's license and impose administrative fines not to exceed \$10,000 per offense. [Idaho Code § 54-1806A.]

F. State Government

Personal records identifying medical conditions that are submitted to any public agency pursuant to a statutory requirement for licensing, certification, permit or bonding are exempt from the public access requirements imposed on other public records. [Idaho Code § 9-340C.] Records of the department of health and welfare or a public health district that identify a person infected with a reportable disease are likewise exempt. [Idaho Code § 9-340C(12).] Additionally, government-maintained records of hospital care, medical records, records of psychiatric care or treatment and professional counseling records relating to an individual's condition, diagnosis, care or treatment are also exempt from public inspection except for background checks required by law for the sale of firearms, guns or ammunition. [Idaho Code § 9-340C(13).]

III. PRIVILEGES

Idaho 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 professional for purposes of diagnosis or treatment. [Idaho Code §§ 9-203(4) (physician-patient); 9-203(6) (school counselor-student); 54-2314 (psychologist-client); 54-3410 (professional counselor-client).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer

Idaho maintains a cancer registry that requires the reporting of identifying information to the department of health within 180 days of diagnosis by any hospital, outpatient surgery center, radiation treatment center or treatment clinic diagnosing and/or treating a patient with cancer. [Idaho Code § 57-1704; 57-1705.] The department is to ensure that all identifying information is kept confidential. [Idaho Code § 57-1706.] This information may be exchanged with other states' cancer registries, federal cancer control programs or health researchers. [*Id.*] Disclosure of confidential information for research purposes must comply with the policies and protocols of the department. [Idaho Code § 57-1706.]

Remedies and Penalties

Right to Sue. An action may be brought against reporting entities for the unauthorized disclosure of confidential or privileged information when such disclosure is due to gross negligence or willful conduct. [Idaho Code § 57-1707.]

B. HIV/AIDS and Venereal Diseases

Idaho requires that physicians and others report, by name, individuals who are being treated for HIV/AIDS and venereal diseases to the department of health and welfare. [Idaho Code §§ 39-601 (classifying HIV/AIDS as a venereal disease); 39-602; 39-606.] Reports containing patient identification may only be used by public health officials authorized to conduct investigations and generally are not subject to public inspection. [Idaho Code § 39-606.] These records are not discoverable and may not be compelled to be produced in any civil or administrative hearing. [Idaho Code § 39-610.] Public health authorities may contact and advise those persons who have been exposed to HIV or hepatitis B infections. [Idaho Code § 39-610.] These authorities may also disclose HIV related information that identifies a person to other local or state public health agencies when the confidential information is necessary to carry out the investigation, control and surveillance of disease. [*Id.*]

Remedies and Penalties.

Fines and Penalties. Any person who willfully or maliciously discloses the content of these records to any third party, except pursuant to a written authorization by the person who is the subject of the record, is guilty of a misdemeanor. [Idaho Code § 39-606.]

C. Mental Health

Access. A patient hospitalized in a mental health facility has the right of reasonable access to all records concerning him. [Idaho Code § 66-346.] The director of the facility, however, may deny the patient's rights and, if he does so, must enter a statement explaining the reasons for denial in the patient's treatment record. [*Id.*] An agent who was appointed, in writing, to make mental health treatment decisions on behalf of a patient may only do so when the patient is incapable. The agent has the same right as the patient to receive information regarding mental health treatment and review the medical records. [Idaho Code § 66-606.]

Restrictions on disclosure. Records that identify a patient or former patient who has been (or is being) detained or committed for mental illness are confidential unless necessary to carry out the detention or commitment proceeding or if a court determines that disclosure is necessary and is in the public interest. [Idaho Code § 66-348.] An agent who was appointed, in writing, to make mental health treatment decisions for a patient may consent to disclosure of medical records relating to that treatment. [Idaho Code § 66-606.]

Admissions and clinical records of mentally ill, developmentally disabled or physically disabled persons who are in assisted-living facilities are confidential. [Idaho Code §§ 39-3315; 39-3316.]

D. Substance Abuse

The Alcoholism and Intoxication Treatment Act requires that the registration and other records of alcohol and drug addiction treatment facilities be kept confidential. [Idaho Code § 39-308.] The director of the facility may make available information from patients' records for purposes of research into the causes and treatment of alcoholism or drug addiction. [*Id.*] Researchers are prohibited from publishing their information in a manner that discloses any patient-identifying information. [*Id.*]

ILLINOIS

Illinois statutorily grants patients the right of access to their medical records maintained by physicians, hospitals and insurers. Illinois also statutorily prohibits the disclosure of confidential medical information maintained by these entities. Additionally, there privacy protections are addressed in statutes governing other specific entities or medical conditions.

I. PATIENT ACCESS

Individuals are given the right of access to their medical records under the Acupuncture Practice Act [225 Ill. Comp. Stat. 2/ et seq.], the Code of Civil Procedure [735 Ill. Comp. Stat. 5/8-2001 et seq.], and the Insurance Information and Privacy Protection provisions of the Insurance Code [215 Ill. Comp. Stat. 5/1009].

A. Acupuncturists

Under the Acupuncture Practice Act, an acupuncturist must provide a patient with a copy of the patient's records upon written request. [225 Ill. Comp. Stat. 2/110.] Failure to comply with this provision is grounds for disciplinary action. [225 Ill. Comp. Stat. 2/110].

B. Clinical Psychologists and Clinical Social Workers

A patient has the right to examine or copy records relating to psychological or social work services only with the consent of the clinical psychologist or clinical social worker or when access is ordered by a court upon the patient's demonstrating good cause. [735 Ill. Comp. Stat. 5/8-2004.] The patient must reimburse the psychologist or social worker at the time of copying for all reasonable expenses, including the costs of independent copy service companies. [*Id.*] The psychologist or social worker may not charge more than a \$20 handling charge for processing the request for copies, and 75¢ per page for the first through 25th pages, 50¢ per page for the 26th through 50th pages, and 25¢ per page for all pages in excess of 50, and actual shipping costs. [*Id.*] For copies made from microfiche or microfilm, the charge may not exceed \$1.25 per page. [*Id.*] Beginning in 2003, these maximum fees will be adjusted annually. [*Id.*; 735 Ill. Comp. Stat. 5/8-2006.]

C. Hospitals

After discharge, an individual has a statutory right of access to hospital records, which include but are not limited to history, bedside notes, charts, pictures and plates, kept by a hospital in connection with the treatment of the patient requesting the records. [735 Ill. Comp. Stat. 5/8-2001.] This provision does not cover records maintained by mental health institutions or programs of the Department of Human Services. [735 Ill. Comp. Stat. 5/8-2002.] Access to those records is governed by the

Mental Health and Developmental Disabilities Confidentiality Act. (See Section IV below.)

Upon receiving a patient's written request, a hospital must grant a former patient (or his attorney or designated physician) access to his hospital records kept in connection with his treatment, and allow copies of the records to be made. [735 Ill. Comp. Stat. 5/8-2001.] The hospital has a maximum of 60 days to satisfy the request. [735 Ill. Comp. Stat. 5/8-2001.]

The patient must reimburse the hospital at the time of copying for all reasonable expenses, including the costs of independent copy service companies. [*Id.*] The hospital may not charge more than a \$20 handling charge for processing the request for copies, and 75¢ per page for the first through 25th pages, 50¢ per page for the 26th through 50th pages, and 25¢ per page for all pages in excess of 50, and actual shipping costs. [*Id.*] For copies made from microfiche or microfilm, the charge may not exceed \$1.25 per page. [*Id.*] The hospital may, however, charge for the reasonable cost of all duplication of record material or information that cannot routinely be copied or duplicated on a standard commercial photocopy machine such as x-ray films or pictures. Beginning in 2003, these maximum fees will be adjusted annually. [*Id.*; 735 Ill. Comp. Stat. 5/8-2006.]

Remedies and Penalties

Fines and Penalties. A hospital that fails to comply within the specified time limit will be liable for the expenses and reasonable attorneys' fees incurred with any court ordered enforcement. [735 Ill. Comp. Stat. 5/8-2001.]

D. Insurance Entities, including HMOs

1. Scope

The Illinois Insurance Information and Privacy Protection Act applies to insurance entities including health insurers, HMOs, insurance agents and insurance support organizations. [215 Ill. Comp. Stat. 5/1002 (detailing entities and persons covered); 215 Ill. Comp. Stat. 5/1003(L) (defining "insurance institutions").]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [215 Ill. Comp. Stat. 5/1003(T) (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 or medical care institution from the individual, or from the individual's spouse, parent or legal guardian. [215 Ill. Comp. Stat. 5/1003(R) (defining "medical record information").] "Medical professional" means any person licensed or certified to provide health care services to natural persons, including but not limited to, a physician, dentist, nurse, optometrist, chiropractor, pharmacist, physical or occupational therapist, psychiatric social worker, speech therapist, clinical dietitian or clinical psychologist. [215 Ill. Comp. Stat. 5/1003(Q) (defining "medical professional").] "Medical care institution" means any facility or institution that is licensed to provide health care services to natural persons, including but not limited to: hospitals, skilled

nursing facilities, home-health agencies, medical clinics, rehabilitation agencies and public-health agencies and health maintenance organizations. [215 Ill. Comp. Stat. 5/1003(P) (defining “medical care institution”).] The Act does not apply to medical information that has had all personal identifiers removed. [215 Ill. Comp. Stat. 5/1003(T).]

With respect to health insurance, the rights granted by the Act extend to Illinois 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. [215 Ill. Comp. Stat. 5/1002(1)(a).]

2. Requirements

An insurance company, HMO or other insurance entity must permit the individual to inspect and copy his reasonably located 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. [215 Ill. Comp. Stat. 5/1009.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [215 Ill. Comp. Stat. 5/1009(A)(2).]

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. [215 Ill. Comp. Stat. 5/1009(C).]

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. [215 Ill. Comp. Stat. 5/1009(A).]

Fees. The insurance entity can impose a reasonable fee to cover copying costs. [215 Ill. Comp. Stat. 5/1009(D).]

Right to Amend. A person has a statutory right to have any factual error corrected and any misrepresented or misleading personal information amended or deleted. [215 Ill. Comp. Stat. 5/1010.] 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.*]

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. [215 Ill. Comp.

Stat. 5/1021(A) & (D).] The court may award costs and reasonable attorney's fees to the prevailing party. [215 Ill. Comp. Stat. 5/1021(C).] The statutory remedy is the sole remedy, in law or equity, for violations of the IIPPA. [215 Ill. Comp. Stat. 5/1021(E).]

Fines and Penalties. After hearing, the Insurance Commissioner may issue a cease and desist order to insurance entities found to be in violation of these provisions. [215 Ill. Comp. Stat. 5/1018.] If the hearing results in a finding of a knowing violation, the director may also order the payment of a monetary penalty not to exceed \$500 per violation and not to exceed \$10,000 in the aggregate for multiple violations. [215 Ill. Comp. Stat. 5/1020.]

E. Physicians

Upon written request a physician must provide a patient, his physician or authorized attorney to examine and copy his medical records. [735 Ill. Comp. Stat. 5/8-2003.] A "physician" is defined as "a person licensed under the Medical Practice Act [225 Ill. Comp. Stat. 60] to practice medicine in all of its branches or a chiropractic physician licensed to treat human ailments without the use of drugs and without operative surgery." This definition does not include acupuncturists, who are covered by the Acupuncture Practice Act (*see* Section I.A. above). An individual's right of access applies to patient records, which include but are not limited to those relating to the diagnosis, treatment, prognosis, history, charts, pictures and plates, kept by a physician in connection with the treatment of the patient requesting the records. [735 Ill. Comp. Stat. 5/8-2003.]

The physician must respond to the request within 60 days of receipt. [735 Ill. Comp. Stat. 5/8-2003.] The patient must reimburse the physician at the time of copying for all reasonable expenses, including the costs of independent copy service companies. [*Id.*] The physician may not charge more than a \$20 handling charge for processing the request for copies, and 75¢ per page for the first through 25th pages, 50¢ per page for the 26th through 50th pages, and 25¢ per page for all pages in excess of 50, and actual shipping costs. [*Id.*] For copies made from microfiche or microfilm, the charge may not exceed \$1.25 per page. [*Id.*] The physician may, however, charge for the reasonable cost of all duplication of record material or information that cannot routinely be copied or duplicated on a standard commercial photocopy machine such as x-ray films or pictures. Beginning in 2003, these maximum fees will be adjusted annually. [*Id.*; 735 Ill. Comp. Stat. 5/8-2006.]

Remedies and Penalties

Fines and Penalties. A physician who fails to comply within the specified time limit will be liable for the expenses and reasonable attorneys' fees incurred with any court ordered enforcement. [735 Ill. Comp. Stat. 5/8-2003.]

II. RESTRICTIONS ON USE AND DISCLOSURE

A. Health Care Providers, HMOs, and Insurers

Under the Medical Patient Rights Act, a patient has a statutory right to privacy and confidentiality in health care. [410 Ill. Comp. Stat. 50/0.01 and 50/3(a) and (d).] This right extends to information in the possession of physicians, health care providers (including hospitals, skilled nursing homes and extended care facilities), health services corporations, and insurers (including health maintenance organizations). [410 Ill. Comp. Stat. 50/2.03; 50/2.04; and 50/3(d).]

Generally, the nature or details of services provided to a patient cannot be disclosed to anyone (other than the patient or his designee) without the patient's written authorization. [410 Ill. Comp. Stat. 50/3(d).] Treatment may not be conditioned on the requirement that a patient sign such an authorization. [*Id.*]

Disclosure *without* authorization is permitted to persons directly involved in treating the patient or processing the payment for that treatment and persons responsible for peer review, utilization review, or quality assurance. [*Id.*] Medical information may also be disclosed without the patient's consent to authorities required to be notified of suspected child abuse or neglect, or of sexually transmitted diseases, or where otherwise authorized or required by law. [*Id.*]

Hospitals are required to provide patients (or their guardians) with a written statement of these rights upon admission. [410 Ill. Comp. Stat. 50/5.]

Remedies and Penalties

Fines and Penalties. Violating a patient's right to privacy and confidentiality is a petty offense, subject to a fine of \$500. [410 Ill. Comp. Stat. 50/4.]

B. Insurance Entities, Including HMOs

1. Scope

The Illinois Insurance Information and Privacy Protection Act governs the disclosure of personal information by insurers. The Act applies to insurance entities including health insurers, HMOs, insurance agents and insurance support organizations and others. [215 Ill. Comp. Stat. 5/1002 (detailing entities and persons covered); 215 Ill. Comp. Stat. 5/1003(L) (defining "insurance institutions").]

The Act covers "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [215 Ill. Comp. Stat. 5/1003(T) (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 or medical care institution from the individual, or from the individual's spouse, parent or legal guardian. [215 Ill. Comp. Stat. 5/1003(R) (defining "medical record information").] "Medical professional" means any person licensed or certified to provide

health care services to natural persons, including but not limited to, a physician, dentist, nurse, optometrist, chiropractor, pharmacist, physical or occupational therapist, psychiatric social worker, speech therapist, clinical dietitian or clinical psychologist. [215 Ill. Comp. Stat. 5/1003(Q) (defining “medical professional”).] “Medical care institution” means any facility or institution that is licensed to provide health care services to natural persons, including but not limited to: hospitals, skilled nursing facilities, home-health agencies, medical clinics, rehabilitation agencies and public-health agencies and health maintenance organizations. [215 Ill. Comp. Stat. 5/1003(P) (defining “medical care institution”).] The Act does not apply to medical information that has had all personal identifiers removed. [215 Ill. Comp. Stat. 5/1003(T).]

With respect to health insurance, the rights granted by the Act extend to Illinois 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. [215 Ill. Comp. Stat. 5/1002(1)(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 IIPPA. [215 Ill. Comp. Stat. 5/1007.] 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, name the insurance institution or agent and identifies by generic reference representatives of the insurance institution to whom the individual is authorizing information to be disclosed, and specify the purposes for which the information is collected. 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. [215 Ill. Comp. Stat. 5/1014.]

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. An authorization submitted by someone other than an insurance entity must be dated and signed by the individual. These authorizations are effective for one year. [*Id.*]

Authorization Exceptions. There are numerous circumstances under which an insurance entity may 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; and others. [215 Ill. Comp. Stat. 5/1014.]

c. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [215 Ill. Comp. Stat. 5/1005.] 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 within 2 years of discovery of the violation. [215 Ill. Comp. Stat. 5/1021.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*] The statutory remedy is the sole remedy or recovery available to individuals, in law or in equity, for violations of the IIPPA. [*Id.*]

Fines and Penalties. If, after a hearing, the Insurance Commissioner determines that an insurance entity has violated these provisions, the commissioner may issue an order requiring the entity to cease and desist from engaging in the prohibited conduct. [215 Ill. Comp. Stat. 5/1016 and 5/1018.] Where it is determined that there has been a knowing violation, the commissioner may also order the payment of a fine of up to \$500 per violation, and not to exceed \$10,000 in the aggregate for multiple violations. [215 Ill. Comp. Stat. 5/1020.] Any person who knowingly *and* willfully obtains information concerning an individual from an insurance entity under false pretenses is guilty of a Class 4 felony, punishable by imprisonment for 1 to 3 years. [215 Ill. Comp. Stat. 5/1023; 730 Ill. Comp. Stat. 5/5-8-1.]

C. State Government

The Illinois Freedom of Information Act (FOIA) governs the disclosure of records held by the state and local government. [See 5 Ill. Comp. Stat. 140/.] FOIA applies to any legislative, executive, administrative, or advisory bodies of the state, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, and commissions of the state. [5 Ill. Comp. Stat. 140/2 (defining "public body").] Files and personal information related to clients, patients, residents, students or other individuals receiving medical care or services directly or indirectly from public bodies may not be

disclosed under the FOIA unless the disclosure is consented to in writing by the individual who is the subject of the information. [5 Ill. Comp. Stat. 140/7.]

III. PRIVILEGES

Illinois recognizes a healthcare practitioner-patient privilege, which allows a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications made between himself and a healthcare practitioner. [735 Ill. Comp. Stat. 5/8-802.] The privilege extends to a patient and his physician, surgeon, psychologist, nurse, mental health worker, therapist and others. [*Id.*] Disclosure of this information is permitted in: homicide trials; actions against the practitioner for malpractice; suits involving the validity of a document such as a patient's will; and other enumerated situations. [*Id.*]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Alcoholism and Other Substance Abuse

Under the Alcoholism and Other Drug Abuse and Dependency Act, the patient, his guardian or parent if the patient is a minor, has a right to inspect and copy all clinical or other records pertaining to his care and maintenance kept by the treatment program or his physician (unless otherwise prohibited by state or federal law). [20 Ill. Comp. Stat. 301/30-5(t).] The patient may be charged a reasonable fee for a copy of the records. [*Id.*]

Records of the identity, diagnosis, prognosis or treatment of any patient maintained in connection with any state regulated, authorized or assisted program or activity related to alcohol or other drug abuse or dependency education, early intervention, training, treatment or rehabilitation are confidential and may be disclosed only in accordance with the provisions of federal law and regulations concerning the confidentiality of alcohol and drug abuse patient records as contained in 42 U.S.C. Sections 290dd-3 and 290ee-3 and 42 C.F.R. Part 2. Disclosure may be made without patient authorization under these laws and regulations in specified circumstances, such as medical emergencies and audit evaluation activities. [20 Ill. Comp. Stat. 301/30-5(bb).]

Remedies and Penalties

Fines and Penalties. Unauthorized disclosures are a class A misdemeanor and subject to a maximum fine of \$2,500 for each offense. [*Id.*; 730 Ill. Comp. Stat. 5/5-9-1.]

B. Cancer

The Illinois Health and Hazardous Substances Registry Act requires hospitals, laboratories, or other facilities to report each incidence of cancer diagnosed by those hospitals, laboratories, or facilities, along with any other information the Illinois Department of Public Health may require to develop a Health and Hazardous Substances Registry. [20 Ill. Comp. Stat. 2310/2310-365 and 410 Ill. Comp. Stat. 525/1 et seq.] The identity and any group of facts that tends to lead to the identity of a

person whose information has been provided to the registry are confidential and not open to public inspection or dissemination. [410 Ill. Comp. Stat. 525/4.] Furthermore, the identity of any person claimed to be derived from registry data is not admissible in evidence and is not discoverable in court. Information for specific research purposes, however, may be disclosed in accordance with procedures established by the Department of Public Health.

C. Genetic Test Results

1. In General

Under the Genetic Information Privacy Act, the fact that someone has undergone genetic testing, along with the results of genetic tests, constitutes confidential and privileged information that may be released only to the individual tested and to persons specifically authorized in writing by that individual to receive the information. [410 Ill. Comp. Stat. 513/15 and 513/30.] Generally, this information is not admissible as evidence and is not discoverable in any court or any proceeding. [410 Ill. Comp. Stat. 513/15.]

Disclosure *without* authorization may be made where necessary to an authorized agent or employee of a health facility or health care provider if the health facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care, and the agent or employee has a need to know the information in order to conduct the tests or provide care. Additionally, patient authorization is not required for disclosures to health facilities involved in transplants using body parts from deceased persons with respect to genetic information regarding that person or to those facilities involved in artificial insemination. Similarly, no authorization is required for disclosures to health facility staff committees for program monitoring and review. [410 Ill. Comp. Stat. 513/30.]

The health care provider who orders a genetic test for a minor (under 18 years of age) may notify the minor's parent or legal guardian, if in his professional judgment, notification is in the best interest of the minor, and the provider has already attempted unsuccessfully to persuade the minor to notify the parent or legal guardian. [*Id.*] The statute does not create a duty to inform. [*Id.*]

Remedies and Penalties

Right to Sue. A person whose genetic information has been disclosed in violation of these provisions has a statutory right to bring a civil action for damages and equitable relief. [410 Ill. Comp. Stat. 513/40.] Liquidated damages for negligent and intentional or reckless violations are specified. [*Id.*]

2. Insurers

An insurer may not seek information derived from genetic testing for use in connection with a health insurance policy. [410 Ill. Comp. Stat. 513/20.] Insurers may not use information derived from genetic testing, regardless of the source of that information, for a nontherapeutic purpose as it relates to a policy of accident and health insurance, unless the individual voluntarily submits the results and the results are favorable to the individual. [*Id.*] An insurer that possesses information derived from genetic testing

may not release the information to a third party, except as specified in 410 Ill. Comp. Stat. 513/30]. [*Id.*]

Remedies and Penalties

Right to Sue. A person whose information is disclosed by an insurer 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 of discovery of the violation. [410 Ill. Comp. Stat. 513/40 (providing that disclosures by insurers are governed by the Insurance Code) and 215 Ill. Comp. Stat. 5/1021.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*] The statutory remedy is the sole remedy or recovery available to individuals, in law or in equity, for violations of the IIPPA. [*Id.*]

Fines and Penalties. If, after a hearing, the Insurance Commissioner determines that an insurance entity has violated these provisions, the commissioner may issue an order requiring the entity to cease and desist from engaging in the prohibited conduct. [215 Ill. Comp. Stat. 5/1016 and 5/1018.] Where it is determined that there has been a knowing violation, the commissioner may also order the payment of a fine of up to \$500 per violation, and not to exceed \$10,000 in the aggregate for multiple violations. [215 Ill. Comp. Stat. 5/1020.]

D. Head and Spinal Cord Injuries

Illinois maintains a registry for head and spinal cord injuries. The reports and records made in furtherance of that registry that are maintained by the government are confidential and identifying information contained in them may not be disclosed without the patient's authorization. A researcher must demonstrate a necessity for identities before the department will even request a patient's consent to release this information. [410 Ill. Comp. Stat. 515/3.]

E. HIV/AIDS

Under the AIDS Confidentiality Act, the identity of persons who have been tested for HIV and the results of those tests generally may not be disclosed even in legal proceedings, except in limited circumstances. [410 Ill. Comp. Stat. 305/9.] Disclosure may be made to the subject of the test, the subject's spouse (but only after the physician has unsuccessfully attempted to persuade the patient to notify his spouse himself), emergency personnel and law enforcement personnel who have come into direct skin or mucous membrane contact which is of a nature that may transmit HIV, to the Illinois Department of Public Health in accordance with rules for reporting and controlling the spread of the disease, health facilities performing transplants and to health facility staff committees for program monitoring and review. In the case of a minor under 18 years of age, the health care provider who ordered the test may notify the parent or legal guardian of the minor, if in his professional judgment, notification would be in the best interest of the minor, and the provider has already attempted unsuccessfully to persuade the minor to notify the parent or legal guardian. [410 Ill. Comp. Stat. 305/9(k)].

Remedies and Penalties

Right to Sue. A person whose information has been disclosed in violation of these provisions has a statutory right to bring a civil action for damages and equitable relief. [410 Ill. Comp. Stat. 305/13.] A person who negligently violates the Act is liable for liquidated damages of \$1,000 or actual damages whichever is higher. Similarly, the statute provides for liquidated damages of \$5,000 or actual damages (if higher) for intentional violations. [*Id.*]

Under the AIDS Registry Act, hospitals, laboratories and other facilities are required to report cases of AIDS and AIDS-related complex to the Department of Public Health as well as other information pertaining to such reported cases that the Department deems necessary or appropriate. Illinois uses a code-based system rather than name reporting for AIDS/HIV surveillance. [410 Ill. Comp. Stat. 310/4]. In general, the Department may not release information collected pursuant to this Act, unless it is in a statistical form that does not identify the reporting entity, physician or patient in any way. Data obtained directly from an individual's medical records are for the confidential use of the Department and those authorized by the Department to carry out the purposes of this Act. In addition, the identity of any person whose condition or treatment has been studied or any facts that are likely to reveal the identity of the person is confidential. Requests from researchers for additional information on individuals for research studies approved by the Department require authorization from the patient or her legally authorized representative. [410 Ill. Comp. Stat. 310/7].

F. Mental Health and Developmental Disabilities

1. Access

The recipient of mental health or developmental disabilities services is entitled, upon request, to inspect and copy his records, with the exclusion of the therapist's personal notes. [740 Ill. Comp. Stat. 110/2 through 110/4.] If the recipient is at least 12 but under 18, the parent or guardian may inspect and copy the records, provided that the recipient is informed and does not object or the therapist does not find compelling reasons to deny access. A reasonable fee may be charged for duplication of a record.

If the person inspecting the records is under 18, assistance must be provided in interpreting the records. Any person entitled access to records under this statute may dispute or request modification of the record. [740 Ill. Comp. Stat. 110/4.]

2. Restrictions on Disclosure

All records and communications of providers of mental health or developmental disabilities services are confidential and may not be disclosed without the written consent of the recipient of these services (or his parent or guardian) except as provided by the Mental Health and Developmental Disabilities Act. [740 Ill. Comp. Stat. 110/3 and 110/5.] The format of the consent form is mandated by statute, and generally must specify to whom disclosure is to be made and the purpose of the disclosure. [740 Ill. Comp. Stat. 110/5.] Disclosure without consent is permitted: as necessary to apply for or receive benefits [740 Ill. Comp. Stat. 110/6]; for accrediting and other review processes [740 Ill. Comp. Stat. 110/7]; between agencies or

departments of the state that jointly provide services; and in other enumerated instances. [740 Ill. Comp. Stat. 110/8 through 110/12.2.] The recipient's record must include an accounting of disclosures made without consent. [740 Ill. Comp. Stat. 110/13.]

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 suit for damages, an injunction or other appropriate relief. [740 Ill. Comp. Stat. 110/15.] The court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

Fines and Penalties. Intentional violations are class A misdemeanors subject to a maximum fine of \$2,500 for each offense [740 Ill. Comp. Stat. 110/16; 730 Ill. Comp. Stat. 5/5-9-1.]

G. Sexually Transmitted Diseases

Illinois has a fairly comprehensive statutory scheme, including mandatory reporting requirements, for identifying and preventing the spread of sexually transmitted diseases (STDs). The mandatory reports maintained by the Department of Health are "strictly confidential," are not accessible to the public, and are generally not available in any legal proceeding except those designed to prevent the spread of STDs. [410 Ill. Comp. Stat. 325/8.] (For information about requirements for reporting AIDs, see Sec. E, HIV/AIDS, above.)

INDIANA

Indiana statutorily grants a patient the right of access to his own medical records maintained by health care providers, including physicians, hospitals, psychologists and others. The state also has statutory provisions governing the disclosure of confidential health care information in the possession of health care providers and HMOs. In addition, there are privacy protections addressed in statutes governing specific medical conditions.

I. PATIENT ACCESS

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

1. Scope

Indiana statutorily provides patients access to their records maintained by providers. [Ind. Code Ann. §§ 16-39-1-1 through 16-39-1-9.] This directive pertains to records possessed by physicians, hospitals, pharmacists, psychotherapists, dentists, registered and practical nurses, optometrists, psychologists, chiropractors, podiatrists, physical therapists, audiologists, speech-language pathologists, dietitians, occupational therapists, respiratory therapists, licensed home health agencies, licensed health facilities, and the state or local health departments and their employees. [Ind. Code Ann. §§ 16-18-2-295 (defining “provider”) and 16-39-1-1.]

The statutory access provisions encompass most health records, which generally include written, electronic, or printed information in a provider’s possession concerning a patient. [Ind. Code Ann. §§ 16-39-1-1 and 16-18-2-168 (defining “health record”).] These general provisions do not apply to a patient’s mental health records, records regarding communicable diseases or records regarding alcohol and other drug abuse [Ind. Code Ann. § 16-39-1-1], all of which are governed by separate provisions. [See Ind. Code Ann. §§ 16-39-1-1 (alcohol and drug abuse records are governed by federal regulation, 45 CFR, Part 2); 16-41-8-1 (communicable disease records must be released to the affected individual); 16-39-2-4 (patient access to their mental health records).] (See Section IV below for discussion of access to mental health records.)

In addition to the written and printed information possessed by the provider, a patient is also entitled to access to or a copy of his x-ray films. [Ind. Code Ann. § 16-39-1-2.]

Health records may be requested by a competent patient 18 years or older. [Ind. Code Ann. § 16-39-1-3.] A patient under the age of 18 who is emancipated also has the right of access. [*Id.*] When a patient is incompetent, the request for health records may be by the parent, guardian, or custodian of the patient. [*Id.*] The records of a deceased patient may be requested by the personal representative of the patient’s estate. [*Id.*] If

the deceased does not have a personal representative, the spouse of the deceased patient may make a request. [*Id.*] If there is no spouse, the request may be made by the child of the deceased patient, or the parent, guardian, or custodian of the child if the child is incompetent. [*Id.*]

2. Requirements

A patient must submit a written request for access to or a copy of his health record (or a pertinent part relating to a specific condition) to a provider. [Ind. Code Ann. § 16-39-1-1.] The request must give the provider reasonable notice. [*Id.*] There are specific rules for the release of contact lens prescription information. [*Id.*] A request made under this provision is valid for 60 days. [Ind. Code Ann. § 16-39-1-1(e).]

Copying Fees. The provider may charge the actual cost for providing x-ray films, and may charge 25¢ per page, actual postage and a \$15 retrieval fee for other medical records. [Ind. Code Ann. §§ 16-39-1-2 (x-rays); 16-39-9-2 (general rule); 16-39-9-3 (specific fee amounts).] If the provider charges a retrieval fee, he may not charge for the copying of the first 10 pages of a medical record. [*Id.*] An additional \$10 may be charged to provide the records within two working days of the request. [Ind. Code Ann. § 16-39-9-3.]

Denial of Access. A patient is not entitled to obtain his hospital records while he is an inpatient of a hospital or certain other health facilities. [Ind. Code Ann. § 16-39-1-6.] However, the patient's parent (if the patient is a minor), spouse or next of kin is entitled to obtain the records in this circumstance. [*Id.*] Additionally, a patient may be denied access to his own health records if a health care professional determines that the requested information would be detrimental to the patient's health or is likely to cause the patient to harm himself or others. [Ind. Code Ann. § 16-39-1-5.]

B. State Government

The Fair Information Practices Act [Ind. Code Ann. §§ 4-1-6-1 through 4-1-6-8] imposes on state agencies a variety of duties related to the personal information that they maintain. The Act applies to every agency, board, commission, department, bureau, or other entity of the administrative branch, except those under the responsibility of the state auditor, treasurer of state, secretary of state, attorney general, superintendent of public instruction, the state police department or state higher education entities. [Ind. Code Ann. § 4-1-6-1(d) (defining "state agency").]

The Act applies to "personal information" which generally is defined as any information that describes, locates, or indexes anything about an individual or that affords a basis for inferring personal characteristics concerning a particular individual, including but not limited to medical history. [Ind. Code Ann. § 4-1-6-1(b) (defining "personal information").]

Rights under the Fair Information Practices Act may be exercised by the "data subject," the individual to whom personal information refers. [Ind. Code Ann. § 4-1-6-1(c) (defining "data subject").]

1. Patient Access Requirements

A state agency that maintains a personal information system must, upon request and proper identification of the individual (or his authorized agent), give the individual or his agent the right to inspect all personal information (including medical information) about the individual and the right to obtain a copy of this information at a reasonable, standard charge, in a form that is comprehensible to the individual or agent. Medical and psychological records, however, are not provided directly to the individual, but must be made available to a physician or psychologist designated by the individual in a written authorization. [Ind. Code Ann. § 4-1-6-3.]

To the extent it has maintained such information, the agency must also make available to an individual, upon his request, a list of the uses made of his personal information of a confidential nature, including the identity of all any recipients that have gained access to the data. [Ind. Code Ann. § 4-1-6-3(c).]

Right to Amend. Agencies must have procedures that allow a data subject to challenge, correct or explain information about him in the personal information system. [Ind. Code Ann. § 4-1-6-5.] If challenged, the agency is to conduct an investigation and if the information is determined incomplete, inaccurate, not pertinent, not timely or not necessary to be retained, it must be promptly corrected or deleted. [*Id.*] Following any correction or deletion of personal information the agency must inform past recipients that the item has been deleted or corrected and shall require the recipients to acknowledge receipt of such notification and furnish the data subject the names and last known addresses of all past recipients of the uncorrected or undeleted information. [*Id.*]

If the dispute is not resolved by the investigation, the data subject may file a statement of dispute. [*Id.*] The agency maintaining the data system must then supply all previous recipients with a copy of the statement and include the statement of dispute in any subsequent disclosure or dissemination of the disputed data. [*Id.*]

2. Other Requirements

Agencies may only collect or maintain that personal information as is relevant and necessary to accomplish a statutory purpose of the agency. [Ind. Code Ann. § 4-1-6-2(a).] Personal information that is collected must be maintained to the maximum extent possible, accurate, complete, timely, and relevant to the needs of the state agency. [Ind. Code Ann. § 4-1-6-2(d).]

II. RESTRICTIONS ON DISCLOSURES

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

1. Scope

Indiana statutorily specifies the ownership rights in health records and the conditions under which these records may be used and shared with others. [See Ind. Code Ann. §§ 16-39-5-1 through § 16-39-5-3.] These provisions apply to “providers,” including:

physicians, hospitals, pharmacists, psychotherapists, dentists, registered and practical nurses, optometrists, psychologists, chiropractors, podiatrists, physical therapists, audiologists, speech-language pathologists, dietitians, occupational therapists, respiratory therapists, licensed home health agencies, licensed health facilities, and the state or local health departments and their employees. [See *generally* Ind. Code Ann. § 16-18-2-295 (defining “provider”).]

These provisions govern most health records, which generally include written, electronic, or printed information in a provider’s possession concerning a patient. [Ind. Code Ann. §§ 16-39-1-1 and 16-18-2-168 (defining “health record”).] These general provisions do not apply to a patient’s mental health records, records regarding communicable diseases or records regarding alcohol and other drug abuse [Ind. Code Ann. § 16-39-1-1], all of which are governed by separate provisions. [See Ind. Code Ann. §§ 16-39-1-1 (alcohol and drug abuse records are governed by federal regulation, 45 CFR, Part 2); 16-41-8-1 (communicable disease records must be released to the affected individual); 16-39-2-4 (patient access to their mental health records).] (See Section IV below for discussion of access to mental health records.)

2. Requirements

Providers are the owners of original health care records and they may use these records without the specific written authorization of the patient for legitimate business purposes, including submission of claims for payment from third parties; collection of accounts; litigation defense; quality assurance; peer review; and scientific, statistical and educational purposes. [Ind. Code Ann. § 16-39-5-3.] In using the records, the provider must protect the confidentiality of the health records and may disclose the identity of the patient only when disclosure is essential to the provider’s business use or to quality assurance and peer review. [*Id.*]

Providers may obtain a patient’s health records from another provider without the patient’s consent if the health records are needed to provide health care services to the patient. [Ind. Code Ann. § 16-39-5-1.]

A provider may disclose a health record to another provider or to a nonprofit medical research organization to be used in connection with a joint scientific, statistical, or educational project. Each party that receives information from a health record in connection with the joint project must protect the confidentiality of the health record and may not disclose the patient’s identity except as allowed by statute. [Ind. Code Ann. § 16-39-5-3.]

A provider may disclose a health record or information obtained from a health record to the Indiana hospital trade association for use in connection with a voluntary scientific, statistical, or educational project undertaken by the association. [Ind. Code Ann. § 16-39-5-3.] However, the provider may disclose the identity of a patient to the association only when the disclosure is essential to the project. [*Id.*] The association, in turn, may disclose the information it receives from a provider to the state health department to be used in connection with a voluntary scientific, statistical, or educational project undertaken jointly by the association and the state department if the association and the state department have agreed to the project's scope, nature, and duration. [*Id.*] The information disclosed by: either a provider to the association or the association to the state department under this provision is confidential. [*Id.*]

A provider may also release a patient's health record pursuant to the patient's written consent. [Ind. Code Ann. § 16-39-1-4.] The written consent for release (other than to an insurance company) must include: the patient's name, patient's address, name of the requestor, name or person to whom the information is to be released, purpose of the release, a description of the information to be released, the signature of the patient, the date on which the consent is signed, the date, event or condition on which the consent will expire. [Ind. Code Ann. § 16-39-1-4.]

Consents for the release of health records to accident and sickness insurance companies must be in writing and must include: the name of the insured, date of consent, name of company to whom the information is being released, and description of information to be released. [Ind. Code Ann. § 16-39-5-2.]

3. Remedies and Penalties

Fines and Penalties. A person who recklessly violates or fails to comply with the restrictions pertaining to disclosure for research commits a Class C infraction [Ind. Code Ann. § 16-39-5-3(h)] and is subject to a maximum judgment of \$500. [Ind. Code Ann. § 34-28-5-4 (specifying the maximum judgments allowable for violations constituting infractions).]

B. HMOs

For purposes of a quality management program, an HMO is entitled to access to the treatment records and other information pertaining to the diagnosis, treatment and health status of any enrollee during the period of time the HMO covers the enrollee. [Ind. Code Ann. § 27-13-31-4.]

HMOs and limited service HMOs (*i.e.*, an entity that provides or arranges a limited health service such as vision care services on a prepaid basis) are prohibited from disclosing 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. [Ind. Code Ann. §§ 27-13-31-1 and 27-13-34-12.] Disclosure is permitted 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. [Ind. Code Ann. § 27-13-31-1.]

Remedies and Penalties

Fines and Penalties. There are administrative procedures for addressing violations of the provisions governing HMOs, including the nondisclosure provisions, under which the insurance commissioner may determine an adequate and effective means of correcting or preventing the violation. [Ind. Code Ann. §§ 27-13-28-2 through 27-13-28-5.] The department of insurance also has the power to investigate complaints, grievances, or appeals on behalf of enrollees. [Ind. Code Ann. § 27-13-28-7.] In addition, the insurance commissioner may issue cease and desist orders and impose monetary penalties on limited service HMOs that violate the law. [Ind. Code Ann. § 27-13-34-21.]

C. Pharmacists

A pharmacist must hold in “strictest confidence” all prescriptions, drug orders, records and patient information. [Ind. Code Ann. § 25-26-13-15.] He may divulge such information only when it is in the best interest of the patient or when requested by the board of pharmacy or by a law enforcement officer charged with the enforcement of the laws pertaining to drugs or devices or the practice of pharmacy. [*Id.*] A pharmacist may not be held civilly liable for any good faith release of information under this section. [*Id.*]

D. State Government

1. Fair Information Practices Act

a. Scope

The Fair Information Practices Act [Ind. Code Ann. §§ 4-1-6-1 through 8] imposes on state agencies a variety of duties related to the personal information that they maintain. The Act applies to every agency, board, commission, department, bureau, or other entity of the administrative branch, except those under the responsibility of the state auditor, treasurer of state, secretary of state, attorney general, superintendent of public instruction, the state police department or state higher education entities. [Ind. Code Ann. § 4-1-6-1(d) (defining “state agency”).]

The Act applies to “personal information” which generally is defined as any information that describes, locates, or indexes anything about an individual or that affords a basis for inferring personal characteristics concerning a particular individual, including for example medical information. [Ind. Code Ann. § 4-1-6-1(b) (defining “personal information”).]

b. Disclosure Requirements

Under the Fair Information Practices Act, government agencies that hold medical information must ensure that other agencies or individuals are not provided access to personal information unless otherwise allowed by statute or is approved by the individual whose personal information is sought. [Ind. Code Ann. § 4-1-6-2.] Agencies must comply with a data subject’s request to disseminate his data to a third person if practicable. [Ind. Code Ann. § 4-1-6-3.] The agency may charge a reasonable, standard charge if necessary. [Ind. Code Ann. § 4-1-6-4.]

Agencies must maintain procedures to ensure that no personal information is made available in response to a demand for data made by means of compulsory legal process, unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed. [Ind. Code Ann. § 4-1-6-2(j).]

Agencies must also maintain a complete and accurate record of every access to personal information in a system that is not a matter of public record by any person or organization not having regular access authority. [Ind. Code Ann. § 4-1-6-2 (h).] In addition, agencies must maintain a list of all persons or organizations having regular access to personal information that is not a matter of public record in the information system. [Ind. Code Ann. § 4-1-6-2 (g).]

c. Other Requirements

Agencies must undertake a number of administrative steps to protect the privacy of personal information. For example, a state agency that maintains a personal information system must, upon request and proper identification of an individual or his authorized agent, allow the individual to inspect or obtain a copy of the list of persons to whom his confidential personal information has been disclosed including the date, nature and purpose of the disclosure. [Ind. Code Ann. § 4-1-6-3.] The agency may impose reasonable, standard charges. [*Id.*] This accounting of disclosures does not include recipients with regular access authority. [Ind. Code Ann. § 4-1-6-3(c).] Each agency must establish rules to assure compliance with this chapter and instruct each of its employees having any responsibility for or use of any personal information of all rules and procedures to assure compliance with this chapter. [Ind. Code Ann. § 4-1-6-2(k).]

In addition, agencies must, to the extent possible, segregate confidential information from that of public records; and shall establish confidentiality requirements and appropriate access controls for all categories of personal information contained in the system. [Ind. Code Ann. § 4-1-6-2(f).] They must also take reasonable precautions to protect personal information from anticipated threats or hazards to their security or integrity. [Ind. Code Ann. § 4-1-6-2(l).]

E. Utilization Review Agents

A utilization review agent must protect the confidentiality of the medical records of covered individuals. [Ind. Code Ann. § 27-8-17-11.] A “covered individual” is an individual who has contracted for or who participates in coverage under an insurance policy, HMO contract, or other benefit program providing payment, reimbursement, or indemnification for the costs of health care for the individual and/or his eligible dependents. [Ind. Code Ann. §§ 27-8-17-1 (defining “covered individual”); 27-8-17-3 (defining “enrollee”).]

III. PRIVILEGES

Indiana recognizes a number of health care provider-patient privileges, under which a professional is prohibited, except in limited circumstances, from disclosing matters communicated to him in his professional capacity by a client. [Ind. Code Ann. §§ 25-23.6-6-1 (social worker-client); 25-33-1-17 (psychologist-client); 35-37-6-9 (victim

counselor-client); 34-46-3-1 (physician-patient).] An HMO or limited service HMO is entitled to claim any statutory privilege against disclosure that the provider who furnished the information is entitled to claim. [Ind. Code Ann. § 27-13-31-1(c).]

IV. CONDITION SPECIFIC REQUIREMENTS

A. Birth Defects

Indiana maintains a birth problems registry that requires health professionals to report to the state incidents of birth problems, including: developmental malformations, structural deformations, genetic, inherited, or biochemical diseases, low birth weight, chronic conditions that may require long term health care, stillbirth

or any other severe disability designated by the state department or recognized in a child between birth and two years of age. [Ind. Code Ann. § 16-38-4-1, et seq.] Information about individual patients in the reports is for the confidential use of the state department only, with a few exceptions. [Ind. Code Ann. § 16-38-4-10.] Researchers may be granted access to confidential information concerning individual patients provided they meet specific criteria, including executing an agreement that prohibits the publication or release of the names of individual patients. [Ind. Code Ann. § 16-38-4-11.] The department may also release identifying information to: birth problems registries of other states; and physicians and local health officers for diagnostic and treatment purposes if the patient has given written consent. [Ind. Code Ann. § 16-38-4-13.]

B. Cancer

Indiana maintains a cancer registry that requires physicians, dentists, hospitals and medical laboratories to report confirmed cases of cancer to the state. [Ind. Code Ann. § 16-38-2-3.] The information concerning individual cancer patients generally is for the confidential use of the state department of health. [Ind. Code Ann. §§ 16-18-1-1; 16-18-2-339 (defining “state department”), and 16-38-2-4.] Researchers may be granted access to confidential information concerning individual cancer patients provided they meet specific criteria, including executing an agreement that prohibits the publication or release of the names of individual cancer patients. [Ind. Code Ann. § 16-38-2-5.] Researchers may only use the name of individual patients when requesting additional information for research projects or soliciting participation in a research project, and then, only with the prior oral or written consent of the patient’s physician. [Ind. Code Ann. § 16-38-2-6.] If the physician grants consent, the researcher must then obtain the cancer patient’s written consent. [*Id.*] The department also may release confidential information to cancer registries of other states that have entered into reciprocal agreements with Indiana. [Ind. Code Ann. § 16-38-2-7.]

C. Communicable Diseases

Indiana requires the reporting of communicable diseases, including HIV/AIDS, by licensed physicians, hospital administrators or their representatives, and medical laboratory directors or their representatives to a designated local or state health officer. [Ind. Code Ann. § 16-41-2-1, et seq.] Medical records concerning an individual must be released to the individual or to a person authorized in writing by the

individual to receive the medical records. [Ind. Code Ann. § 16-41-8-1(d).] A person may not disclose or be compelled to disclose medical or epidemiological information involving a communicable disease, including pursuant to subpoena, without the subject's written consent except in very limited circumstances. [Ind. Code Ann. § 16-41-8-1(a).] The information may be released for statistical purposes if done in such a manner that it does not identify an individual. [*Id.*] It may also be released to enforce the public health laws or to protect the health or life of a named party. [*Id.*]

Remedies and Penalties

Fines and penalties. A person responsible for recording, reporting, or maintaining information concerning a communicable disease that is required to be reported who recklessly, knowingly, or intentionally discloses or fails to protect this confidential information commits a Class A misdemeanor. [Ind. Code Ann. § 16-41-8-1(b).] If the person who commits the violation is a public employee, he is also subject to discharge or other disciplinary action. [Ind. Code Ann. § 16-41-8-1(c).]

D. Genetic Information and Test Results

Indiana has detailed provisions governing the manner in which insurers may obtain and use information obtained from genetic screenings and tests. [*See* Ind. Code Ann. §§ 27-28-26-1 through 27-28-26-11.] These restrictions apply to accident and sickness insurance (whether a group or individual policy), group or individual contracts through which a health maintenance organization furnishes health care services, state and local government health care plans that provide coverage for health care services on a self-insurance basis, and employee welfare benefit plans that are self-funded. [Ind. Code Ann. §§ 27-28-26-1 (applicability) and 27-28-26-4 (defining "insurer").]

For purposes of these provisions, "genetic screening or testing" is the testing of an individual's genes or chromosomes for abnormalities, defects, or deficiencies that may be linked to physical or mental disorder; indicate a susceptibility to illness, disease, or other disorder, or demonstrate genetic damage due to environmental factors. [Ind. Code Ann. § 27-8-26-2 (defining "genetic screening or testing").] The term does not include the detection of a genetic disorder through the manifestation of the disorder. [*Id.*]

In developing and asking questions regarding the medical history of an applicant for health care services coverage, an insurer may not ask: for the results of or questions designed to ascertain the results of genetic screening or testing. [Ind. Code Ann. § 27-8-26-6.]

Insurers are also restricted in the actions they can undertake in processing an application for health care services coverage or in determining insurability for health care services coverage. They may not require an individual (or any member of an individual's family) seeking health care services coverage to submit to genetic screening or testing. Neither may the insurer consider any information obtained from genetic screening or testing in a manner adverse to the person or his family. [Ind. Code Ann. § 27-8-26-5.] Insurers are also prohibited from inquiring, directly or indirectly, into the results of genetic screening or testing, or using such information to cancel, refuse to issue or renew, or limit benefits under health care services coverage. [*Id.*] Additionally, insurers may not make a decision adverse to an applicant or a

member of an applicant's family based on entries related to the results of genetic testing or screening in medical records or other reports of genetic screening or testing. [*Id.*]

An insurer may not cancel, refuse to issue, refuse to renew or refuse to enter into a contract for coverage based on the results of genetic screening or testing. [Ind. Code Ann. § 27-8-26-7.]

An insurance company other than a life insurance company may not obtain the results of any genetic screening or testing without an individual's written consent. [Ind. Code Ann. §§ 16-39-5-2 and 27-8-26-2 (defining "genetic screening or testing").] A consent form to release genetic screening or test results must: indicate in at least 10 point boldface type that the individual need not consent to releasing the results of any genetic testing or screening; and must be approved by the commissioner of insurance before use. [Ind. Code Ann. § 16-39-5-2.] Although an insurer is not liable if it inadvertently receives the results of genetic testing or screening and without having obtained written consent, it may not use the genetic testing or screening results to deny coverage or benefits (as described above). [*Id.* and Ind. Code Ann. § 27-8-26-1, et seq.]

Remedies and Penalties

Fines and Penalties. A violation of these provisions is an unfair and deceptive act or practice in the business of insurance under Ind. Code Ann. § 27-4-1-4. [Ind. Code Ann. § 27-8-26-11.]

E. Mental Health Records

Providers must maintain a record for every patient receiving mental health services. [Ind. Code Ann. § 16-39-2-2.] The provider is the owner of the mental health record and is entitled to retain possession of it. [*Id.*] The information contained in the mental health record, however, belongs to the patient as well as to the provider. [*Id.*] The provider must maintain the record for at least 7 years. [*Id.*]

The term "mental health records" means recorded or unrecorded information about the diagnosis, treatment or prognosis of a patient receiving mental health services or developmental disability training. [Ind. Code Ann. § 16-18-2-226 (defining "mental health record" for purposes of article 39 of title 16 of the Indiana Code).] The term does not include alcohol and drug abuse records. [*Id.*]

Patient Access. A patient is entitled to inspect and copy his own mental health record. [Ind. Code Ann. §§ 16-39-2-4; 16-39-2-9.] If the patient is a minor, the parent, guardian or other court appointed representative is entitled to exercise the right of access to the minor's record. [Ind. Code Ann. § 16-39-2-9.]

Access may be denied if the provider determines, for good medical cause, that the information requested would be detrimental to the health of the patient or is likely to cause the patient to harm himself or others. [Ind. Code Ann. § 16-39-2-4.] If the provider is a state institution or agency, the patient may appeal the denial of access. [*Id.*]

Disclosure. Upon a patient's written request, the provider must make the patient's mental health record available to an individual or organization designated by the patient or the patient's legal representative. [Ind. Code Ann. § 16-39-2-5.] Requests for access must be in writing and include: the patient's name; name of the person requested to release the record; identity of the person or entity to whom the patient's record is to be released; purpose of the release; a description of the information to be released; the patient's signature; date of the request; statement that the patient's consent is subject to revocation at any time, except to the extent that action has been taken in reliance on the patient's consent and the date, event, or condition on which the patient's consent expires. [*Id.*]

Upon the written request of certain specified family members or guardians involved in the planning, provision, and monitoring of mental health services delivered to the patient and with the written consent of the treating physician, a provider must furnish a summary of the patient's diagnosis and prognosis; the types of medication prescribed to the patient; and a summary of the nature and effects of treatment and the right to refuse treatment. [Ind. Code Ann. § 16-39-4-2. *See also* Ind. Code Ann. §§ 12-27-6-2 and 12-27-6-3.]

Copying Fees. The provider may impose a 25¢ per page fee for copies, actual postage and a \$15 retrieval fee for mental health records. [Ind. Code Ann. §§ 16-39-2-11; 16-39-9-3.] If the provider charges a retrieval fee, he may not charge for the copying of the first 10 pages of a medical record. In addition, an additional \$10 may be charged to provide copies within 2 working days. [Ind. Code Ann. § 16-39-9-3.].

Restrictions on Disclosure. Mental health records are confidential and generally may be disclosed only with the patient's consent. [Ind. Code Ann. § 16-39-2-3.] Mental health information may be disclosed without the patient's consent for a number of specified purposes, including:

- **Treatment.** To individuals that are employed by the provider; a managed care provider; a health care provider if needed to provide treatment to the patient;
- **Payment.** To the extent necessary to obtain payment for services rendered;
- **Educational Needs.** To the patient's school if the superintendent determines that the information will aid the school in meeting educational needs of a disabled patient;
- **Research.** For research conducted in accordance with the rules of the division of mental health;
- **Law Enforcement.** To a law enforcement agency if: the patient escapes from a facility to which the patient is committed; a superintendent of the facility determines that failure to provide the information may result in bodily harm to the patient or another individual; the patient commits or threatens to commit a crime; the patient is in the custody of a law enforcement officer or agency for any reason and the disclosed information is limited to medications currently prescribed for the patient or to the patient's history of adverse medication reactions and the provider determines that the release of the information will aid in protecting the health, safety, or welfare of the patient;
- **Emergency.** To another health care provider in a health care emergency.

[Ind. Code Ann. § 16-39-2-6.]

A provider may also use a patient's records without specific written authorization for legitimate business purposes, including: quality assurance; peer review; litigation defense; and scientific, statistical and educational purposes. The provider, however, must protect the confidentiality of the records at all times and disclose a patient's identity only when disclosure is essential to the provider's business use or to quality assurance and peer review. [Ind. Code Ann. §§ 16-39-2-3; 16-39-5-3.]

Generally, the patient's mental health information is not discoverable or admissible in any legal proceeding without the patient's consent. [Ind. Code Ann. § 16-39-2-7.] However, the court may order the release of the mental health information without the patient's consent upon the showing of good cause following a hearing under Ind. Code

16-39-3 or following a hearing held under the Indiana Rules of Trial Procedure. [Ind. Code Ann. § 16-39-2-8.]

F. Substance Abuse

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States may not be disclosed unless authorized in accordance with the federal substance abuse statutes and regulations. [See Ind. Code Ann. § 16-39-1-9 and 45 C.F.R., Part 2.]³

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³ Ind. Code Ann. § 16-39-1-9 provides that alcohol and drug abuse records described in 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3 may not be disclosed unless authorized in accordance with 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3. However, these sections have been omitted and the description of covered alcohol and drug abuse records and restrictions on disclosures of these records are now contained in 42 U.S.C. 290dd-2.

IOWA

Iowa does not statutorily grant a patient the right of access to his medical records. Nor does the state have a general, comprehensive statute prohibiting the disclosure of confidential medical information. Rather, these protections are addressed in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

There is no general statutory right to access medical records.

II. RESTRICTIONS ON DISCLOSURE

A. HMOs

An officer, director, trustee, partner or employee of a health maintenance organization (HMO) may not make a public disclosure of a communication made to a provider that is subject to the provider-patient statutory privilege and that the HMO employee became aware of by reason of his employment. [Iowa Code § 514B.30. See “Privileges” below for discussion of providers covered.] An HMO is also prohibited from releasing the names of its membership list of enrollees, whether or not for value or consideration, except to the extent necessary to enforce the statutory provisions governing HMOs or to conduct cost or quality related research or analyses. [*Id.*]

B. State Government

Medical records, hospital records and the records of professional counselors concerning the condition, diagnosis, care or treatment of a patient or former patient that are maintained by a public entity generally maintain their status as confidential records and are not open to public inspection unless otherwise ordered by a court. [Iowa Code § 22.7(2).]

III. PRIVILEGES

Iowa recognizes a health care provider-patient privilege that allows a patient in a legal proceeding to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of treatment and diagnosis. [Iowa Code § 622.10.] This privilege extends to counselors, physicians, surgeons, physician assistants, advanced registered nurse practitioners, mental health professionals, and their respective patients. [*Id.*] This privilege extends to HMOs that obtain knowledge of privileged communications. [Iowa Code § 514B.30.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Iowa maintains a central registry to facilitate the compiling of statistical information on the causes, treatment, prevention and cure of genetic disorders and birth defects. [Iowa Code § 136A.6.] Identifying information contained in the registry is confidential. [*Id.*; Iowa Code § 22.7(2).]

B. Communicable Diseases, Infectious Diseases and Poisonings

A health care provider, or a public, private or hospital clinical laboratory attending to an individual infected with a reportable disease must report the case to the state department of health, and to the local health department when a case occurs within the local department's jurisdiction. Reportable diseases include: chlamydia; hepatitis, types A, B, C, D and E, lyme disease, tuberculosis, anthrax, pesticide poisoning, lead poisoning, any syndrome of any kind caused by a chemical or radiological agent when the provider reasonably suspects that the agent may be a result of a deliberate act such as terrorism, and many others. [Iowa Admin. Code § 641-1.3.] Such mandatory reports to the department of health identifying persons infected with a reportable disease are to be kept confidential and are not accessible to the public under the open records law, unless otherwise ordered by a court. [Iowa Code §§ 22.7(16); 139A.3.] Reports to the department identifying persons infected with a sexually transmitted disease or infection, and all such related information, records, and reports concerning the person, are specifically deemed confidential and not accessible to the public. [Iowa Code § 139A.30.]

C. Drug and Alcohol Abuse

The registration and other records of substance abuse treatment facilities are confidential. [Iowa Code § 125.37.] The director of such a facility, however, may make available information from patients' records for purposes of research into the causes and treatment of substance abuse. [*Id.*] Researchers are prohibited from publishing information in such a way that discloses patients' names or other identifying information. [*Id.*] A patient's records may also be disclosed without his consent to medical personnel in a medical emergency. [*Id.*] The records of the identity, diagnosis, prognosis, or treatment of a person that are maintained in connection with the provision of substance abuse treatment services are confidential. [Iowa Code § 125.93.] In addition, a practitioner engaged in medical practice or research, or the Iowa drug abuse authority and its program licensees may not be required to disclose the identity of a patient in treatment or involved in a research study. [Iowa Code § 125.504.]

D. HIV

All reports and records relating to HIV/AIDS status are strictly confidential and may not be released, shared with an agency or institution, or made public upon subpoena, search warrant, or discovery proceedings unless a court determines there is a compelling need for disclosure. [Iowa Code § 141A.9.] The information may also be released pursuant to the patient's written authorization, a "written release of test

results.” [Id.] Such a written release for disclosure of HIV-related test results must be signed; dated; specify to whom disclosure is authorized; and specify the time period that the release is to be effective. [Iowa Code § 141A.1(15)(defining “release of test results”).]

Additionally, there are a number of circumstances, specified in the statute, under which HIV/AIDS-related information may be released without the authorization of the patient, including: to the subject of the test or the subject’s legal guardian; to an authorized agent or employee of a health facility or health care provider, if the health facility or health care provider ordered or participated in the testing or is otherwise authorized to obtain the test results, the agent or employee provides patient care or handles or processes samples, and the agent or employee has a medical need to know such information; to a health care provider providing care to the subject of the test when knowledge of the test results is necessary to provide care or treatment; to the health department in accordance with reporting requirements for an HIV-related condition; pursuant to court order issued in compliance with the statute; and to others.

There are certain circumstances, where even if there are notification requirements, the patient’s name cannot be disclosed. For example, when informing partners of HIV exposure, the department may not disclose the identity of the person who provided the names of the persons to be contacted and must protect the confidentiality of persons contacted. [Iowa Code § 141A.5.]

Remedies and Penalties

Right to Sue. A person whose rights are violated under these provisions may file a civil action for damages in district court within two years after the cause of action accrues. [Iowa Code § 141A.11.]

Fines and Penalties. A provider who intentionally or recklessly makes an unauthorized disclosure may be fined \$1,000. [Iowa Code § 141A.11.] A person who violates the confidentiality of the partner notification program (which prohibits the disclosure of the identity of the person providing contact names) is guilty of an aggravated misdemeanor, punishable by imprisonment for up to 2 years and a fine ranging from \$500 to \$5,000. [Iowa Code §§ 141A.5 and 141A.11.]

E. Mental Health Conditions

1. In General

a. Scope

Mental health professionals, mental health facilities, data collectors and their respective employees and agents are generally prohibited from disclosing or permitting the disclosure of mental health information without the written authorization of the client or his legal representative. [Iowa Code §§ 228.2; 228.3.] Mental health information includes all oral, written or otherwise recorded information that identifies a patient and pertains to the diagnosis, treatment or mental condition of that patient. [Iowa Code § 228.1 (defining “mental health information”).] An individual 18 years of

age or older or an individual's legal representative has the right to authorize the disclosure of mental health information. [Iowa Code § 228.3.]

b. Requirements

An authorization must be signed and dated by the client or his legal representative and must specify the nature of the information to be disclosed, the person authorized to disclose the information, the purpose for which the information may be used, and the length of time for which the authorization is valid. [Iowa Code § 228.3.] The authorization must also advise the patient of his right to inspect the disclosed mental health information at any time. [*Id.*]

The authorization may be revoked by providing a written revocation to the recipient named in the authorization and to the mental health provider or other entity that was previously authorized to disclose the information. [Iowa Code § 228.4.] Mental health information disclosed prior to the revocation date may still be used for the purposes stated in the original written authorization. [*Id.*] Mental health information disclosed pursuant to a client's authorization generally may not be further disclosed by the recipient except as allowed by law or pursuant to a new authorization. [Iowa Code § 228.2.]

c. Exceptions to Authorization

There are a number of circumstances under which mental health information may be disclosed *without* the patient's authorization including for the following purposes:

- **Treatment.** Mental health information may be transferred at any time to another facility, physician, or mental health professional in cases of a medical emergency. [Iowa Code § 228.2.]
- **Family involvement with care.** Mental health professionals and mental health facilities may disclose limited mental health information to family members who have submitted a written request without the client's authorization when the following conditions are met: the family member must be directly involved in the patient's care; the patient's physician verifies the family member's involvement and disclosure is necessary for the treatment of the patient. [Iowa Code § 228.8.]
- **Commitment proceedings.** Disclosure of mental health information without the client's consent is also permitted if and to the extent necessary: to initiate or complete civil commitment proceedings; to file requisite reports for the funding of local community health services; and to meet other statutory requirements. [Iowa Code § 228.6.]
- **Research.** Mental health information may also be disclosed if necessary to conduct scientific and data research, management audits or program evaluations of the mental health professional or facility provided certain requirements are met; to facilitate the provision of administrative and professional services to the individual; and for collection of fees due to the mental health professional or facility. [Iowa Code § 228.5.]
- **Others.** [See Iowa Code §§ 228.2; 228.5; 228.6.]

Upon disclosure of mental health information, whether the disclosure is administrative, required by law or pursuant to individual authorization, the person making the disclosure must enter a notation on and maintain the notation with the

individual's record, stating the date of disclosure and the name of the recipient of the information. [Iowa Code § 228.2.]

2. Third-party Payors

Mental health information may be disclosed, in accordance with the prior written consent of the patient or his legal representative, to a peer review organization or third-party payor, including insurance companies and self-insured employers, provided that the peer review organization or third-party payor has filed a written statement with the commissioner of insurance agreeing to maintain the confidentiality of mental health information and to destroy the information when it is no longer needed. [Iowa Code § 228.7.] If a self-insured employer has not filed such a written statement, its employees may not be granted routine or ongoing access to mental health information unless they have signed a statement indicating that they are aware that the information may not be used or disclosed except as provided in this subsection and that they are aware of the penalty for unauthorized disclosure. [*Id.*] Employees of these entities are prohibited from using mental health information or disclosing it to any person, except to the extent necessary to administer claims, to conduct utilization and quality control review of the services provided, to conduct an audit of claims paid, or as otherwise allowed by law. [*Id.*]

Remedies and Penalties

Fines and Penalties. An employee or an agent of a third-party payor or a peer-review organization who willfully uses or discloses mental health information in violation of this provision is guilty of a serious misdemeanor, punishable by a fine not to exceed \$500 for the first offense and \$5,000 for each additional offense. [Iowa Code § 228.7(3).]

KANSAS

Kansas does not have a general, comprehensive statute granting a patient access to his medical records or prohibiting the disclosure of confidential medical information. Rather, these privacy protections are addressed in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

There is no general statute granting a patient the right of access to his medical records.

A. HMOs

Upon request, when an enrollee leaves an HMO, an enrollee is entitled to have his complete medical record that is in the possession of the HMO provided to another health care provider. [Kan. Stat. Ann. § 40-3226(b).]

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 that person or from any provider without the patient's or applicant's express consent. [Kan. Stat. Ann. § 40-3226(a).] Consent is always required to release the name of an enrollee or applicant in data pertaining to that individual's health contained in any medical review procedure or any reports required under the statutes governing HMOs. [*Id.*] Disclosure is otherwise allowed to the extent it is necessary to carry out the purposes of the statutory provisions governing HMOs, or as otherwise provided by law. [*Id.*]

Remedies and Penalties

Fines and Penalties. A violation of these provisions constitutes a class C misdemeanor, punishable by imprisonment not to exceed one month, fine, or both. [Kan. Stat. Ann. §§ 21-4502; 40-3216.]

B. Insurers

1. Scope

Kansas has adopted by reference the model Privacy of Consumer Financial and Health Information regulations issued by the National Association of Insurance Commissioners (NAIC Model Regs). [Kan. Admin. Reg. § 40-1-46.] 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 Kansas Insurance Law) with respect to the disclosure of “nonpublic personal health information” of insurance consumers and customers. [See NAIC Model Regs. §§ 4(Q) (defining “licensee”) and 17 (available at <http://www.ksinsurance.org/other/privacy/privacyhistory1.htm>).] “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. [NAIC Model Regs. § 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 of health care. [NAIC Model Regs. § 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. [NAIC Model Regs. § 4(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. [NAIC Model Regs. §20.]

2. Requirements

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [NAIC Model Regs. §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. [NAIC Model Regs. §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; and actuarial, scientific, medical or public policy research. [NAIC Model Regs. §17.]

C. State Government

Medical, psychiatric, psychological or alcoholism or drug dependency treatment records that pertain to identifiable patients and are maintained by a public agency generally are exempt from public inspection under the Open Records Act. [Kan. Stat. Ann. § 45-221(a)(3).]

D. Utilization Review Organizations

Utilization review organizations must have written procedures for assuring that patient-specific information obtained during the utilization review process will be kept confidential in accordance with state and federal laws and used solely for the purposes of utilization review, quality assurance, discharge planning and catastrophic case management. [Kan. Stat. Ann. § 40-22a09.] Any records or other information exchanged between a health care provider or patient and utilization review organization may not be subject to discovery, subpoena or other legal compulsion and are not admissible in evidence other than a disciplinary proceeding by an agency of the state that regulates health care providers. [Kan. Stat. Ann. § 40-22a10.]

Remedies and Penalties

Fines and Penalties. Violations of this provision may subject the utilization review organization to administrative actions, such as cease and desist orders, suspension or revocation of its certificate, or monetary penalties between \$500 and \$1,000 per violation. [Kan. Stat. Ann. § 40-22a07.]

III. PRIVILEGES

Kansas 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. [Kan. Stat. Ann. §§ 60-427 (physician-patient); 65-1525 (optometrist-patient); 65-1654 (pharmacist-patient); 65-5601 to 65-5603 (mental health treatment personnel-patient); 65-5810 (professional counselor-client); 74-5323 and 74-5372 (psychologist or psychotherapist-patient).] HMOs are entitled to claim any statutory privileges against disclosure that the provider of the information is entitled to claim. [Kan. Stat. Ann. § 40-3226(a).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Alcohol and Substance Abuse

Under the Care and Treatment Act for Persons with an Alcohol or Substance Abuse Problem, district court records relating to commitment proceedings for alcohol or substance abuse problems, as well as treatment records and medical records that are in the possession of any district court or treatment facility, are confidential and may only be disclosed without the patient's written consent in the following circumstances: when the head of the treatment facility makes a written determination that disclosure is necessary for the treatment of the patient; to an accreditation agency or for a scholarly study as long as the recipient pledges not to disclose the name of any patient to any person not otherwise authorized by law to receive the information; pursuant to a court order after the court determines that the records are necessary for the conduct of proceedings before the court and are otherwise admissible as evidence; upon the oral or written request of the patient's attorney for a proceeding conducted according to this act; or as otherwise provided for in this act. [Kan. Stat. Ann. § 59-29b79.] To the extent the confidentiality provisions governing treatment facilities (Kan. Stat. Ann.

§§ 65-5601 through 65-5605) are applicable to treatment or medical records of any patient or former patient, those confidentiality provisions control the disposition of information contained in the records. [Kan. Stat. Ann. § 59-29b79.]

Remedies and Penalties

Fines and Penalties. A willful violation of this provision is a class C misdemeanor, punishable by imprisonment not to exceed one month, fine, or both. [Kan. Stat. Ann. §§ 21-4502; 65-5605; 59-29b79.]

B. Cancer

Kansas maintains a cancer registry to record incidents of cancer. [Kan. Stat. Ann. § 65-1,168 et seq.] The information contained in the cancer registry is confidential and generally may not be disclosed without the patient's written consent. [Kan. Stat. Ann. §§ 65-1,168; 65-1,171; 65-1,172.] This information is not subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding and is not subject to the provisions of the Kansas Open Records Act. [Kan. Stat. Ann. § 65-1,171.] Identifying data collected may be used only: for ensuring the quality and completeness of the registry data; for investigating the nature and cause of abnormal clusterings of cancer and the possible cancer risk related to having an abortion; offering through the personal physician access to cancer diagnostics and treatments not available except through clinical trials; to release data on previously reported cases back to the reporting institution or individual; and as part of an exchange agreement with another state, data on that state's residents may be released to that state's registry if the receiving state's registry ensures equivalent patient confidentiality. [Kan. Stat. Ann. § 65-1,172.] Health care providers who report information to the cancer registry in good faith and without malice are immune from civil and criminal liability. [Kan. Stat. Ann. § 65-1,174.]

C. Contagious Diseases

Kansas requires health care professionals and others to report actual or suspected incidents of contagious or infectious diseases, including personally identifying information, to the board of health. [Kan. Stat. Ann. § 65-118.] Information required to be reported is confidential and may not be disclosed or made public, upon subpoena or otherwise, except in the following circumstances: if the information is not patient identifiable and is disclosed for statistical purposes; with the subject's written consent; in a medical emergency; when required in a child abuse proceeding and the disclosure is made in camera; and where disclosure is necessary, and only to the extent necessary, to protect the public health. [Kan. Stat. Ann. § 65-118; 65-119.]

D. HIV/AIDS

Kansas requires physicians and others to report the name and address of a person suffering from HIV/AIDS to the secretary of health. [Kan. Stat. Ann. § 65-6002.] Information required to be reported is confidential and may not be disclosed or made public, upon subpoena or otherwise, except in the following circumstances: if the information is not patient identifiable and is disclosed for statistical purposes; with the subject's written consent; in a medical emergency; when required in a court proceeding involving a minor and the information is disclosed in camera; and where disclosure is necessary, and only to the extent necessary, to protect the public health.

[*Id.*] Individuals who report HIV information in good faith and without malice are immune from civil and criminal liability. [*Id.*]

A physician treating a patient with HIV/AIDS may disclose the infection to other health care providers, emergency services employees, corrections officers or law enforcement employees who have been or will be placed in contact with body fluids of the patient. [Kan. Stat. Ann. § 65-6004.] This information may not be redisclosed except as necessary to treat the patient. [*Id.*] In addition, a physician may inform the spouse or partner of a person with HIV/AIDS of the risk of exposure. [*Id.*] The spouse or partner is prohibited from redisclosing the information to anyone other than the person with HIV/AIDS. [*Id.*]

Remedies and Penalties

Fines and Penalties. A violation of these provisions constitutes a misdemeanor, punishable by imprisonment not to exceed six months and a fine between \$500 and \$1,000. [Kan. Stat. Ann. § 65-6005.]

E. Mental Health

A patient of a community mental health center, community facility for the mentally retarded, psychiatric hospital or state institution for the mentally retarded may prevent personnel at those facilities from disclosing that he has been or is currently receiving treatment or from disclosing any confidential communications made for the purposes of diagnosis or treatment of the patient's mental, alcoholic, drug dependency or emotional condition. [Kan. Stat. Ann. §§ 65-5601; 65-5602.] Disclosure without the patient's consent is permitted in numerous situations, including the following: during involuntary commitment proceedings; to protect a person who has been threatened with substantial physical harm by the patient; for the purposes of collecting a bill for professional services rendered by a treatment facility; for treatment of a patient; pursuant to a court order; and pursuant to advocacy and protection laws. [Kan. Stat. Ann. § 65-5603.]

Remedies and Penalties

Fines and Penalties. A willful violation of a patient's confidentiality, as defined by the statute, is a class C misdemeanor, punishable by imprisonment not to exceed one month, fine, or both. [Kan. Stat. Ann. §§ 21-4502; 65-5605.]

KENTUCKY

Kentucky 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 addressed in statutes governing specific entities or medical conditions.

I. PATIENT ACCESS

A. Health Care Providers including Hospitals

Upon a patient's written request, a health care provider or hospital must provide, without charge to the patient, a copy of the patient's medical record. [Ky. Rev. Stat. Ann. § 422.317.] The provider or hospital may charge a copying fee not to exceed \$1 per page for the second copy. [*Id.*]

II. RESTRICTIONS ON DISCLOSURE

A. Health Plan Utilization Review

A private review agent may not disclose or publish individual medical records or any other confidential medical information obtained in the performance of utilization review activities except as permitted by the administrative simplification provisions of the Health Insurance Portability and Accountability Act, the Federal Health Privacy Rule (45 C.F.R. §§ 160 through 164), and other applicable laws and regulations. [Ky. Rev. Stat. Ann. § 304.17A-607.]

III. PRIVILEGES

Kentucky recognizes a number of mental health care-patient privileges that allow a patient, in a legal proceeding, to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of diagnosis and treatment between the patient, the mental health care provider, and other participating persons. [Ky. Rules of Evidence 506 (counselor-client privilege, encompassing school counselors, sexual assault counselors, certified art therapists, members of a crisis response team and others); Rule 507 (psychotherapist-patient privilege, encompassing psychiatrists, psychologists, licensed clinical social workers, and registered nurses who practice mental health nursing).] As to patients *involuntarily* hospitalized for mental illness, Kentucky statutes expressly provide that “[t]here shall be no privilege as to any relevant communications between qualified

mental health professionals and patients.” [Ky. Rev. Stat. Ann. §§ 202A.011(10) (defining “patient” for purposes of the chapter); 202A.096.]

Kentucky does not recognize a physician-patient privilege.

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Kentucky maintains a registry for birth defects to collect information and develop preventative measures relating to incidences, high-risk conditions, causes, and trends of various birth defects. [Ky. Rev. Stat. Ann. § 214.655.] All information collected and maintained in the registry must remain confidential. [Ky. Rev. Stat. Ann. § 214.670.]

B. Cancer

Kentucky maintains a cancer registry that allows for analyses and studies as are indicated to advance cancer control. [Ky. Rev. Stat. Ann. § 214.556.] The identity of any person whose condition has been reported to the cancer registry is confidential. [*Id.*] This identifying information may be exchanged with any other cancer control agency or clinical facility for the purpose of obtaining information necessary to complete a case record; and may be used by the registry to contact the individual patient if necessary to obtain follow-up information. [*Id.*] However, a control agency or clinical facility may not further disclose confidential information. [*Id.*]

C. HIV/AIDS

Generally, a person who has obtained or has knowledge of an HIV test may not disclose or be compelled to disclose the identity of any person upon whom a test is performed or the test results in a manner that allows the identification of the subject of the test. [Ky. Rev. Stat. § 214.625(5).] Disclosure of this information may be made to the subject of the test or to persons who are designated in a legally effective release. [*Id.*] Disclosure without the subject’s consent is also permitted to other specified persons and entities including: health care facilities that provide transplant services; authorized medical or epidemiological researchers who may not further disclose any identifying information; a person allowed access by court order; and others. [*Id.*] There are specified protective procedures that are required to be used by a court in determining whether a person is entitled to HIV test results. [*Id.*]

D. Mental Health

1. Insurers-Access to Mental Health Information

Insurers, including insurance companies, HMOs, and self-insurers and multiple employer welfare arrangements not exempt from state regulation by ERISA, may only request providers to furnish records relating to mental health and chemical dependency that are necessary for payment or quality of care issues. [Ky. Rev. Stat. Ann. § 304.17A-555.] Third parties to whom confidential information was disclosed may not re-disclose the information. [*Id.*]

2. Inpatient Treatment

All applications and requests for admissions and release, and all certifications, reports and records of the Cabinet of Health Services that identify a patient or former patient of a hospital providing treatment for the mentally ill or mentally retarded (or a person whose hospitalization was sought) must be kept confidential and generally may not be disclosed by any person without the patient's consent. [Ky. Rev. Stat. Ann. § 210.235.] Disclosure without the patient's consent may be made: as necessary to carry out other laws; pursuant to a court's determination that disclosure is necessary for the conduct of proceedings before it and that failure to disclose would be contrary to public interest; and upon proper inquiry of the family or friends of a patient, but only information as to the patient's medical condition. [*Id.*]

Court records made in proceedings to involuntarily commit a person to a hospital for the mentally ill or for the mentally retarded are confidential and are not open to general public inspection. [Ky. Rev. Stat. Ann. §§ 202A.091; 202B.180.] Disclosure of these records may only be made pursuant to court order. [*Id.*] Following the discharge of a patient from a treatment facility or the issuance of a court order denying a commitment, the patient may move to have the court records expunged. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person who violates the confidentiality of any mental health record under these provisions is guilty of a Class B misdemeanor, punishable by fine, imprisonment, or both. [Ky. Rev. Stat. Ann. § 202A.991.] A person who violates the confidentiality of records relating to a patient's mental retardation under these provisions is guilty of a Class A misdemeanor, punishable by a fine not to exceed \$5,000, imprisonment not to exceed 6 months, or both. [Ky. Rev. Stat. § 202B.990.]

E. Sexually Transmitted Diseases

The Kentucky Sexually Transmitted Diseases Control Confidentiality Act requires the reporting of diagnosed and suspected cases of sexually transmitted diseases, including syphilis, gonorrhea, herpes, HIV/AIDS and others to the health authorities. [Ky. Rev. Stat. §§ 211.180; 214.410; 214.400.] These reports as well as other records and information in the possession of the local health departments and Cabinet for Health Services are strictly confidential, and only personnel of these entities who are assigned to sexually transmitted disease control activities may have access to such information, records, and reports. [Ky. Rev. Stat. § 214.420.] This information may be disclosed with the written consent of all persons identified in the information to be released. [*Id.*] Disclosure without the subject person's consent is permitted to the physician retained by that person; to enforce the rules and regulations relating to the control and treatment of sexually transmitted diseases; and to medical personnel in a medical emergency to the extent necessary to protect the health or life of the named party. [*Id.*]

F. Substance Abuse

Administrators of treatment programs must maintain the confidentiality of information relating to a patient's treatment for alcohol or drug abuse. [Ky. Rev. Stat. Ann. § 222.271] In addition, insurers are only entitled to records relating to chemical dependency that are necessary for payment or quality of care issues. [Ky. Rev. Stat. Ann. § 304.17A-555.] Third parties to whom confidential information has been disclosed may not re-disclose the information. [Ky. Rev. Stat. Ann. § 304.17A-555.]

LOUISIANA

Louisiana statutorily grants a patient a right of access to his medical records in the possession of health care providers (including physicians and pharmacists) and hospitals. 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, Including Physicians and Pharmacists

1. Scope

Medical records of a patient maintained in a health care provider's office are the property and business records of the health care provider. [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(b).] Patients do, however, have the statutory right of access to these records. [*Id.*]

A patient's right of access encompasses records maintained by a health care provider, a term which includes physicians, hospitals, dentists, pharmacists, optometrists, podiatrists, psychologists and others. [La. Rev. Stat. §§ 40:1299.96(B)(1); 40:1299.41(A) (defining "health care provider").] It includes those who provide health care on behalf of the state. [La. Rev. Stat. Ann. §§ 40:1299.96 40:1299.39 (defining "state health care provider").]

The patient has the right of access to the medical, hospital, or other record relating to the patient's medical treatment, history, or condition. [La. Rev. Stat. Ann. § 40:1299.96(A).] Similarly, the patient has a right to a copy of any information related in any way to the patient which the health care provider has transmitted to any company, any public or private agency, or any person. [*Id.*]

The right of access extends to a patient or his legal representative. [*Id.*] In the case of a deceased patient, the right of access may be exercised by the executor of the patient's will, the administrator of estate, the surviving spouse, the parents, or the children of the deceased patient. [*Id.*]

2. Requirements

A patient has the right to obtain a copy of his medical or hospital record from his health care provider by furnishing a signed authorization and upon payment of the copying charge. [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(b).] The health provider is to furnish the copies within 15 days of receiving the patient's written request. [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(c).]

Copying fees. A provider may charge the patient for actual postage and handling not to exceed \$10 for hospitals and \$7.50 for other providers and reasonable copying costs

not to exceed \$1 per page for pages 1-25, 50¢ per page for pages 26-500, and 25¢ per page beyond page 500. [*Id.*] The patient may obtain a copy of X-rays, microfilm, and electronic and imaging media upon payment of reasonable reproduction costs and a handling charge (\$20 hospitals and \$10 for other health care providers). [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(b).]

Denial of access. Access to medical records may be denied to a patient if the health care provider reasonably concludes that knowledge of the health information contained therein would be injurious to the patient or could reasonably be expected to endanger the life or safety of another person. [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(d).]

If the patient has not received his records in reasonable time (generally 15 days), the patient should notify the health care provider by certified mail of this fact and advise the provider that if the patient is forced to seek a court order or subpoena for the records, the costs of obtaining such an order will be imposed on the health care provider. [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(c).] [*Id.*]

3. Remedies and Penalties

Right to Sue. In the event the health provider fails to furnish a copy of the requested records within 5 days of receipt of the patient's second request (as described above), the provider will be liable for any reasonable attorney fees and expenses incurred as the result of the patient's having to resort to obtaining a court order or subpoena for the records. [La. Rev. Stat. Ann. § 40:1299.96(A)(2)(c).] This is the only monetary penalty available for failure to grant access to medical records, unless the health care provider has personally engaged in gross negligence. [*Id.*]

B. Hospitals

Under the Hospital Records and Retention Act, a patient is entitled to obtain a copy of his hospital records upon requesting them in writing and paying a reasonable charge. [La. Rev. Stat. Ann. § 40:2144.] This act covers the compilation of the reports of the various clinical departments within a hospital, as well as reports from health care providers, as are customarily catalogued and maintained by the hospital. [*Id.*] Although the act includes the reports of procedures such as X-rays and electrocardiograms, it does not include the images produced by these procedures. [*Id.*] Access may be denied "for good cause shown," such as medical contraindication. [La. Rev. Stat. Ann. § 40:2144(D).]

Remedies and Penalties

Right to Sue. A hospital or its employees may not, except for their own negligence, be held liable in damages because of their inability to fulfill the request. [*Id.*]

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 without that person's express consent. [La. Rev. Stat. Ann. § 22:2020.] There are several exceptions to this general rule. Information may be disclosed, to the extent necessary, to carry out the purposes of the statutes governing HMOs; pursuant to a court order for the discovery or production of evidence; or to defend itself against claims or litigation by that person.

Remedies and Penalties

Fines and Penalties. The commissioner of insurance may, after appropriate proceedings, levy a fine not to exceed \$1,000 for each violation and up to \$100,000 aggregate for all violations in a calendar year. [La. Rev. Stat. Ann. §§ 22:2013 and 22:2015.] Alternatively, the commissioner may suspend or revoke a license for failure to comply with any of the requirements of the Health Maintenance Organization Act. [Id.]

B. State Government

The medical records and reports generated by the physicians and other employees in public hospitals, correctional institutions, public mental health centers, and public schools for the mentally deficient are exempt from the laws granting the public access to "public records." [La. Rev. Stat. Ann. § 44:7.] The records may be exhibited or copied by or for persons legitimately and properly interested in the disease, physical or mental, or in the condition of the patient, in accordance with rules established by the entity's governing authority. [Id.] They are also subject to discovery, subpoena and introduction into evidence in certain circumstances. [Id.]

C. Utilization Review Agents

A private review agent may not disclose or publish individual medical records or any other confidential medical information obtained in the performance of utilization review activities, other than to the party for whom the agent is acting. [La. Rev. Stat. Ann. § 40:2731.]

III. PRIVILEGES

Louisiana recognizes a health care provider-patient privilege, which allows a person, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of advice, diagnosis or treatment. [La. Code of Evidence Art. 510.] This privilege covers information obtained from the patient, opinions formed as the result of examinations, and medical and hospital records. The privilege pertains to physicians, psychotherapists, pharmacists, optometrists, hospitals, dentists, chiropractors, social workers, rape crisis counselors, and others. [La. Code of Evidence Art. 510(A); La. Rev. Stat. Ann. § 13:3734(A)(1).] An HMO is entitled to claim any statutory privilege against such disclosure that the provider who furnished such information to the HMO could claim. [La. Rev. Stat. Ann. § 22:2020(B).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Louisiana maintains a “Birth Defects Surveillance System” to collect data about children with birth defects. [La. Rev. Stat. Ann. § 40:31.41, et seq.] “Birth defect” includes any abnormality of structure, function, or metabolism that is diagnosed before age three. [La. Rev. Stat. Ann. § 40:31.42.] Physicians, nurses, allied health professionals, hospitals, laboratories, and others that directly or indirectly provide medical services or other health care to a child affected by a birth defect must report information on birth defects to the office of public health within the Louisiana Department of Health and Hospitals, unless there is written objection by the parent or legal guardian that reporting this information would conflict with religious tenets or practices. [La. Rev. Stat. Ann. §§ 40:31.42; 40:31.43.] All individual identifying data in the surveillance system is confidential and is not subject to discovery. [La. Rev. Stat. Ann. § 40:31.44.] Individual identifying data may only be released with the express written informed consent of a parent or guardian. [La. Rev. Stat. Ann. § 40:31.44.]

B. Cancer

Louisiana maintains a statewide registry for reporting incidents of cancer administered by Louisiana State University Medical School. [La. Rev. Stat. Ann. § 40:1299.81.] Patient identifying information may be exchanged with other cancer registries provided they agree in writing to keep such information confidential. [La. Rev. Stat. Ann. § 40:1299.87.] This patient identifying information may also be disclosed to medical researchers when the confidential information is necessary to carry out the research, as determined by the office of the president of Louisiana State University. [*Id.*] All information regarding case specific data concerning patients that is contained in records of interviews, written reports and statements procured in connection with studies conducted under the auspices of the registry are confidential and privileged and may be used solely for the purposes of the study. [La. Rev. Stat. Ann. § 40:1299.85.] Any disclosure authorized by these provisions may only include information necessary for the stated purpose of the requested disclosure, and may only be made pursuant to a written agreement that the information will be kept confidential and will not be further disclosed without written authorization of the office of the president. [La. Rev. Stat. Ann. § 40:1299.87.] Case specific data is not available pursuant to subpoena and may not be disclosed, discovered, or compelled to be produced in any civil, criminal, administrative, or other proceeding. [*Id.*]

Remedies Penalties

Right to Sue. An action for damages against any person who participates in the reporting cancer registry data may arise from the disclosure of confidential or privileged information if the person fails to act in good faith. [La. Rev. Stat. Ann. § 40:1299.85.]

C. Communicable Diseases

Reports and records of communicable diseases that are submitted to or prepared by the office of public health are confidential and may be used solely for statistical, scientific, and medical research purposes relating to the cause or condition of health.

[La. Rev. Stat. Ann. § 40:3.1.] This information may, subject to the rules and regulations of the office of public health, be disclosed to other public health authorities or to corroborating medical researchers, when the confidential information is necessary to carry out the duties of the agency or researcher in the investigation, control, or surveillance of disease. [*Id.*] Any such disclosure must include only the information necessary for the stated purpose of the requested disclosure, and may be made only upon written agreement that the information will be kept confidential and will not be further disclosed without written authorization of the office of public health. [*Id.*] This confidential data is not available pursuant to subpoena and may not be disclosed, discovered, or compelled to be produced in any civil, criminal, administrative, or other proceeding. [*Id.*]

Remedies and Penalties

Right to Sue. A person who intentionally discloses the content of any confidential data to any third party, except as authorized by law, is subject to a civil penalty in an amount not less than \$1,000 and not more than \$5,000 plus court costs, which will be paid to the person whose record was unlawfully disclosed. [La. Rev. Stat. Ann. § 40:3.1.] Additionally, a person damaged by an unauthorized intentional disclosure may maintain a civil action for actual damages suffered because of such a disclosure. [*Id.*]

D. Genetic Test Results

1. In General

With the exception of genetic tests specifically mandated to be reported by law, the results of any prenatal or postnatal genetic tests are confidential medical information, are excluded from state reporting requirements and may not be disclosed without the express written consent of the person tested. [La. Rev. Stat. Ann. § 40:1299.6.]

2. Insurers

A general authorization for the release of medical records does not serve as an authorization for the disclosure of genetic information. [La. Rev. Stat. Ann. § 22:213.7(C)(5).] “Genetic information” is defined as “all information about genes, gene products, inherited characteristics, or family history/pedigree that is expressed in common language.” [La. Rev. Stat. Ann. § 22:213.7(A) (defining “genetic information”).]

Insurers may not obtain genetic information from an insured or enrollee, or from his DNA sample, without first obtaining written informed consent from the insured, enrollee or his representative. [La. Rev. Stat. Ann. 22:213.7(C).] A valid consent for the disclosure of genetic information must be in writing, be signed and dated, identify the individual who may disclose the information, identify to whom the disclosure may be made, state the purpose for the disclosure, describe the specific genetic information to be disclosed, state the date upon which the authorization will expire (may not be more than 60 days from the date of authorization), include a statement that the authorization may be revoked at any time before the disclosure is made, and include a statement that the authorization will be invalid if used for a purpose other than the described purpose for which the disclosure is made. [La. Rev. Stat. Ann. § 22:213.7(C)(2).]

There are circumstances where genetic information may be disclosed without patient authorization including: to determine paternity; to determine the identity of deceased individuals; to determine the identity of an individual in a criminal proceeding; for anonymous research where the identity of the individual will not be released; pursuant to newborn state law screening requirements; and pursuant to federal law for the identification of individuals. [La. Rev. Stat. Ann. § 22:213.7(D).]

An insured's or enrollee's genetic information is the property of the insured or enrollee. The information may not be retained by any person without the insured's or enrollee's written authorization unless retention is for purposes of determining paternity or for purposes of a criminal or death investigation or use in a criminal or juvenile proceeding. [La. Rev. Stat. Ann. § 22:213.7(E).]

Remedies and Penalties

Right to Sue. Any person who *negligently* collects, stores or analyzes a DNA sample, or discloses genetic information in violation of these provisions is liable to the individual for each violation in an amount equal to: the actual damages sustained or \$50,000, whichever is greater; the costs of the action plus reasonable attorney fees. [La. Rev. Stat. Ann. § 22:213.7(F).] The patient is entitled to treble damages in any case where the violation resulted in profit or monetary gain. [*Id.*]

If a person *willfully* collects, stores or analyzes a DNA sample, or willfully discloses genetic information in violation of these provisions, he is liable to the individual for each violation in an amount equal to: actual damages sustained or \$100,000, whichever is greater, and costs of the action plus reasonable attorney fees. [*Id.*] The same penalties apply to any person who through a request, the use of persuasion, under threat, or with a promise of reward, willfully induces another to collect, store or analyze a DNA sample or willfully disclose genetic information in violation of these provisions. [*Id.*]

E. HIV/AIDS

If a written consent to release medical information contains a refusal to release HIV test results, the test results may not be disclosed. [La. Rev. Stat. Ann. § 40:1300.14(A).] HIV test results includes the original document or a copy but does not extend to any other note or diagnosis. [La. Rev. Stat. Ann. § 40:1300.12 (defining "HIV test result").]

HIV test results may be disclosed to a number of entities *without* patient consent including: to an agent or employee of a health facility if they are permitted access to medical records and the health facility is authorized to obtain HIV test results; to a health care provider in order to afford an opportunity to protect himself from transmission of the virus; to any person to whom disclosure is ordered by a court of competent jurisdiction; and to an agent or employee for billing purposes. [La. Rev. Stat. Ann. § 40:1300.14(B).] Re-disclosure is prohibited. [La. Rev. Stat. Ann. § 40:1300.14(D).] A court may grant an order for disclosure of confidential HIV test results only if it finds a compelling need for disclosure; a clear and imminent danger to an individual who may unknowingly be at significant risk as a result of contact; or, upon application of a state or local health official, a clear and imminent danger to the

public health. [La. Rev. Stat. Ann. § 40:1300.15.] The records in such a court proceeding are to be sealed and other protective precautions taken. [*Id.*]

F. Mental Health

A patient in a treatment facility for the mentally ill may not be deprived of his right to privacy. [La. Rev. Stat. Ann. § 28:171.]

A representative of a mental health patient has the same rights as the patient to access, review or consent to the disclosure of medical records. [La. Rev. Stat. Ann. § 28:1.227.]

Mental Retardation. The records of persons receiving services from the office for citizens with developmental disabilities or other providers of mental retardation services are confidential and may not be disclosed without legally adequate consent. [La. Rev. Stat. Ann. § 28:391.] These records are not public records and may not be released except as required by law or the policies, procedures and regulations of the Department of Health and Human Resources. [*Id.*]

G. Substance Abuse

Substance abuse counselors may not disclose any information from their consultations with an individual without the individual's written consent, except when a communication reveals the contemplation of a crime or harmful act, or when the person waives the privilege by bringing charges against the counselor. [La. Rev. Stat. Ann. § 37:50.3384.] If the individual is a minor under the age of 18 and the information indicates that the minor was a victim or subject of a crime, the counselor may be required to testify in an examination, trial or other proceeding in which the crime is a subject of inquiry. [*Id.*]

MAINE

Maine statutorily grants a patient the right of access to his treatment records maintained by a broad range of health care practitioners, hospitals, and insurance entities and provides comprehensive provisions governing the disclosure of health care information.

I. PATIENT ACCESS

A. Health Care Practitioners

1. Scope

Health care practitioners must provide patients access to their treatment records. [Me. Rev. Stat. Ann. tit. 22, § 1711-B.] “Health care practitioners” include all persons licensed to provide health care, partnerships of health care providers, and their agents and employees. [Me. Rev. Stat. Ann. tit. 22, § 1711-C (1)(F) (defining “health care practitioner”).] In an effort to cover the full range of potential health care providers, the statute broadly defines “health care” as meaning “preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, treatment, procedures or counseling, including appropriate assistance with disease or symptom management and maintenance, that affects an individual’s physical, mental or behavioral condition,” and expressly includes services related to individual cells or genetic information, prescribing or furnishing drugs, hospice services, and transplant and banking services. [*Id.*]

“Treatment records” include all records relating to a patient’s diagnosis, treatment and care, including x-rays, performed by a health care practitioner. [Me. Rev. Stat. Ann. tit. 22, § 1711-B (defining “treatment records”).]

The access rights provided by these provisions extend to:

- the patient, if he is 18 years or older and mentally competent;
- the parent, guardian ad litem or legal guardian if the patient is a minor;
- the legal guardian if the patient is mentally incompetent;
- the designee of a durable health care power of attorney; or
- the agent, guardian or surrogate pursuant to the Uniform Health Care Decisions Act.

[Me. Rev. Stat. Ann. tit. 22, § 1711-B.]

This right of access does not affect the right of minors to have their treatment records that are related to health care services to which they may consent under law treated confidentially. [*Id.*]

2. Requirements

Within a reasonable time of receiving a written authorization, a health care practitioner must release copies of all treatment records of a patient or a narrative containing all relevant information in the treatment records to the patient. [Me. Rev. Stat. Ann. tit. 22, § 1711-B(2).] The practitioner may *exclude* any personal notes that are not directly related to the patient's treatment and any information related to an FDA-authorized or regulated clinical trial. [Me. Rev. Stat. Ann. tit. 22, § 1711-B(2).]

The practitioner may impose a reasonable charge for copies of a patient's treatment record or medical report, not to exceed the reasonable costs incurred. [Me. Rev. Stat. Ann. tit. 22, § 1711-A.]

Denial of Access. If the practitioner believes that release of the records to the patient would be detrimental to the health of the patient, he must advise the patient that the copies or narrative of the records will be made available to the patient's authorized representative upon presentation of a written authorization signed by the patient. [*Id.*] The copies or records must be provided to the authorized representative in a reasonable time. [*Id.*]

Correction and Amendment. A patient has the right to submit to a practitioner health care information that corrects or clarifies the patient's treatment record, which must be retained with the record by the practitioner. [Me. Rev. Stat. Ann. tit. 22, § 1711-B(3)(D).] The practitioner may add a statement in response to the submitted correction or clarification and must provide a copy to the patient. [*Id.*]

3. Remedies and Penalties

Fines and Penalties. A person who willfully violates this section commits a civil violation for which a forfeiture of not more than \$25 may be imposed. [Me. Rev. Stat. Ann. tit. 22, § 1711-B(8).] Each day that the records or narrative is not released after the reasonable time has elapsed constitutes a separate violation, up to a maximum of a \$100 fine. [*Id.*]

B. Hospitals

After discharge, a patient has the right, upon submitting a written authorization, to receive copies of his medical records from a licensed hospital within a reasonable time. [Me. Rev. Stat. Ann. tit. 22, §§ 1711; 1711-B.] The hospital may impose a reasonable charge for the copies and may require payment prior to responding to the request. [*Id.*]

Denial of Access. The hospital may withhold any information related to an FDA-authorized clinical trial. [*Id.*] If the hospital is of the opinion that release of the records to the patient would be detrimental to the health of the patient, it must advise the patient that the copies will be made available to the patient's authorized representative upon presentation of a written authorization signed by the patient. [*Id.*] The copies must be provided to the authorized representative in a reasonable time. [*Id.*]

Correction and Amendment. A patient (or his parent or guardian) has the right to submit to a hospital health care information that corrects or clarifies the patient's

treatment record which must be retained with the record by the hospital. [Me. Rev. Stat. Ann. tit. 22, § 1711-B(3)(D).] The hospital may add a statement in response to the submitted addition and must provide a copy to the patient. [*Id.*] Reasonable costs for making and providing copies of additions to medical records may be imposed, and the hospital may request payment prior to responding to a request. [*Id.*]

C. Insurance Entities, Including HMOs

1. Scope

The Maine Insurance Information and Privacy Protection Act applies to insurance carriers, including HMOs and health care service corporations, producers, producer agencies, administrators, any entity required to be licensed to assume risk, self-funded plans, preferred provided plans and third party administrators. [Me. Rev. Stat. Ann. tit. 24-A, § 2204(23) & (15) (defining “regulated insurance entity” and “insurance carrier”).]

2. Requirements

Within 30 days of receiving a written request and proper identification, a regulated insurance entity must inform an insurance consumer of the nature and substance of the personal information it possesses and allow that consumer to see and copy the information or obtain a copy of it by mail, whichever the consumer chooses. [Me. Rev. Stat. Ann. tit. 24-A, § 2210(1).]

If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Me. Rev. Stat. Ann. tit. 24-A, § 2210(1).] In lieu of disclosure directly to the consumer, the carrier or producer may elect to disclose health care information, together with the identity of the health care provider who provided the information, to a person designated by the consumer who is licensed to provide health care with respect to the condition to which the information relates. [Me. Rev. Stat. Ann. tit. 24-A, § 2210(4).] The insurance entity must notify the consumer at the time it follows this procedure. [*Id.*] The insurance entity can impose a reasonable fee to cover copying costs, except when the information is requested in relation to an adverse underwriting decision. [Me. Rev. Stat. Ann. tit. 24-A, §§ 2210(5); 2212.]

Correction and Amendment. 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. [Me. Rev. Stat. Ann. tit. 24-A, § 2211.] Within 30 days of receiving a written request from an insurance consumer to correct, amend or delete any recorded personal information, the insurance entity must make the correction, amendment or deletion; or notify the consumer of its refusal to make the requested changes, its reasons for the refusal and the consumer’s right to file a statement. Insurers are required to file a statement with the medical record advising anyone who requests disclosure of the disputed information of the patient’s disagreement with the recorded information. [*Id.*] If the insurance entity makes the requested changes, it must notify the consumer in writing and furnish the correction, amendment or fact of deletion to any person specifically designated by the consumer who may have within the preceding 2 years, received the consumer’s recorded

personal information. [*Id.*] The entity must also provide the amended information to any insurance support organization whose primary source of personal information is insurance carriers, if that organization has systematically received recorded personal information from the carrier within the preceding 7 years. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any insurance consumer aggrieved by a regulated insurance entity's or insurance support organization's failure to respond to a request made pursuant to these provisions may appeal to the superintendent of insurance, who may convene an adjudicatory hearing to determine whether there has been a violation and may order the entity or organization to take such measures as are necessary to comply with these provisions. [Me. Rev. Stat. Ann. tit. 24-A, § 2217.]

II. RESTRICTIONS ON DISCLOSURE

A. Health Care Practitioners and Facilities

1. Scope

An individual's health care information is confidential and may not be disclosed by a health care practitioner or facility without the individual's authorization except as provided by law. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(2).] "Health care practitioners" include persons licensed to provide or otherwise lawfully providing health care, partnerships of health care providers, and their agents and employees who act in relation to or support of the provision of health care to individuals. [Me. Rev. Stat. Ann. tit. 22, § 1711-C (1)(F) (defining "health care practitioner").] The statute broadly defines "health care" as meaning "preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, treatment, procedures or counseling, including appropriate assistance with disease or symptom management and maintenance, that affects an individual's physical, mental or behavioral condition," and expressly includes services related to individual cells or genetic information, prescribing or furnishing drugs, hospice services, and transplant and banking services. [*Id.*]

"Health care facility" means a facility, institution or entity licensed under the Health and Welfare provisions of the state code that offers health care to persons in Maine. The term includes hospitals, clinics, home health care providers, hospice programs and licensed pharmacies. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(1).] State mental health institutions and other specified facilities are not covered by this provision. [*Id.*]

"Health care information" is defined as information that directly identifies an individual and relates to his physical, mental or behavioral condition; person or family medical history; or medical treatment or health care provided to the individual. It does not include information created or received by a member of the clergy, information that is encrypted or encoded to protect the anonymity of the individual; or information pertaining to or derived from federally sponsored, authorized or regulated research, to the extent that the information is used in a manner that protects individual

identification. [Me. Rev. Stat. Ann. tit. 22, § 1711-C (defining “health care information”).]

2. Requirements

Authorization Requirements. Generally, an authorization must be in written form and may be in an original, facsimile, or electronic form. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(3).] A minor who has legally consented to health care must authorize the disclosure of his health care information himself. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(12).] The authorization must contain the name and signature of the individual as well as the date of signature. [*Id.*] Specified criteria must be met for an electronic authorization to meet these requirements. [*Id.*] The authorization must specify: the types of persons authorized to disclose health care information and the nature of the information to be disclosed; the identity or description of the third party to whom the information is to be disclosed; the specific purpose of the disclosure and whether any subsequent disclosures may be made; and the duration of the authorization. It must also contain specified statements concerning a patient’s rights. [*Id.*]

When it is not practical to obtain written authorization, or when a person chooses to give oral authorization to disclose, a health care practitioner or facility may (at its discretion) disclose health care information pursuant to an oral authorization. [Me. Rev. Stat. Ann. tit. 22, §§ 1711-C(3-A); 1711-C(3-B).] Such an authorization is valid only if it is given by one of the individuals specified in the statute, generally a patient, family member or close friend. [*Id.*] An authorization to disclose may not extend longer than 30 months, except those related to insurance coverage. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(4).] The authorization may be revoked at any time, orally or in writing, but is subject to the rights of those who have acted in reliance upon the authorization. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(5).] Disclosure of health care information pursuant to a written, oral or third party authorization may not be in excess of the information reasonably required for the purpose for which it is disclosed. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(10)(A).] Authorizations and revocations must be kept with the individual’s health care information. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(3) & (5).]

Health care practitioners and facilities are expressly prohibited from disclosing health care information for the purpose of marketing or sales without written or oral authorization for the disclosure. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(8).]

Authorization Exceptions. Disclosure *without* an individual’s authorization is permitted in a number of circumstances, including:

- to other health care practitioners and facilities within and outside the original office, practice or organizational affiliates (excluding information derived from mental health services unless an emergency exists) for diagnosis, treatment or care of individuals;
- for quality assurance, utilization or peer reviews;
- to family or household members unless expressly prohibited by the individual;
- to a governmental agency to protect public health;
- third parties when reasonable professional judgment determines a direct threat of imminent harm to any individual;
- as directed by a court order or subpoena;

- to a person conducting scientific research approved by an institutional review board or the board of a nonprofit health research organization, or when necessary for a clinical trial sponsored, authorized or regulated by the U.S. Food and Drug Administration. The recipient must return or destroy any identifying information when no longer required;
- to a person outside the office engaged in payment activities;
- to a member of the media or public who asks a health care facility about an individual by name, unless the subject of the information expressly prohibits disclosure;
- for accreditation or regulatory purposes;
- to attorneys involved in a court proceeding where disclosure is appropriate;
- for immunization purposes; and
- to members of the clergy unless expressly prohibited.

[Me. Rev. Stat. Ann. tit. 22, § 1711-C(6)(A) through (S).]

Other Requirements. In addition, health care practitioners and facilities are required to develop policies and procedures to protect the confidentiality of health care information to ensure that information is not negligently or unlawfully disclosed. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(7).] The policies of health care facilities must provide that during admission, inpatients are given notice of the right of the individual to control the disclosure of health care information and the individual's ability to direct that his name be removed from the directory listing of persons. [*Id.*]

3. Remedies and Penalties

Right to Sue. An individual who is aggrieved by conduct in violation of these provisions may bring a civil action against a person who intentionally unlawfully disclosed his health care information. The individual may seek injunctive relief and costs. This statutory remedy provision does not prohibit an aggrieved person from pursuing all common law remedies, including but not limited to an action based on negligence. [*Id.*]

Fines and Penalties. When the state's Attorney General has reason to believe that a person has intentionally violated this provision, he may bring an action to enjoin unlawful disclosure of health care information.

In addition, any person who intentionally violates a provision of this section may be subject to civil penalties, ranging between \$1,000- \$5,000, payable to the state and the aggrieved individual. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(13).] If a court finds that an intentional violation has occurred, after due notice of the violating conduct, with sufficient frequency to constitute a general business practice, the person may be subject to a civil penalty not to exceed \$10,000 for health care practitioners and \$50,000 for health care facilities, payable to the state. [*Id.*]

B. HMOs

Generally, HMOs may not disclose any data or information pertaining to the diagnosis, treatment or health of an enrollee or applicant without the express consent of that person. [Me. Rev. Stat. Ann. tit. 24-A, § 4224.] Disclosure may be made without the enrollee/applicant's consent: to carry out the purposes of the statutory provisions governing HMOs; pursuant to statute or court order for the production of evidence or the discovery of evidence; to assist health care review committees; and in response to

a claim or litigation between an enrollee/applicant and the HMO, when such data or information is pertinent. [*Id.*]

Remedies and Penalties.

Fines and Penalties. When the superintendent of insurance or commissioner of human services has reason to believe that a violation has occurred the superintendent or commissioner may impose administrative penalties between \$100 - \$500, issue an order directing an HMO to cease and desist or apply to the Superior Court for issuance of an injunction. [Me. Rev. Stat. Ann. tit. 24-A § 4221.]

C. Insurers, including HMOs

1. Scope

The Maine Insurance Information and Privacy Protection Act applies to insurance carriers, including HMOs and health care service corporations, producers, producer agencies, administrators, any entity required to be licensed to assume risk, self-funded plans, preferred provided plans and third party administrators (referred to in this guide collectively as “insurance entities”). [Me. Rev. Stat. Ann. tit. 24-A, § 2204(23) & (15) (defining “regulated insurance entity” and “insurance carrier”).]

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 signed, 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, identify the insurance entity and its representatives (by generic reference) authorized to receive the information and specify the purposes for which the information is collected. [Me. Rev. Stat. Ann. tit. 24-A, § 2208.] The authorization remains valid for the term of coverage of the policy and any renewals of that policy. [Me. Rev. Stat. Ann. tit. 24-A, § 2208(8)(B).] The consumer has the right to receive a copy of the authorization and may revoke the authorization. [*Id.*] However, the revocation may be used as a basis for denying insurance benefits. [*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. [Me. Rev. Stat. Ann. tit. 24-A, § 2215.] In addition, the disclosure must be made with due consideration for the safety and reputation of all persons who may be affected by the disclosure and limited to the minimum amount of personal information necessary to accomplish a lawful purpose. [*Id.*]

Insurance entities may not disclose an individual’s health care information to third parties or to affiliates for the purpose of marketing of a product or service without the individual’s authorization. [Me. Rev. Stat. Ann. tit. 24-A, § 2215(1)(J) and (P).]

Authorization Exceptions. There are numerous circumstances under which an insurance entity can disclose information *without* the individual’s authorization including: verifying insurance coverage benefits; to an insurance regulatory authority; 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; to state governmental authorities as necessary to perform their duties when reporting is required or authorized by law, in order to protect public health and welfare; and others. [Me. Rev. Stat. Ann. tit. 24-A, § 2215.]

c. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Me. Rev. Stat. Ann. tit. 24-A, § 2206.] 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 will be furnished to the individual upon request. [*Id.*]

3. Remedies and Penalties

Right to Sue. An insurance consumer who is injured by an unauthorized disclosure may bring an action in the Superior Court to recover damages, interest on damages and reasonable costs and attorney’s fees within 2 years after the disclosure is or should have been discovered. [Me. Rev. Stat. Ann. tit. 24-A, § 2217.] The insurance chapter provides for no other express or implied right of action. [*Id.*]

D. State Government

Information that is expressly exempt from disclosure by another statute is not considered to be a “public record” subject to disclosure under the Maine Freedom of Access Act. [Me. Rev. Stat. Ann. tit. 1, § 402(3).] Similarly, records that would be within the scope of a privilege against discovery or use as evidence recognized in Maine are exempt from disclosure. [*Id.*] Medical records and reports of municipal emergency medical service units are also exempt. [*Id.*]

III. PRIVILEGES

Maine recognizes a number of health care provider-patient privileges that allow a patient, in a legal proceeding, to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient’s physical, mental or emotional condition, including alcohol or drug addiction. [Me. R. Rev. R. 503 (physician and psychotherapist-patient); Me. Rev. Stat. Ann. tit. 32, §§ 1092-A (dentists and dental hygienists); 7005 (social worker-client); 13862 (marriage/family therapist-client); Me. Rev. Stat. Ann. tit. 20-A, § 4008 (school counselor and school social worker-client).] The provider is presumed to have the authority to claim the privilege on behalf of the patient. [Me. R. Rev. R. 503; Me.

Rev. Stat. Ann. tit. 32, § 1092-A.] An HMO is entitled to claim any statutory privileges against disclosure that the provider who furnished the information to the HMO is entitled to claim. [Me. Rev. Stat. Ann. tit. 24-A, § 4224.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Maine maintains a central birth defects registry to aid research on birth defects. [Me. Rev. Stat. tit. 22 § 8943.] Any information that may identify an individual within the registry is confidential. [*Id.*]

B. Cancer

Maine's Department of Human Services maintains and operates a statewide cancer-incidence registry. [Me. Rev. Stat. Ann. tit. 22 § 1404.] All hospitals and other health care facilities providing screening, diagnostic or therapeutic services with respect to cancer are required to report to the department all persons diagnosed as having a malignant tumor within 30 days of diagnosis. [Me. Rev. Stat. Ann. tit. 22 § 1402.] The Bureau of Health has promulgated regulations protecting the confidentiality of information submitted to the registry, including, among other things, limiting access to individually identifiable information to personnel essential to the conduct of the registry program and requiring staff to sign a confidentiality agreement. [See Rules for the Department of Human Services 10-144, Chap. 255.]

C. Communicable Diseases

Maine requires the reporting of incidents of communicable disease by physicians to public health officials. [Me. Rev. Stat. Ann. tit. 22, § 821 et seq.] Information released to the Department of Human Services must be kept confidential and may not be disclosed by the department, except as provided in Me. Rev. Stat. Ann. tit. 22, § 824 (see below) and Me. Rev. Stat. Ann. tit. 5, § 19203 (see discussion of HIV/AIDS below).

Any person who receives information pursuant to these statutory reporting requirements must treat as confidential the names of individuals having or suspected of having a notifiable communicable disease, as well as any other individual identifiable information. [Me. Rev. Stat. Ann. tit. 22, § 824.] This information may be released to the department for adult or child protection purposes in accordance with law; or to other public health officials, agents or agencies or to officials of a school where a child is enrolled, for public health purposes. In a public health emergency, as declared by the state health officer, the information may also be released to private health care providers and agencies for the purpose of preventing further disease transmission. [*Id.*] Any person receiving a disclosure of identifying information pursuant to statutorily mandated reports may not further disclose this information without the consent of the infected person. [*Id.*]

The physician-patient and psychotherapist-patient privileges are abrogated to the extent necessary to permit reporting to the Bureau of Health any incidents of notifiable disease, including communicable diseases. [Me. Rev. Stat. Ann. tit. 22, § 815.]

Remedies and Penalties

Right to Sue. A person who knowingly violates the confidentiality provisions is civilly liable for actual damages suffered by a person reported upon and for punitive damages. [Me. Rev. Stat. Ann. tit. 22, § 825.]

Fines and Penalties. Additionally, a knowing violation is considered to be a civil violation for which a forfeiture of not more than \$500 may be adjudged. [*Id.*]

D. Genetic Test Results

1. Employers

Maine prohibits employers from discriminating against an employee or applicant for employment because of the individual's refusal to submit to a genetic test or make available the results of a genetic test or on the basis that the individual received a genetic test or genetic counseling, except when based on a "bona fide occupational qualification." [Me. Rev. Stat. Ann. tit. 5, § 19302.]

A "genetic test" is a test to determine the presence or absence of an inherited characteristic that includes tests of nucleic acids such as deoxyribonucleic acid (DNA), ribonucleic acid (RNA), or mitochondrial DNA, and tests of chromosomes or proteins to identify a predisposing characteristic. [Me. Rev. Stat. Ann. tit. 5, § 19301.]

Remedies and Penalties

Right to Sue. A individual alleging that his rights have been violated may file a civil action with the Superior Court. Reasonable attorneys' fees, civil penal damages or compensatory and punitive damages may not be awarded unless the plaintiff establishes that he first filed a complaint with the Human Rights Commission. [Me. Rev. Stat. Ann. tit. 5, §§ 4621; 4622.]

Fines and Penalties. An individual whose rights have been violated may file a complaint with the Human Rights Commission within 6 months of the alleged act. [Me. Rev. Stat. Ann. tit. 5, §§ 19302(2); 4611.] The Human Rights Commission will conduct an investigation to determine whether adequate grounds exist to justify filing an action with the Superior Court. [Me. Rev. Stat. Ann. tit. 5, §§ 4612; 4613.] The court may award reasonable attorneys' fees and costs to the prevailing party, and the commission may also be liable for attorneys' fees and costs the same as a private person. [Me. Rev. Stat. Ann. tit. 5, § 4614.]

2. Health Care Practitioners and Facilities

Maine's comprehensive statute governing the disclosure of health care information also covers genetic information because "health care information" is defined broadly. [See discussion of Restrictions on Disclosure: Health Care Practitioners and Facilities above.] Health care information means information that directly identifies the individual and relates to that individual's health care, including services and treatment that involve individual cells or their components or genetic information. [Me. Rev. Stat. Ann. tit. 22, § 1711-C.]

Remedies and Penalties

Fines and Penalties. Any person who intentionally violates a provision of this section may be enjoined from the unlawful disclosure of health care information, and be subject to civil penalties, not to exceed \$5,000, payable to the State and the aggrieved individual. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(13)(c).] However, this statutory remedy provision does not prohibit an aggrieved person from pursuing all common law remedies, including but not limited to an action based on negligence. [Me. Rev. Stat. Ann. tit. 22, § 1711-C(13)(d).]

3. Insurers

The genetic discrimination provisions of Maine law are applicable to insurers, HMOs or other organizations providing health care coverage. [Me. Rev. Stat. Ann. tit. 24-A, § 2159-C.] They apply for the purposes of the issuance, withholding, extension or renewal of any hospital confinement or other health insurance, or in fixing of the rates, terms or conditions for insurance, or in the issuance or acceptance of any application for insurance. [*Id.*] For these purposes, insurers, HMOs or other organizations providing health care coverage may not discriminate against an individual on the basis of genetic information; the individual's refusal to submit to a genetic test or make available the results of a genetic test; or on the basis that the individual received a genetic test or genetic counseling. [Me. Rev. Stat. Ann. tit. 24-A, § 2159-C.]

“Genetic information” means the information concerning genes, gene products or inherited characteristics that may be obtained from an individual or family member. [Me. Rev. Stat. tit. 24-A, § 2159-C (defining “genetic information”) .] “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 deoxyribonucleic acid (DNA), ribonucleic acid (RNA), or mitochondrial DNA, and tests of chromosomes or proteins in order to identify a predisposing genetic characteristic. [Me. Rev. Stat. tit. 24-A, § 2159-C (C) (defining “genetic test”).]

E. HIV

1. Scope

Generally, no person may disclose the results of an HIV test or contents of medical records that contain HIV information without a specific written authorization by the subject of the test. [Me. Rev. Stat. Ann. tit. 5, § 19203.] A general medical release form is insufficient. [Me. Rev. Stat. Ann. tit. 5, §§ 19203; 19203-D.] HIV test results are treated differently from medical records that contain HIV information for the purposes of disclosures that are allowed without written authorization. [*Id.*]

2. Requirements for HIV Test Results

Generally, HIV test results may be released only to the subject of the test and to those to whom the subject has authorized disclosure in writing. [Me. Rev. Stat. Ann. tit. 5, § 19203.] Disclosure may also be made to a health care provider designated by the subject in writing. [*Id.*] When a patient has authorized disclosure of test results to a person or organization providing health care, the patient's health care provider may

make these results available only to other health care providers working directly with the patient and only for the purpose of providing direct medical patient care. [*Id.*]

Health care providers who procure, process, distribute or use a human body part donated for a purpose may perform an HIV test without obtaining informed consent to the testing in order to assure medical acceptability of the gift for the purpose intended. [*Id.*]

Identifiable results of an HIV test may be disclosed *without* the subject's authorization to the Bureau of Health, which may further disclose the results only to the extent necessary to carry out its duties and to certain other agencies to the extent that those employees or other persons are responsible for the treatment or care of subjects of the test. [Me. Rev. Stat. Ann. tit. 5, § 19203.] Additionally HIV test results may be disclosed to a victim-witness advocate authorized to receive the test results of a person convicted of sexual crime. The advocate, in turn, is to disclose the results to the victim; and to persons authorized under law to receive test results following an accidental exposure. [*Id.*] These provisions do not preclude the entry of an HIV test result into a medical record. [*Id.*]

3. Requirements for Medical Records Containing HIV Infection Status

The person who is the subject of an HIV test, at or near the time the entry is made in the medical record, must elect, in writing, whether to authorize the release of that portion of the medical record containing the HIV status information when that person's medical record has been requested. The release form must clearly state whether the person has authorized the release of the HIV-related information. When release has not been authorized the custodian of the medical record may release only that portion of the medical record that does not contain the HIV infection status information. [Me. Rev. Stat. Ann. tit. 5, § 19203-D.]

A medical record containing results of an HIV test may not be disclosed, discoverable or compelled to be produced in any proceeding without the consent of the subject of the HIV test. [Me. Rev. Stat. Ann. tit. 5, § 19203-D.] Exceptions to this general rule are limited to: proceedings held pursuant to the communicable disease laws, Adult Protective Services Act, child protection laws, mental health laws, and a court order upon a showing of good cause. [*Id.*] Furthermore, access to medical records by utilization or peer review committees and qualified personnel conducting scientific research, management or financial audits, or program evaluation is permitted so long as the results of such work do not identify any individual patient. [*Id.*]

Health care providers and others with access to medical records containing HIV infection status information must have written policies providing for the confidentiality of all patient information consistent with Maine's statutory provisions on medical conditions. [Me. Rev. Stat. Ann. tit. 5, § 19203-D.]

Remedies and Penalties

Right to Sue. A person who violates a provision of this section is liable for actual damages plus costs and is subject to civil penalties of up to \$1,000 for a negligent violation and up to \$5,000 for an intentional violation. [Me. Rev. Stat. Ann. tit. 5, § 19206.] Additionally, a person may bring an action to enjoin disclosure. [*Id.*]

Discrimination. Generally, an HIV test may not be performed without the patient's consent. [Me. Rev. Stat. Ann. tit. 5, § 19203-A.] A subject's written consent must be obtained prior to performing tests required by an insurer or health plan. [*Id.*] In addition, providers may not deny health care treatment on the basis of a patient's refusal to submit to an HIV test. [*Id.*] No consent is necessary if a bona fide occupational exposure that creates a significant risk exists and a court order is obtained. [*Id.*] However, the test results may not be included in the subject's records. [*Id.*]

In addition, no insurer may request a person to reveal whether he has obtained an HIV test or reveal the results of such tests prior to an application for insurance coverage. [Me. Rev. Stat. Ann. tit. 24-A, § 2159.]

F. Mental Health including Mental Retardation and Substance Abuse Services

1. Protection and Advocacy Agencies

Patient Access. A patient with a mental illness must be given access to his medical records held by an administrative agency unless an affiliated mental health professional determines that it would be detrimental to the individual. [Me. Rev. Stat. Ann. tit. 5, § 19507; Me. Rev. Stat. Ann. tit. 34-B, § 3003.] If there is written notice from the professional opposing disclosure of the records to the patient, the agency may not disclose the records unless another mental health professional has reviewed the records and based on his professional judgment determines that disclosure would not be detrimental to the individual. This professional must be selected by the individual, his guardian or legal representative, or the agency acting on the individual's behalf. [Me. Rev. Stat. Ann. tit. 5, § 19507.]

Restrictions on Disclosure. Administrative agencies may disclose mental health information or records that do not contain personally identifiable information. [Me. Rev. Stat. Ann. tit. 5, § 19507.] They may disclose personally identifiable information pursuant to the patient's consent or his guardian's or legal representative's consent, if the patient is a minor or incompetent. The agencies may disclose the information without consent, if the patient is unable to give consent by reason of a mental or physical condition and he has no legal guardian or representative. [*Id.*]

2. Mental Health Professionals and Facilities

Generally, all orders of commitment, medical and administrative records, applications and reports, and facts contained in them, pertaining to any client may not be disclosed by any person, without the written consent of the client (or his parent or legal guardian). [Me. Rev. Stat. Ann. tit. 34-B, §§ 1207; 5605.] Exceptions to this general rule, that allow disclosures without the person's consent, include disclosure to carry out the purposes of the statutory functions of the Department of Mental Health, Mental Retardation and Substance Abuse Services ("department"); by court order; to commercial or governmental insurers to determine eligibility for reimbursement; to approved researchers who shall preserve the anonymity of the client and not remove identifying data from the mental health facility; and if there is a clear and substantial

reason to believe that the client poses an imminent danger to others. [Me. Rev. Stat. Ann. tit. 34-B, § 1207.]

Information relating to the physical condition or mental status of a client may be disclosed to his spouse or next of kin upon proper inquiry, without the client's consent. [Me. Rev. Stat. Ann. tit. 34-B, § 1207(1).] In addition, a licensed mental health professional providing care and treatment to an adult client may provide access to necessary information to a family member or other person who lives with or provides direct care to the client with notice to the client prior to disclosure. [Me. Rev. Stat. Ann. tit. 34-B, § 1207(5).] Prior to the disclosure, the client must be informed in writing of the request for disclosure, the reason for the request and the specific information being provided. Disclosures are limited to information regarding diagnosis, admission to or discharge from a treatment facility, names of medications prescribed, their side effects and consequences of failure to take the medication, treatment plans and goals and behavioral management strategies. If the client does not consent to the disclosure, the family member or other person may appeal to the department. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any person who unlawfully disseminates, releases or discloses information in violation of this section is guilty of a Class D crime, punishable by 1-3 years imprisonment. [Me. Rev. Stat. Ann. tit. 34-B, § 1207; Me. Rev. Stat. Ann. tit. 17-A, § 4-A.]

3. Residential Facilities

Upon request, a parent or guardian is entitled to access to the records of a person with mental retardation or autism or a person who is incompetent. [Me. Rev. Stat. Ann. tit. 34-B, § 5605.] All records of individuals receiving services from the residential facility must be kept confidential, and in general may not be disclosed by any person, without the written authorization of the individual (or his parent or legal guardian). [Me. Rev. Stat. Ann. tit. 34-B, §§ 5605; 1207.] Exceptions to this general rule include: disclosure to carry out the purposes of the statutory functions of the Department of Mental Health, Mental Retardation and Substance Abuse Services ("department"), by court order, to commercial or governmental insurers to determine eligibility for reimbursement, to approved researchers who shall preserve the anonymity of the client and not remove identifying data from the mental health facility, and if there is a clear and substantial reason to believe that the client poses an imminent danger to others. [Me. Rev. Stat. Ann. tit. 34-B, §§ 1207; 5605.]

G. Substance Abuse

Alcoholism and drug treatment patient records are to be kept confidential by insurers in their compliance with state policies ensuring equitable health care treatment for alcoholism and drug dependency. [Me. Rev. Stat. Ann. tit. 24-A, § 2842(8).] A minor may receive social work services associated with the abuse of drugs or alcohol without the consent of or notice to that minor's parent or guardian. [Me. Rev. Stat. Ann. tit. 32, § 7004.] While not required to do so, a social worker may inform the parent or guardian of the service rendered. [*Id.*]

In addition, registration and other records of treatment facilities remain confidential although the information may be released for research purposes. [Me. Rev. Stat. Ann.

tit. 5, § 20047.] Information released for such purposes may not be published in a way that discloses patients' names or other identifying information. [*Id.*]

Drug Treatment Centers. Information that directly or indirectly identifies a patient of the facility or his family or custodian is confidential and may not be released without a court order or a written release from the person about whom the confidential information has been requested. [Me. Rev. Stat. Ann. tit. 22, § 7703.] These provisions apply to residential facilities for the treatment or rehabilitation of drug and alcohol users that are not licensed as a medical care facility under chapter 405. [Me. Rev. Stat. Ann. tit. 22, § 7701; 8001 (defining "drug treatment center").] Confidential information that has been legally released may only be used for the purpose for which it was provided and may not be further disseminated. [Me. Rev. Stat. Ann. tit. 22, § 7703(5).]

Remedies and Penalties

Fines and Penalties. Any person who violates these provisions is guilty of a Class E crime and may be subject to a civil fine not to exceed \$500. [Me. Rev. Stat. Ann. tit. 22, § 7702-A.]

MARYLAND

Maryland statutorily grants patients the right of access to their medical records maintained by health care providers, health care institutions, insurance entities, health maintenance organizations and other specified entities. The state also restricts the disclosures of confidential medical information made by these entities. Additionally, privacy protections are addressed in statutes governing other specific entities or medical conditions.

I. PATIENT ACCESS

A. Health Care Providers

Under the Confidentiality of Medical Records Act (CMRA), patients are given the right to see and copy their own medical records. [See Md. Code Ann., Health-Gen. § 4-301, et. seq.] They also have the right to request that their medical records be amended.

1. Scope

The CMRA applies to medical records maintained by health care providers, a term which is defined as including physicians, physician assistants, osteopaths, audiologists, speech pathologists, licensed nutritionists, dietitians, pharmacies, physical therapists, occupational therapists, acupuncturists, optometrists, chiropractors, registered or licensed nurses, dentists, podiatrists, psychologists, electrologists, licensed or certified social workers and professional therapists, counselors and their agents, employees, officers and directors. [Md. Code Ann., Health-Gen. §§ 4-304; 4-301(h) (defining “health care provider” as those licensed or authorized to provide services under Md. Code Health Occupations Article) and Md. Code Ann., Health Occ. § 1-101, et. seq.] The definition of “health care provider” also includes health care facilities, hospitals (including related institutions), medical laboratories, outpatient clinics and HMOs. [Md. Code Ann., Health-Gen. § 4-301(h).]

Under this Act, a “medical record” is identifiable health care information in any form or medium that is entered in the record of a patient. [Md. Code Ann., Health-Gen. §§ 4-301; 4-304 (defining “medical record”).] A person also has the right to see and copy any documentation of disclosures of a medical record to any person who is not an employee, agent, or consultant of the health care provider. [Md. Code Ann., Health-Gen. §§ 4-304; 4-301(g)(2) (defining “medical record” as including such documentation).] It should be noted that this does not require that the patient be given a full accounting of all disclosures that have been made. While authorizations to disclose and actions taken in response to such authorizations must be entered in a medical record, there is *no* requirement that disclosures made without the patient’s authorization be noted in the patient’s record. [Md. Code Ann., Health-Gen. § 4-303.]

In certain circumstances, a person does not have the right to see the personal notes of a mental health care provider under these provisions. These personal notes are not

considered to be part of the medical record if the mental health care provider: keeps the personal note in his sole possession for his own personal use; maintains the personal note separate from the recipient's medical records; and generally does not disclose the personal note to any other person. "Personal note" does not include information concerning the patient's diagnosis, treatment plan, symptoms, prognosis, or progress notes. [Md. Code Ann Health-Gen. § 4-307.]

The persons entitled to access under this Act include adult patients, individuals authorized to consent to health care for the patient, legal representatives of a decedent or attorney whom the patient has appointed in writing and in certain circumstances unemancipated minors. [Md. Code Ann., Health-Gen. §§ 4-304; 4-301(k) (defining "person in interest"). For ease of reference, this summary uses the word "patient" to refer to all "persons in interest" unless otherwise noted.] Access rights to the records of minors are more fully discussed below.

Mental Health Records. For special rules relating to access to mental health records, see "Condition Specific Requirements" below.

2. Requirements

To either obtain a copy of his medical record or to review his original medical record, a patient must submit a written request to the appropriate health care provider. [Md. Code Ann., Health-Gen. §4-304(a).] The provider must respond within a reasonable time, but no more than 21 days after receipt of the request. [Md. Code Ann., Health-Gen. §§ 4-304(a); 4-309.]

Generally, a parent has the right of access to medical records relating to the treatment of an unemancipated minor. [Md. Health-Gen. §§ 4-304; 4-301(k)(5) (defining "person of interest").] A minor has the right of access to his medical records where he is authorized by law to consent to treatment and has consented to care. [Md. Code Ann., Health-Gen. § 4-301(k)(4).] It should be noted however, that even when a minor has the right to consent to treatment the provider has discretion to provide a parent or guardian access to information regarding treatment needed or rendered to a minor, except abortion. [Md. Code Ann., Health-Gen. §§ 301(k)(4); 20-102.] Under Maryland law, minors may consent to treatment for or advice regarding: drug abuse, alcoholism, venereal disease, pregnancy, and contraception. [Md. Code Ann., Health-Gen. § 20-102.]

Copying fees. A provider may require the patient to pay a copying fee of 50¢ per page prior to furnishing the requested material. [Md. Code Ann., Health Gen. § 4-304(c) and (d).] In addition, providers may impose a fee not to exceed \$15 in clerical costs for medical record retrieval and preparation, as well as the actual cost for postage and handling of the medical record. [Md. Code Ann., Health Gen. § 4-304(c).] These fees are applicable to a medical bill if requested by the patient. [Md. Code Ann., Health Gen. § 4-304 (amended by 2001 Md. Laws Ch. 265).] However, they do not apply to X-rays. [Md. Code Ann., Health § 4-304(c).]

Denial of access. A provider may not refuse to disclose medical records for non-payment of a medical bill. [Md. Code Ann., Health-Gen. § 4-309(b).] However, a health

care provider may deny access to portions of a medical record that are related to the psychological treatment of a patient where the provider believes that disclosure is potentially harmful to the patient. [Md. Code Ann., Health-Gen. § 4-304(a)(2).] Upon request, the provider must furnish a summary of the undisclosed sections of the medical record to the patient, and must insert a copy of the summary into the record. [*Id.*] The provider is also required to inform the patient of his right to have another health care provider (who is authorized to treat him for the same condition) to review the entire record. [Md. Code Ann., Health-Gen. §4-304(2).]

Right to Amend. A health care provider must establish reasonable procedures to allow a person to request an addition to or correction of a medical record. [Md. Code Ann., Health-Gen. §4-304(b).] However, patients do not have the right to have information deleted from their medical records. [Md. Code Ann., Health-Gen. § 4-304(b).]

Within a reasonable time after receiving the request for a change, the health care provider must either make the requested change or provide a written notice of refusal of the request. [Md. Code Ann., Health-Gen. § 4-304(b)(3).] If the provider makes the requested change, notice of the amendment or change must be furnished to any individual the patient has designated to receive the notice and to anyone to whom the health care provider has disclosed disputed information within the previous six months. [Md. Code Ann., Health-Gen. § 4-304(b)(6).] Furthermore, the amendment or change must be included with subsequent disclosures of the medical record. [Md. Code Ann., Health-Gen. § 4-304(b)(7).]

If the provider denies the request to amend or change the medical record, it must furnish the patient with a written notice of denial. [Md. Code Ann., Health-Gen. § 4-304(b)(3)(ii).] The Act does not specify the permitted bases for denying a request to amend or change a medical record. [*Id.*] The notice of the denial must state the reason for the refusal and specify the procedures, if any, for the patient to request review of the denial. [Md. Code Ann., Health-Gen. §§ 4-304(b)(3); §4-304(b)(4).]

If the provider upholds the denial to amend the records, the provider must allow the patient to add a concise statement of disagreement to the medical record. [Md. Code Ann., Health-Gen. § 4-304(b)(5).] Providers are required to furnish the statement of disagreement to any individual the patient has designated to receive the statement and to anyone to whom the health care provider has disclosed disputed information within the past six months. [Md. Code Ann., Health-Gen. § 4-304(b)(6).] Additionally, the statement of disagreement must be included with subsequent disclosures of the medical record. [Md. Code Ann., Health-Gen. § 4-304(b)(7).]

3. Remedies and Penalties

Right to Sue. Patients have the right to sue and to recover actual damages from health care providers who knowingly violate the Confidentiality of Medical Records Act. [Md. Code Ann., Health-Gen. § 4-309(f).] A provider who knowingly refuses to provide a patient access to his own medical records within a reasonable time (no more than 21 days after the request) may be liable for actual damages. [Md. Code Ann., Health-Gen. § 4-309(a).]

Fines and Penalties. A provider who knowingly and willfully violates the Confidentiality of Medical Records Act is guilty of misdemeanor and, on conviction, subject to a fine not exceeding \$1,000 for the first offense, and \$5,000 for subsequent convictions. [Md. Code Ann., Health-Gen. § 4-309(d).]

A physician may be disciplined, including revocation or suspension of license, for failing to provide details of a patient's medical record to the patient in accordance with the CMRA [Md. Code Ann., Health Occ. § 14-404.] Similarly, a podiatrist may be disciplined for failing to provide the details of the medical records of a patient to a licensed health care practitioner or institution or an authorized insurance carrier on proper request. [Md. Code Ann., Health Occ. § 16-312.]

B. Insurers

Under the Maryland Insurance Code, medical files on applicants and claimants that are compiled by insurers under policies of health insurance or life insurance must be made available for inspection on the request of the applicant or claimant. [Md. Code Ann., Ins. § 4-402.]

1. Scope

The “insurers” who must give people access to their information under this provision include anyone engaged as an indemnitor, surety, or contractor in the business of entering into insurance contracts. [Md. Code Ann., Ins. §§ 4-402 and 1-101 (defining “insurer”).] This definition would include traditional fee-for-service insurers. It also includes pre-paid dental plans. [See 72 Op. Atty. Gen'l. 167 (1987).] In contrast, HMOs are treated as “health care providers” and are covered by the Confidentiality of Medical Record Act. [See discussion above under “Patient Access.”]

The persons who have access under this provision include applicants and claimants for health or life insurance. [Md. Code Ann., Ins. § 4-402.] The information that must be made available for inspection includes the files that are compiled on applicants or claimants for health or life insurance. It does not include information related to workers' compensation insurance. [See Md. Code Ann., Ins. §§ 4-402; 1-101(q) (defining “health insurance”).]

2. Requirements

Upon request, an insurer must allow an applicant or claimant to inspect medical files that have been compiled about that person under health or life insurance policies. [Md. Code Ann., Ins. § 4-402.] Information that is provided to an insurer by a physician is available to the applicant or claimant on request after a 5-year period has passed from the date of the medical examination. [*Id.*] Prior to that time, the written authorization of the physician is required. [*Id.*]

II. RESTRICTIONS ON USE AND DISCLOSURE

A. Dental Plan Organization

Generally, dental plan organizations may not disclose any information pertaining to the diagnosis, treatment or health of an enrollee without the express consent of that person. [Md. Code Ann., Ins. §§ 14-418(b)(1); 14-401 (defining “dental plan organization” and “enrollee”).] However, disclosure may be made if the information is pertinent to a legal dispute between the enrollee and the dental plan organization. [Md. Code Ann., Ins. § 14-418(b)(2).]

B. Employers

1. Pre-employment

Employers may not require a job applicant to answer questions relating to a physical, psychiatric, or psychological disability, illness, handicap, or treatment unless it has a direct, material, and timely relationship to the ability of the job applicant to perform the job correctly. [Md. Code Ann., Lab. & Empl. § 3-701.] These restrictions do not prohibit a proper medical evaluation by a physician to assess the ability of an applicant to perform a job. [*Id.*]

2. Discrimination

An employer may not discriminate against or discharge an employee due to medical information that the employer gained through the employee’s participation in a group medical plan. [Md. Code Ann., Lab. & Empl. § 5-604(a)(1).] This does not prevent an employer from using medical information that: has a direct, material, and timely relationship to the capacity or fitness of an employee to perform the job of the employee properly; or differs substantially from medical information that the employee falsely provides in an application for employment. [*Id.*]

Remedies and Penalties

Right to Sue. An employee who believes that he has been discriminated against or discharged in violation of these provisions may submit to the Commissioner of Labor and Industry a written, signed complaint within 30 days after the alleged discrimination occurs. [Md. Code Ann., Lab. & Empl. § 5-604(c).] If, after investigation, the Commissioner determines that an employer or other person has violated these provisions, the Commissioner is responsible for filing a complaint to enjoin the violation, to reinstate the employee to the former position with back pay, or for other appropriate relief in the circuit court. [*Id.*] This is the exclusive remedy and the employee does not have a right to sue on his own behalf. *Silkworth v. Ryder Truck Rental, Inc.* 70 Md. App. 264, 520 A.2d 1124 (1987), cert. denied, 310 Md. 2, 526 A.2d 954 (1987).

C. Health Care Providers and HMOs

The Confidentiality of Medical Records Act (CMRA) requires health care providers to maintain the confidentiality of a patient’s medical record and disclose it only as

authorized by the patient, as permitted by the CMRA, or as otherwise provided by law. [Md. Code Ann., Health-Gen. §§ 4-302; 4-303(a).]

1. Scope

The Confidentiality of Medical Records Act applies to medical records maintained by health care providers, a term which is defined as including physicians, physician assistants, osteopaths, audiologists, speech pathologists, licensed nutritionists, dietitians, pharmacies, physical therapists, occupational therapists, acupuncturists, optometrists, chiropractors, registered or licensed nurses, dentists, podiatrists, psychologists, electrologists, licensed or certified social workers and professional therapists, counselors and their agents, employees, officers and directors. [Md. Code Ann., Health-Gen. §§ 4-403; 4-301(i); 4-301(h) (defining “health care provider” as those licensed or authorized to provide services under Md. Health Occupations Article) and [Md. Code Ann., Health Occ. § 1-101, et. seq.] The definition of “health care provider” also includes health care facilities, hospitals (including related institutions), medical laboratories, outpatient clinics and HMOs. [Md. Code Ann., Health-Gen. § 4-301(h).]

Under this Act a “medical record” is identifiable health care information in any form or medium that is entered in the record of a patient. [Md. Code Ann., Health-Gen. §§ 4-301; 4-304 (defining “medical record”).] With respect to mental health, the term includes information concerning the patient’s diagnosis, treatment plan, symptoms, prognosis, or progress notes. [See Md. Code Ann., Health-Gen. § 4-307.] The term includes the personal notes of a mental health care provider only if such notes are kept with the rest of the medical record and are disclosed to others. [*Id.*]

The persons entitled to authorize disclosure under this Act include adult patients, individuals authorized to consent to health care for the patient, legal representatives of a decedent or attorneys whom the patient has appointed in writing and in certain circumstances unemancipated minors. [Md. Code Ann., Health-Gen. §§ 4-304; 4-301(k) (defining “person in interest”).] The rights of minors to control the disclosure of their medical records are discussed more fully below.

Mental Health Records. For special rules relating to disclosure of mental health records, see “Condition Specific Requirements” below. For ease of reference, this summary uses the word “patient” to refer to all “persons in interest” unless otherwise noted.

2. Requirements

Generally, a health care provider may not disclose a patient’s medical record unless the disclosure has been authorized by the patient or is otherwise permitted by law.

a. Authorization Requirements

A patient’s authorization to disclose medical records must be in writing, signed and dated by the patient, specify the name of the health care provider authorized to release the information, identify to whom the information is to be disclosed, state the time period for which the authorization is valid, which may not exceed one year except in certain circumstances, and meet other requirements. [Md. Code Ann., Health-Gen. § 4-303(b).] A health care provider must also disclose a medical record if authorized by a preauthorized form that is part of an application for insurance. [*Id.*]

A parent or other person authorized to consent to health care for an unemancipated minor may authorize the disclosure of the medical records of a minor. [Md. Health-Gen. §§ 4-301; 4-304 (defining “person of interest”).] A minor has the right to authorize disclosure of his medical records where he is authorized by law to consent to treatment and has consented to care. [Md. Health-Gen. §§ 4-301; 4-304]. For example, minors may consent to treatment for or advice regarding: drug abuse, alcoholism, venereal disease, pregnancy, and contraception. [Md. Code Ann., Health-Gen. § 20-102.]

The patient may revoke an authorization in writing. The revocation becomes effective upon receipt by the health care provider. A revocation does not affect disclosures that have been made prior to its receipt. [Md. Code Ann., Health-Gen. § 4-303(d).]

The authorization, any action taken in response to it, and any revocation must be entered in the patient’s medical record. [Md. Code Ann., Health Gen. § 4-303(e).]

b. Exceptions to Authorization Requirement

Health care providers are permitted to disclose information without the authorization of the patient in numerous situations. [Md. Code Ann., Health-Gen. § 4-305.] These exceptions are permissive, not mandatory. [*Id.*]

Some of the major circumstances under which providers are permitted to disclose medical records without patient authorization are:

- To the provider’s authorized employees, agents, medical staff, medical students, or consultants for the sole purpose of offering, providing, evaluating, or seeking payment for health care to patients [Md. Code Ann., Health-Gen. § 4-305(b)(1)(i)];
- When a health care provider determines that an immediate disclosure is necessary to provide for the emergency health care needs of a patient or recipient [Md. Code Ann., Health-Gen. § 4-305(b)(6)];
- Directory information (*i.e.*, information concerning the presence and general health condition of a current patient) unless the patient specifically directs a provider not to disclose this information. This provision does not permit the disclosure of information developed primarily in connection with mental health services. [Md. Code Ann., Health Gen. § 4-302(c).]
- For accreditation by professional standard setting entities provided the person given access signs an acknowledgment of the duty not to redisclose the information [Md. Code Ann., Health-Gen. § 4-305(b)(2)];
- For research purposes subject to the applicable requirements of an institutional review board, provided the person given access signs an acknowledgment of the duty not to redisclose the information [Md. Code Ann., Health-Gen. § 4-305(b)(2)];
- To legal counsel regarding only the information in the medical record that relates to the subject matter of the representation; [Md. Code Ann., Health-Gen. § 4-305(b)(1)(ii)];
- To a provider’s insurer or legal counsel for the purpose of handling a potential or actual claim against a provider if the medical record is maintained on the

claimant and relates to the subject matter of the claim; [Md. Code Ann., Health-Gen. § 4-305(b)(1)(iii);

- To immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, if made in accordance with good medical or other professional practice (except mental health information) [Md. Code Ann., Health-Gen. § 4-305(b)(7); and
- Others

An individual or entity to whom a medical record is disclosed may not redisclose the medical record to another person without authorization of the patient unless the disclosure is permitted by the CMRA for purposes of reporting child abuse or is directory information. [Md. Code Ann Health-Gen. § 4-302(d).]

3. Remedies and Penalties

Right to Sue. A health care provider or any other person who knowingly violates the confidentiality statutes is liable for actual damages. [Md. Code Ann., Health-Gen. § 4-309.]

Fines and Penalties. A health care provider or any other person, including an officer or employee of a governmental unit, who knowingly and willfully violates any provision of the CMRA is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$1,000 for the first offense and not exceeding \$ 5,000 for each subsequent conviction. [Md. Code Ann., Health-Gen. § 4-309(d).] Additionally, a provider who knowingly and willfully discloses a medical record in violation of the CMRA is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$ 50,000, imprisonment for not more than 1 year, or both. If the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, it is punishable by a fine not exceeding \$250,000, imprisonment for not more than 10 years, or both. [Md. Ann., Health-Gen. § 4-309(d).]

A pharmacy that provides confidential patient information in violation of the CMRA may be reprimanded by the state Board of Pharmacy, be placed on probation, or have its license suspended or revoked. [Md. Health Occ. § 12-313B (27).]

D. Insurers

1. Maryland State Insurance Law

The Maryland Insurance Code restricts the manner in which insurers may disclose medical information that they maintain.

a. Scope

The “insurers” governed by these provisions include anyone engaged as an indemnitor, surety, or contractor in the business of entering into insurance contracts. [Md. Code Ann., Ins. §§ 4-403 and 1-101 (defining “insurer”).] This definition would include traditional fee-for-service insurers. It also includes pre-paid dental plans. [See 72 Op.

Atty. Gen'l. 167 (1987).] In contrast, HMOs are treated as “health care providers” and are covered by the Confidentiality of Medical Record Act. [See discussion above under “Patient Access.”] The disclosure provisions also apply to insurance service organizations whose functions include the collection of medical data. [Md. Code Ann. Ins. § 4-403.]

The restrictions on disclosure apply only to those that identify a particular insured or covered person. [Md. Code Ann., Ins. § 4-403(d).]

b. Requirements

Generally, an insurer or an insurance service organization whose functions include the collection of medical data may not disclose an insured person’s medical records except as specified in the statute. [Md. Code Ann., Ins. § 4-403.] An insurer may only disclose “specific medical information contained in an insured’s medical records” to: the insured; the insured’s agent or representative; and upon the insured’s request to a physician chosen by the insured. Both an insurer and an insurance service organization may disclose specific medical information upon the authorization of the insured. [Md. Code Ann., Ins. § 4-403(b).]

Authorization Exceptions. An insurer or insurance service organization may disclose the contents of an insured’s medical records without the authorization of the insured in the circumstances listed below.

- To a medical review committee, accreditation board, or commission, if the information is in furtherance of their purpose;
- In response to legal process;
- To a nonprofit health service plan or Blue Cross or Blue Shield plan to coordinate benefits;
- To investigate possible insurance fraud;
- For reinsurance purposes;
- In the normal course of underwriting to an insurer information exchange that may not redisclose the information unless expressly authorized by the subject of the information;
- To evaluate an application for or renewal of insurance;
- To evaluate and adjust a claim for benefits;
- To evaluate, settle, or defend a claim or suit for personal injury;
- Pursuant to a cost containment contract to verify that the benefits paid were proper; and
- To a policyholder if the policyholder does not further disclose the specific medical information and the information is required for an audit of the billing made by the insurer to the policyholder.

[Md. Code Ann., Ins. § 4-403(c).]

c. Remedies and Penalties

Right to Sue. Insurers that knowingly violate the statute are liable to a plaintiff for any damages recoverable in a civil action, including reasonable attorney fees. [Md. Code Ann., Ins. § 4-403(e).]

2. Maryland Insurance Administration Regulations

a. Scope

In addition to statutory restrictions on the disclosure of personal medical information, the Maryland Insurance Administration adopted a privacy regulation (Privacy of Consumer Financial and Health Information) to prevent the unauthorized disclosure of Maryland 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. [Md. Regs. Code tit. 31, § 31.16.08.03(19) (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. [Md. Regs. Code tit. 31, § 31.16.08.03(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. [Md. Regs. Code tit. 31, § 31.16.08.03(16) (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. [Md. Regs. Code tit. 31, § 31.16.08.03(C) & (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. [Md. Regs. Code tit. 31, § 31.16.08.20.]

b. Requirements

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Md. Regs. Code tit. 31, § 31.16.08.17.] 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. [Md. Regs. Code tit. 31, § 31.16.08.18.]

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. [Md. Regs. Code tit. 31, § 31.16.08.17.]

This regulation does not supercede existing Maryland law related to medical records, health or insurance information privacy. [Md. Regs. Code tit. 31, § 31.16.08.21.]

F. Nonprofit Health Service Plans & Blue Cross or Blue Shield Plans

The Maryland Insurance Code restricts the manner in which nonprofit health service plans and Blue Cross or Blue Shield plans may disclose medical information that they maintain. The restrictions and exceptions are similar, but not identical to those for insurers. (*See Insurers, above.*)

1. Scope

The disclosure provisions regarding entities functioning as insurers apply to nonprofit health service plans, and Blue Cross and Blue Shield plans. [Md. Code Ann., Ins. § 14-138.]

The restrictions on disclosure apply only to those that identify a particular subscriber or certificate holder. [*Id.*]

2. Requirements

Entities functioning as insurers may not disclose specific medical information contained in a subscriber's or certificate holder's medical records, unless the disclosure is to the individual or the individual's agent or representative, or the individual authorizes the disclosure. [Md. Code Ann., Ins. §§ 14-138(a); 14-138(b).]

Authorization Exceptions. Nonprofit health service, and Blue Cross and Blue Shield plans may disclose specific medical information contained in a subscriber's or certificate holder's medical records without the authorization of that person in the following circumstances:

- To a medical review committee, accreditation board, or commission, if the information is in furtherance of their purpose;
- In response to legal process;
- To another nonprofit health service plan or Blue Cross or Blue Shield plan to coordinate benefits;
- To a government agency performing its lawful duties as authorized by an act of the General Assembly or United States Congress;
- To a researcher, on request for medical and health care research in accordance with a protocol approved by an institutional review board;
- In accordance with a cost containment contract to verify that the benefits paid were proper; and
- To a third party payor if that payor does not further disclose the specific medical information and the information is required for an audit of the billing made by the plan to the payor.

[Md. Code Ann., Ins. § 14-138(c).]

3. Remedies and Penalties

Right to Sue. A nonprofit health service plan that knowingly violates the statute is liable to a plaintiff for any damages recoverable in a civil action, including reasonable attorney's fees. [Md. Code Ann., Ins. § 14-138(e).]

Fines and Penalties. A person or plan that violates the statutory provisions governing nonprofit health service plans, including the restrictions on disclosure, is guilty of a misdemeanor and is subject to a civil penalty of \$5,000 per violation and/or imprisonment not to exceed 1 year. [Md. Code Ann., Ins. § 14-140.]

G. State Government

Under the Public Information Act, public records that by law are privileged or confidential are not open for inspection. [Md. Code Ann., State Gov't. § 10-615.] The Act exempts specific records from disclosure to the general public including hospital records about medical care that contain information about specific persons [Md. Code Ann., State Gov't. § 10-616.] and public records that contain medical or psychological information about an individual, other than an autopsy report of a medical examiner. [Md. Code Ann., Stat. Gov't. § 10-617.] These records are available only to the person in interest to the extent permitted under § 4-304 (a) of the Health-General Article. [*Id.*]

Among those records that are designated "confidential" by law are any records report, statement, note or other information that is assembled or obtained for research or study by the AIDS Administration or the secretary of the Department of Health and Mental Hygiene that names or otherwise identifies any person. [Md. Code Ann., Health-Gen. § 4-101.] (See "Condition-specific Restrictions" below for additional records that are designated confidential by law.)

Maryland also requires state agencies to limit their collection of "personal records," defined as public records that name or with reasonable certainty otherwise identify an individual. [Md. Code Ann. Stat. 10-624.] Personal records may not be created unless the need for information has been clearly established by the state governmental unit collecting the records. The information collected for personal records must be appropriate and relevant to the purpose for which it is collected, accurate and current to the greatest extent practicable and may not be obtained by fraudulent means. An official custodian who keeps personal records must notify the individual of the reason for which the personal information is collected; specific consequences for refusal to provide personal information; the person's right to inspect, amend or correct personal records, if any; and a list of entities with whom personal information is shared other than the official custodian. [Md. Code Ann., State Gov't. § 10-624.] Each unit of state government must post its privacy policies on its Internet web site. [Md. Code Ann., State Gov't. § 10-624(c)(4).] It should be noted that these provisions relating to the treatment of "personal records" do not preempt those contained in the Confidentiality of Medical Records Act, and therefore appear to apply primarily to records other than those created by health care providers.

Remedies and Penalties

Right to Sue. A person, including an officer or employee of the government is liable to an individual for actual damages and any punitive damages that the court considers appropriate if the person willfully and knowingly permits inspection or use of a public record that contains individually identifiable information in violation of these provisions. [Md. Code Ann., State Gov't. § 10-626.]

III. PRIVILEGES

Maryland recognizes a number of mental health care provider-patient privileges that allow a patient or his authorized representative to refuse to disclose, and to prevent a witness from disclosing, confidential communications relating to diagnosis or treatment of the patient; or any information that by its nature would show the existence of a mental health record of the diagnosis or treatment. [Md. Code Ann., Cts & Jud. Pro. § 9-109 (psychiatrist or psychologist-patient); § 9-109.1 (psychiatric-mental health nursing specialist-patient); § 9-121 (licensed clinical social worker-client).] Maryland does not recognize the physician-patient privilege.

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Hospitals must report sentinel birth defects (such as spina bifida, hydrocephaly, and cleft palate) to the Department of Health. [Md. Code Ann., Health-Gen. § 18-206.] The reported information must include the identity of the child with the birth defect. [*Id.*] Individually identifiable information may not be further disclosed without the parent's consent. [*Id.*]

B. Cancer

Maryland maintains a cancer registry to monitor causes of cancer and treatments. [See Md. Code Ann., Health-Gen. § 18-204.] The Maryland Cancer Registry includes reporting requirements for central nervous system tumors. [Md. Code Ann., Health-Gen. § 18-204.] Information contained in a cancer report is subject to the confidentiality requirements pertaining to confidential research records specified in Md. Code Ann., Health-Gen. §4-101, et seq., *not* the Confidentiality of Medical Records Act [*Id.*]. Generally, cancer reports, as confidential records, may be used only for the research and study for which it was assembled or obtained and may not be disclosed to any person not engaged in a research or study project. [Health-Gen. §§ 4-101; 4-102.]

The Secretary may disclose information contained in cancer reports to another governmental agency performing its lawful duties pursuant to State or federal law where the Secretary determines that the agency to which the information is disclosed will maintain the confidentiality of the information. [Md. Code Ann., Health-Gen. §§ 18-203; 18-204.]

The Secretary may also disclose confidential data from the cancer registry to: an institution or individual researcher for certain research approved by the Secretary that will enhance the cancer control goals of the state; a reporting facility that meets certain requirements; an out-of-state cancer registry or cancer control agency under certain circumstances; county health officers and the Baltimore City commissioner of health; and another governmental entity performing its lawful duties. [Md. Code Ann., Health-Gen. §§ 18-203; 18-204; Md. Regs. Code tit. 10, § 10.14.01.05.] Prior to releasing confidential data to a cancer control agency, the secretary must determine that the recipient will maintain the confidentiality of the disclosure. [Md. Code Ann., Health-Gen. § 18-203; Md. Regs. Code tit. 10, § 10.14.01.05.]

C. Communicable Diseases including Sexually Transmitted Diseases

Maryland requires laboratory directors to submit reports to the county health officer when the laboratory tests from human specimens show evidence of any of 62 enumerated diseases, including meningitis, various sexually transmitted diseases, and other diseases such as smallpox. [Md. Code Ann., Health-Gen. § 18-205.] Similarly, providers with reason to suspect that a patient has an infectious or contagious disease that endangers public health must immediately submit a report to the county health officer. [Md. Code Ann., Health-Gen. § 18-201.] The health officer informs the secretary of the Department of Health and Mental Hygiene of these reports. [Md. Code Ann., Health-Gen. §§ 18-201; 18-205.] The reports are confidential, not open to public inspection, and subject to subpoena or discovery in a criminal or civil proceeding only pursuant to a court order sealing the court record. [*Id.*] The secretary may disclose the reports to another governmental agency performing its lawful duties, if the Secretary determines that the receiving agency will maintain confidentiality and that the disclosure is necessary to protect the public health or prevent the spread of contagious disease. [*Id.*]

D. Genetic Test Results

Maryland law restricts the use and disclosure of genetic information by insurers, nonprofit health service plans, and HMOs. Among other prohibitions, these entities may not release identifiable genetic information or the results of a genetic test to any person who is not an employee of the insurer, nonprofit health service plan, or HMO, or a participating health care provider who furnishes services to insured or enrollees, without the prior written authorization of the tested person. The information may only be used for providing medical care or conducting research approved by an institutional review board. Authorization must be obtained for each disclosure and must meet certain statutory requirements. [Md. Code Ann., Ins. § 27-909.]

Employers. Employers may not refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to compensation, terms or conditions of employment because of the person's genetic information or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test. Neither may the employer request or require genetic tests or genetic information as a condition for hiring or determining benefits. [Md. Ann. Code of 1957 Art. 49B, § 16.]

Remedies and Penalties

Right to Sue. A person who believes he has been discriminated against in violation of these provisions may file a complaint, signed under oath, with the Maryland Human Relations Commission. [Md. Ann. Code of 1957 Art. 49B, § 9A.]

E. HIV/AIDS

The records of HIV patients are confidential. [Md. Code Ann., Health-Gen. § 18-338.1.] The record and test results of the patient or health care provider are confidential and not discoverable or admissible in any criminal, civil, or administrative action unless the patient's identity cannot be discovered through the data. [Md. Code Ann., Health-Gen. § 18-338.1(h).] Providers are required to report infectious diseases that may threaten public health and are required to file a report that does not identify the patient when the infectious disease is HIV. [Md. Code Ann., Health-Gen. § 18-201.] Similar provisions protect the confidentiality of HIV tests performed on pregnant women. [Md. Code Ann., Health-Gen § 18-338.2.]

Providers acting in good faith may not be held liable for breaching patient confidentiality or not disclosing a patient's HIV status to partners or persons at risk. [Md. Code Ann., Health-Gen. § 18-337.]

F. Mental Health

1. In General

Patient Access. The records of mental health patients are subject to additional protections beyond the general requirements for medical records contained in the Confidentiality of Medical Records Act. The attending provider may refuse to disclose to the patient any portion of the medical record if the provider, with "input from a primary provider of mental health services," believes that disclosure would be injurious to the health of a patient. [Md. Code Ann., Health-Gen. §§ 4-303(a); 4-304.] However, upon written request the provider must make available to the patient a summary of the undisclosed portion of the record, insert a copy of the summary in the medical record, permit an examination or copying of the medical record by another health care provider authorized to treat the patient for the same medical condition as the health care provider denying the request, and inform the patient of his right to select another health care provider. [*Id.*]

Restrictions on Disclosure. When mental health records are disclosed without the authorization of the patient including to another health care provider for the treatment of the patient, only the information in the record relevant to the purpose for which disclosure is sought may be released. [Md. Code Ann., Health-Gen. §§ 4-305(b)(4); 4-307.] Documentation of all disclosures must be entered into the recipient's medical record. [Md. Code Ann., Health-Gen. § 4-307(g).]

Authorization Exceptions. Mental health records may be disclosed without the authorization of the patient for purposes of rate review, auditing, health planning, licensure, approval, or accreditation, if the individual given access signs an acknowledgment of the duty not to disclose personal identifying information about the recipient of services. [Md. Code Ann., Health-Gen. § 4-307.] Mental health records may

also be disclosed without the authorization of the patient in certain other circumstances including: to the director of a juvenile or adult correctional facility if the recipient has been involuntarily committed and disclosure is necessary for the proper care and treatment of the recipient; as provided in Md. Code Ann., Cts & Jud. Pro. § 5-609 by a health care facility to a law enforcement agency under certain circumstances; by a health care facility to a parent, guardian, next of kin or other specified individuals to confirm or deny the recipient's presence in the facility; and to allow for service of process or court order on a facility. Mental health records may be disclosed to family members or close friends of the patient without consent unless the patient requests confidentiality. [Md. Code Ann., Health-Gen. § 4-305(b)(7).]

Disclosure of mental health records without the authorization of the patient is also permitted, subject to statutory conditions: to the director of a juvenile or adult correctional facility in connection with the transfer of the person from an inpatient provider; to the state-designated protection and advocacy system for the mentally ill under the federal Protection and Advocacy for Mentally Ill Individuals Act of 1986; to another health care provider or legal counsel to the health care provider for use in a commitment proceeding; in accordance with a court order other than compulsory process compelling disclosure, or as otherwise provided by law, to a court, an administrative law judge, a health claims arbitrator, or a party to a court, administrative, or arbitration proceeding; in accordance with service of compulsory process or a discovery request, or as otherwise provided by law, to a court, administrative tribunal, or a party to a civil court, administrative, or health claims arbitration proceeding if certain conditions are met, including notification to the patient that disclosure of his medical record is sought; and to individuals and entities specified in the statute pursuant to a subpoena for medical records on specific recipient of care. [Md. Code Ann., Health-Gen. §4-307(h).] Requests for disclosure and documentation of the disclosure must be inserted in the recipient's medical record. [Id.]

2. Psychologists

Psychologists are required to maintain confidentiality regarding information obtained from a client in the course of the psychologist's work. Psychologists are required to safeguard information obtained in clinical or consulting relationships and other evaluative data; obtain written consent before presenting in writing, lecture, or other public forums any identifying information obtained during the course of professional work; disguise confidential information when used as a basis for teaching or research; reveal confidential information only with the informed written consent of the patient or his representative; avoid undue invasion of privacy by ensuring that written and oral reports contain only data germane to the purpose of the evaluation; and treat any assessment result or interpretation as confidential information. Psychologists are also required to inform clients of the ethical and legal limits of confidentiality; maintain confidentiality in the storage and disposal of written and electronic records; and release confidential information as authorized by federal or state law or regulation. [Md. Regs. Code tit. 10, § 10.36.05.07.]

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MASSACHUSETTS

Massachusetts statutorily grants a patient the right of access to his medical records maintained by health care providers, hospitals, clinics, other facilities and insurance entities. The disclosure of confidential medical information is restricted by a statutory right of privacy as well as by statutes governing specific entities and medical conditions.

I. PATIENT ACCESS

A. Health Care Providers

Upon request, a health care provider must provide a patient access to and a copy of his medical records. [Mass. Gen. Laws ch. 112, § 12 CC.] This provision applies to a person or entity providing medical care or services, including but not limited to, physicians, surgeons, therapists, dentists, nurses, and psychologists. [*Id.*]

The patient must pay a reasonable fee for copies. [*Id.*] No fee may be charged to those seeking their records to pursue claims or appeals under the Social Security Act or any other federal or state needs-based benefit program. [*Id.*]

A psychotherapist may provide a summary of the record if, in his professional judgment, providing the entire record would adversely affect the patient. [*Id.*] If the psychotherapist elects to provide only a summary, the patient may designate an attorney or another psychotherapist to receive the entire record. [*Id.*]

B. Hospitals & Clinics

A patient or his authorized representative has the right to review his hospital or clinic records and must be given a copy of them upon request and payment of a reasonable fee. [Mass. Gen. Laws ch. 111, § 70.] No fee may be charged for copies of hospital or clinic records when they are requested to support a claim or appeal under the Social Security Act or any other federal or state needs-based program. [*Id.*] This right of access applies to records maintained by hospitals or clinics subject to licensure by the department of public health or supported in whole or in part by the commonwealth. In the case of a hospital or clinic under the control of the department of mental health, the records will only be disclosed to the patient when the commissioner of mental health has made a determination that a disclosure would be in the best interest of a patient. [*Id.*]

C. Insurance Entities, Including HMOs

1. Scope

The Massachusetts Insurance Information and Privacy Protection Act applies to insurance institutions (defined to include any entity engaged in the business of insurance, HMOs, medical or hospital service plans, preferred provider arrangements

and others); insurance representatives (defined to include agents, brokers, advisors and others); and insurance-support organizations. [Mass. Gen. Laws ch. 175I, § 8 (detailing entities and persons covered); § 2 (definitions).]

The Act covers “personal information,” including “medical-record information,” which is gathered in connection with an “insurance transaction.” [Mass. Gen. Laws ch. 175I, § 2 (defining “personal information,” “medical-record information” and “insurance transaction”).] “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 (broadly defined to include physicians, nurses, pharmacists, clinical psychologists and others); a medical-care institution (broadly defined to include hospitals, clinics, skilled nursing facilities and other institutions); the individual; or the individual’s spouse, parent or legal guardian. [*Id.* (defining “medical-record information,” “medical professional” and “medical-care institution”).] “Medical-record information” includes information concerning the diagnosis or treatment of AIDS or AIDS related complex, but it does not include counseling for these conditions. [*Id.* (defining “medical-record information”).]

The access provisions only apply to information that is reasonably locatable and retrievable by the insurance entity. [Mass. Gen. Laws ch. 175I, § 8.]

With respect to health insurance, the rights granted by the Act extend to Massachusetts residents who are the subject of the information collected, received or maintained in connection with insurance transactions, as well as applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Mass. Gen. Laws ch. 175I, § 1.]

2. Requirements

Insurance entities (including HMOs) 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. [Mass. Gen. Laws ch. 175I, § 8.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Mass. Gen. Laws ch. 175I, § 8(b)(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 the identity of the recipients is not recorded, the entity must inform the individual of the names of those persons to whom it normally discloses personal information. [Mass. Gen. Laws ch. 175I, § 8(b)(3).]

Fees. The insurance entity can impose a reasonable fee to cover the costs incurred in providing a copy. [Mass. Gen. Laws ch. 175I, §§ 8(e); 10.]

Medical-record information that has been provided to the insurance entity by a medical professional or medical-care institution that is requested by an individual may be supplied either directly to the requesting individual or to a medical professional designated by the individual, at the option of the individual. [Mass. Gen. Laws ch. 175I, § 8(d).]

Mental health record information may be provided to the individual only with the approval of the treating professional or that of another equally qualified mental health professional. *[Id.]*

Right to Amend. A person has a statutory right to have any factual error corrected and any misrepresentation or misleading entry amended or deleted, in accordance with stated procedures. [Mass. Gen. Laws ch. 175I, § 9.] Within 30 business days from the date of receipt of a written request, the insurance entity must either: (1) correct, amend or delete the portion of recorded personal information in dispute; or (2) after reinvestigating the issue, 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 and request review by the insurance commissioner. *[Id.]*

The insurance entity must furnish any correction, amendment, fact of deletion, or statement of disagreement (where the insurer has refused to make the change) to:

- any person specifically designated by the individual who may have, within the preceding 2 years, received recorded personal information about the individual;
- to any insurance support organization that has systematically received recorded personal information from the insurance institution within the preceding 7 years; and
- to the insurance-support organization that furnished the personal information that has been corrected, amended, or deleted. [Mass. Gen. Laws ch. 175I, § 9.]

If the insurance entity has refused to take the requested action, it must also file the individual's statement of disagreement with the disputed personal information and provide a means by which anyone reviewing the disputed personal information will be made aware of the statement and have access to it. Additionally, in any subsequent disclosure by the insurance entity of the information that is the subject of disagreement, the insurance entity must clearly identify the matter in dispute and provide the individual's statement along with the recorded personal information being disclosed. *[Id.]*

3. 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 of the violation. [Mass. Gen. Laws ch. 175I, § 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 monetary penalties. [Mass. Gen. Laws ch. 175I, §§ 15; 17; 18.]

D. State Government

The Fair Information Practices Act (Mass. Gen. Laws ch. 66A, § 1 through § 3) imposes on state agencies a variety of duties related to the personal data that they maintain. The Act applies to every agency of the executive branch of the government, including but not limited to any constitutional or other office, executive office, department,

division, bureau, board, commission or committee having either statewide or local jurisdiction. [Mass. Gen. Laws ch. 66A, § 1 (defining “agency”).]

The Act applies to “personal data,” which generally is defined as information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual. [*Id.* (defining “personal data”).]

Rights under the Fair Information Practices Act may be exercised by the “data subject,” the individual to whom personal data refers. [*Id.* (defining “data subject”).]

1. Patient Access Requirements

Upon written request, an agency must inform an individual whether it maintains personal data concerning him and must make that data fully available to the subject or his authorized representative. [Mass. Gen. Laws ch. 66A, § 2.] The agency must respond to the request in writing and in a format that is understandable to the requestor. [*Id.*] To the extent it has maintained such information, the agency must also make available to an individual, upon his request, a list of the uses made of his personal data, including the identity of all persons and organizations which have gained access to the data. [*Id.*]

Agencies must also have procedures that allow an individual to contest the denial of access to his personal data. [*Id.*]

Right to Amend. Agencies must have procedures that allow a data subject or his representative to contest the accuracy, completeness, pertinence, timeliness or relevance of his personal data. They must also have procedures that permit the data to be corrected or amended when requested and there is no disagreement. When there is a disagreement, the data subject’s claim must be noted and included as part of the personal data and included in any subsequent disclosure or dissemination of the disputed data. [Mass. Gen. Laws ch. 66A, § 2.]

2. Other Requirements

Agencies may not collect or maintain more personal data than are reasonably necessary for the performance of the agency’s statutory functions. [Mass. Gen. Laws ch. 66A, § 2.] Personal data that is collected must be maintained with such accuracy, completeness, timeliness, pertinence and relevance as is necessary to assure fair determination of a data subject’s qualifications, character, rights, opportunities, or benefits when such determinations are based upon such data. [*Id.*] An agency may not rely on any exceptions in the Freedom of Information Act to deny a subject access to his own information that would otherwise be accessible under the Fair Information Practices Act. [*Id.*]

II. RESTRICTIONS ON DISCLOSURE

A. General Right of Privacy

Under Massachusetts law, a person has a statutory right against unreasonable, substantial or serious interference with his privacy. [Mass. Gen. Laws ch. 214, § 1B.] Medical records and information are generally encompassed in this right.

There are statutory exceptions to the right of privacy that explicitly allow disclosure of medical information. For example, physicians, health care facilities, nursing homes and other medical providers may, without patient consent, disclose to certain government agencies information concerning the diagnosis, treatment or condition of a patient in connection with establishing eligibility for, or entitlement to, government benefits (such as veteran's benefits and aid to dependent children) or in connection with mandatory health department reports or reports required by other laws. [Mass. Gen. Laws ch. 112, § 12G.]

Remedies and Penalties

Right to Sue. A person has the right to maintain a civil suit in equity to enforce his right of privacy and to seek damages. [Mass. Gen. Laws ch. 214, § 1B.]

B. Hospitals & Other Facilities

The records of hospitals and other licensed facilities are confidential "to the extent provided by law," a phrase which is not explicated in the statute. [Mass. Gen. Laws ch. 111, § 70E.] This provision applies to hospitals, clinics, nursing homes, institutions for the care of unwed mothers, infirmaries maintained in a town, rest homes, and charitable homes for the aged; any state hospital operated by the department; any private, county or municipal facility, department or ward which is licensed or subject to licensing by the department of mental health or by the department of mental retardation; and other enumerated types of facilities. [*Id.*]

This statute includes two exceptions to this general promise of confidentiality: (1) third-party reimbursers are permitted to inspect and copy any and all records relating to diagnosis, treatment or other services provided to any person for which coverage, benefit or reimbursement is claimed, so long as the policy or certificate under which the claim is made provides that such access to such records is permitted; and (2) this section does not preclude disclosure of facility records for peer review or utilization review procedures applied and implemented in good faith. [Mass. Gen. Laws ch. 111, § 70E.]

Health facilities must provide patients, upon admission, a notice of their statutory rights, including their general right to confidentiality. [*Id.*]

Remedies and Penalties

Right to Sue. Any person whose rights under this section are violated may bring, in addition to any other action allowed by law, a civil action pursuant to the statutory provisions governing malpractice claims. [Mass. Gen. Laws ch. 111, § 70E.]

C. Insurance Entities, Including HMOs

1. Scope

The Massachusetts Insurance Information and Privacy Protection Act applies to insurance institutions (defined to include any entity engaged in the business of insurance, HMOs, medical or hospital service plans, preferred provider arrangements and others); insurance representatives (defined to include agents, brokers, advisors and others); and insurance-support organizations. [Mass. Gen. Laws ch. 175I, § 8 (detailing entities and persons covered); § 2 (definitions).]

The Act covers “personal information,” including “medical-record information,” which is gathered in connection with an “insurance transaction.” [Mass. Gen. Laws ch. 175I, § 2 (defining “personal information,” “medical-record information” and “insurance transaction”).] “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 (broadly defined to include physicians, nurses, pharmacists, clinical psychologists and others); a medical-care institution (broadly defined to include hospitals, clinics, skilled nursing facilities and other institutions); the individual; or the individual’s spouse, parent or legal guardian. [*Id.* (defining “medical-record information,” “medical professional” and “medical-care institution”).] “Medical-record information” includes information concerning the diagnosis or treatment of AIDS or ARC, but it does not include other aspects of the definition of “counseling” for AIDS or ARC issued by the Centers for Disease Control and Prevention. [*Id.* (defining “medical-record information”).]

With respect to health insurance, the rights granted by the Act extend to Massachusetts residents who are the subject of the information collected, received or maintained in connection with insurance transactions, as well as applicants, individuals or policyholders who engage in or seek to engage in insurance transactions. [Mass. Gen. Laws ch. 175I, § 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 statute. [Mass. Gen. Laws ch. 175I, § 6.] The authorization form must be dated and written in plain language. It must 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 such authorization shall remain valid (which will vary depending on the purpose of the authorization); and advise the individual of the right to receive a copy of the authorization form. [Mass. Gen. Laws ch. 175I, § 6.]

b. Disclosure Authorization Requirements and Exceptions

Generally, an insurance entity may not disclose personal or privileged information about an individual that it collected or received in connection with an insurance transaction without that individual's written authorization. [Mass. Gen. Laws ch. 175I, § 13.] Authorizations submitted by those *other* than insurance entities must be in writing, signed and dated, and they are effective for up to one year. [Mass. Gen. Laws ch. 175I, § 13(1).]

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. However, there are several circumstances where an authorization is not required before one insurance entity discloses information to another. [Mass. Gen. Laws ch. 175I, § 13(3).]

The Act prohibits insurance entities from disclosing medical-record information for marketing purposes without the written authorization of the subject of the information. [Mass. Gen. Laws ch. 175I, § 13(11).]

Authorization exceptions. There are numerous circumstances under which an insurance entity can disclose information without the individual's authorization. These include disclosures to law enforcement agencies in order to prevent or prosecute fraud; disclosures pursuant to a facially valid search warrant, subpoena or other court order; disclosures made for research purposes; and others. [Mass. Gen. Laws ch. 175I, § 13.]

c. Notice Requirements

Some types of insurance entities (insurance institutions and insurance representatives) must provide to all applicants and policyholders written notice of their information practices. [Mass. Gen. Laws ch. 175I, § 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 special and compensatory damages sustained as a result of the disclosure. [Mass. Gen. Laws ch. 175I, § 20.] In such an action, the court may award costs and reasonable attorney's fees to the prevailing

party. [*Id.*] The individual cannot bring any other cause of action in the nature of defamation, invasion of privacy or negligence except against a person who discloses false information with malice or willful intent to injure, or against a person who misidentifies an individual as the subject of information and who discloses such misidentified information to others. [Mass. Gen. Laws ch. 175I, § 21.]

Fines and Penalties. Additionally, the insurance commissioner may hold hearings and impose administrative remedies, including monetary penalties. [Mass. Gen. Laws ch. 175I, §§ 15; 17; 18.] 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 or 1 year imprisonment or both. [Mass. Gen. Laws ch. 175I, § 22.]

D. State Government

1. Freedom of Information Act

Government-maintained medical files and information are not considered to be “public records” open to inspection under the Freedom of Information Act. [Mass. Gen. Laws ch. 4, § 7, cl. 26.]

2. Fair Information Practices Act

a. Scope

The Fair Information Practices Act (Mass. Gen. Laws ch. 66A, § 1 through § 3) imposes on state agencies a variety of duties related to the personal data that they maintain. The Act applies to every agency of the executive branch of the government, including but not limited to any constitutional or other office, executive office, department, division, bureau, board, commission or committee having either statewide or local jurisdiction. [Mass. Gen. Laws ch. 66A, § 1 (defining “agency”).]

The Act applies to “personal data,” which generally is defined as information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual. [*Id.* (defining “personal data”).]

b. Disclosure Requirements

Under the Fair Information Practices Act, government agencies that hold medical information must ensure that other agencies or individuals are not provided access to personal information unless otherwise allowed by statute or is approved by the individual whose personal data are sought. [Mass. Gen. Laws ch. 66A, § 2.] Agencies must comply with a data subject’s request to disseminate his data to a third person if practicable. [*Id.*] The agency may charge a reasonable fee if necessary. [*Id.*]

Medical or psychiatric data may be provided to a treating physician in an emergency where the patient is unable to provide consent, however, the patient must be notified of the disclosure once the emergency has ended. [*Id.*]

Agencies must maintain procedures to ensure that no personal data are made available in response to a demand for data made by means of compulsory legal process, unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed. [*Id.*]

Agencies must also maintain a complete and accurate record of every access to and every use of any personal data by persons or organizations outside of or other than the holder of the data, including the identity of all such persons and organizations which have gained access to the personal data and their intended use of such data. [*Id.*] The holder of the information does not need to record any such access of its employees acting within their official duties. [*Id.*]

c. Other Requirements

Agencies must undertake a number of administrative steps to protect the privacy of personal information. For example, each agency must identify one individual immediately responsible for the personal data system whose duty it is to insure that the requirements of this chapter for preventing access to or dissemination of personal data are followed. [Mass. Gen. Laws ch. 66A, § 2.] Additionally, each agency must inform relevant employees of the rules concerning the use and disclosure of personal information, and potential penalties for failure to comply with the law. [*Id.*] They must also take reasonable precautions to protect personal data from dangers of fire, theft, flood, natural disaster, or other physical threat.

III. PRIVILEGES

Massachusetts recognizes mental health provider-patient privileges under which a patient in any court proceeding can refuse to disclose and can prevent others from disclosing confidential conversations made with the therapist for purposes of diagnosis or treatment. [Mass Gen. Laws ch. 233, § 20B.] This evidentiary privilege extends to psychiatrists, psychologists, and certified psychiatric nurse mental health clinical specialists and their respective patients [*Id.*], as well as to licensed social workers and sexual assault counselors. [Mass Gen. Laws ch. 112, § 135B; ch. 233, § 20J].

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer

Massachusetts maintains a cancer registry for the purpose of conducting epidemiological surveys and applying appropriate preventive and control measures. [Mass. Gen. Laws ch. 111, § 111B.] All mandatory reports are confidential and may only be released upon written request of the patient or his authorized representative. [*Id.*] Identifiable information may also be released without authorization to researchers, but no research studies shall identify the subjects of these records or reports. [*Id.*]

B. Contagious Diseases

Reports that the health department requires to be filed concerning infectious diseases (including AIDS) must be kept confidential by the department and are not open for public inspection or copying by any other governmental agency or by any other person. [Mass. Gen. Laws ch. 111D, § 6; Mass. Regs. Code tit. 105, § 300.140 (listing AIDS as a reportable disease).] Any person who makes a report that is required by the department may not be held liable in a civil proceeding for having violated a trust or confidential relationship. [Mass. Gen. Laws ch. 111D, § 6.]

C. Genetic Information & Testing

Massachusetts has a number of provisions that restrict the use and disclosure of genetic information and that govern genetic testing. It is important to note that these provisions use varying definitions of the terms “genetic information” and “genetic test.”

1. Employers

Massachusetts restricts employers’ collection, use and disclosure of genetic information. For purposes of the provisions applying to employers, “genetic test” is defined as a test of human DNA, RNA, mitochondrial DNA, chromosomes or proteins for the purpose of identifying genes, inherited or acquired genetic abnormalities, or the presence or absence of inherited or acquired characteristics in genetic material. [Mass. Gen. Laws ch. 151B, § 1 (22) & (23).] “Genetic information” means any written, recorded individually identifiable result of a genetic test or explanation of such a result or family history pertaining to the presence, absence, variation, alteration, or modification of a human gene or genes. The term does not include information pertaining to the abuse of drugs or alcohol which is derived from tests given for the exclusive purpose of determining the abuse of drugs or alcohol. [*Id.*]

An employer may not collect, solicit or require disclosure of genetic information as a condition of employment; require or administer a genetic test as a condition of employment; offer a person an inducement to undergo a genetic test or otherwise disclose genetic information; inquire about a person’s genetic information (or that of family members) or about previous genetic testing; seek, receive or maintain genetic information for non-medical purposes; or use the results of a genetic test to affect an individual’s employment. [Mass. Gen. Laws ch. 151B, § 4 (19).] These prohibitions also apply to employment agencies, labor organizations and licensing agencies. [*Id.*]

2. Health Care Providers and Others

Massachusetts restricts the manner in which genetic tests may be undertaken and in which genetic information may be used and disclosed by health care providers, health care facilities, genetic testing agencies and others. For purposes of these restrictions, “genetic test” is defined as a test of human DNA, RNA, mitochondrial DNA, chromosomes or proteins for the purpose of identifying genes, inherited or acquired genetic abnormalities, or the presence or absence of inherited or acquired characteristics in genetic material. The term genetic test does not include tests given for drugs, alcohol, cholesterol, or HIV; or any test for the purpose of diagnosing or detecting an existing disease, illness, impairment or disorder. [Mass. Gen. Laws ch. 111, § 70G.] “Genetic information” is defined as any written or recorded individually identifiable result of a genetic test or explanation of such a result. [Mass. Gen. Laws

ch. 111, § 70G.] The term genetic information does not include any information about an identifiable person that is taken: as a biopsy, autopsy, or clinical specimen solely for the purpose of conducting an immediate clinical or diagnostic test that is not a genetic test (as defined above); as a blood sample solely for blood banking; as a newborn screening; as confidential research information for use in research conducted for the purpose of generating scientific knowledge about genes and other specified purposes; or as information pertaining to the abuse of drugs or alcohol which is derived from tests given for the exclusive purpose of determining the abuse of drugs or alcohol. [*Id.*]

The records and reports of any hospital, dispensary, laboratory, hospital-affiliated registry, physician, insurance institution, insurance support organization, or insurance representative, and commercial genetic testing company, agency, or association that pertain to any genetic information are not public records. [Mass. Gen. Laws ch. 111, § 70G.] The contents of these records and reports may not be divulged without the informed written consent of the individual. [*Id.*] Genetic information may be disclosed without the test subject's authorization in a number of instances including, but not limited to: upon proper judicial order; to a person whose official duties, in the opinion of the commissioner of health, entitles receipt of the information; and for use in epidemiological or clinical research conducted for the purpose of generating scientific knowledge about genes or learning about the genetic basis of disease or for developing pharmaceutical and other treatments of disease. [*Id.*]

Similarly, no facility (broadly defined in Mass. Gen. Laws ch. 111, § 70E) and no physician or health care provider may test any person for genetic information or disclose the results of a genetic test without obtaining the prior written consent of the individual. [Mass. Gen. Laws ch. 111, § 70G.] This law includes exceptions relating to epidemiological or clinical research, law enforcement officials, and health care personnel or others executing official duties pursuant to chapter 22E (which relates to the state DNA database). [*Id.*]

Remedies and Penalties

Right to Sue. Any person whose rights under these provisions have been violated, interfered with, or attempted to be interfered with may institute a civil action for injunctive and other equitable relief. [Mass. Gen. Laws ch. 111, § 70G.] The attorney general is also authorized to institute relief on behalf of the commonwealth. [*Id.*]

3. Health Plans

Massachusetts statutorily restricts the manner in which health insurers and other types of health plans can acquire genetic test information. For the most part, a "genetic test" is a test of human DNA, RNA, mitochondrial DNA, chromosomes or proteins for the purpose of identifying the genes or genetic abnormalities, or the presence or absence of inherited or acquired characteristics in genetic material. [Mass. Gen. Laws ch. 175, § 108H; ch. 176A, § 3B; ch. 176B, § 5B; ch. 176G, § 24; ch. 176I, § 4A.] In the case of an insurance company or broker the term does not include tests given for the exclusive purposes of determining the abuse of drugs or alcohol. [Mass. Gen. Laws ch. 175, § 108H.] The term "genetic information" means a written recorded individually identifiable result of a genetic test or explanation of such a result.

No insurance company or insurance broker may require genetic tests or genetic information as a condition of the issuance or renewal of an individual or group policy of accident or sickness insurance. [Mass. Gen. Laws ch. 175, § 108H.]

No insurer, agent or broker authorized to issue policies against disability from injury or disease or for long term care shall require an applicant to undergo a genetic test as a condition of the issuance or renewal of such policy. [Mass. Gen. Laws ch. 175, § 108I.] These entities may ask an applicant whether or not the applicant has taken a genetic test. [*Id.*] The applicant is not required to answer such a question on an application, but the failure to do so may result in an increased rate or denial of coverage. [*Id.*]

No hospital service corporation, medical service corporation, health maintenance organization or preferred provider organization may require genetic tests or private genetic information as a condition of the issuance or renewal or their respective plans. [Mass. Gen. Laws ch. 176A, § 3B; ch. 176B, § 5B; ch. 176G, § 24; ch. 176I, § 4A.]

D. HIV/AIDS

Physicians, other health care providers, hospitals, clinics and other facilities (broadly defined) are prohibited from conducting an HIV test, disclosing the test results, or identifying the subject of such a test without the prior written informed consent of the patient. [Mass. Gen. Laws ch. 111, § 70F.] The consent must be separate from a general authorization to release other medical information. [*Id.*] In addition, no employer shall require the HIV test as a condition of employment. [*Id.*] This statute actually refers to the “HTLV-III” test, an early name for HIV, but is understood to encompass HIV testing.

E. Mental Health

Generally, a psychologist needs a patient’s written consent to disclose any confidential communications about that patient, including the fact that the patient is undergoing treatment. [Mass. Gen. Laws ch. 112, § 129A.] Disclosure without the patient’s consent is allowed: where the patient poses an imminent danger to himself or others; when the psychologist is attempting to collect amounts owed (but only the nature of services provided, dates of services and other financial data can be disclosed); for peer review and utilization review purposes; and in other circumstances. [*Id.*] This provision does not prevent a nonprofit hospital service or medical service corporation from inspecting and copying any and all records relating to diagnosis, treatment or other services provided to any person for which coverage, benefit or reimbursement is claimed, so long as the policy or certificate under which the claim is made provides that such access to the records is permitted. [*Id.*]

Records of those admitted to mental health facilities under state supervision are private and not open to public inspection. [Mass. Gen. Laws ch. 123, § 36.] These records may be disclosed: upon proper judicial order, whether or not in connection with pending judicial proceedings; to the patient’s attorney upon request by the patient or attorney; when in the best interest of the patient as provided in the rules and regulations of the department of mental health; and as required by statutory

provisions governing sex offenses. This section governs the patient records of the department notwithstanding any other provision of law. [*Id.*]

An HMO is prohibited from conditioning the receipt of benefits upon a member's provision of consent to disclose information regarding services for mental disorders. [Mass. Gen. Laws, ch. 176G, § 4B.] This provision does not prohibit the disclosure of non-privileged information; aggregate patient data; patient utilization data in connection with an investigation into fraud (by the patient or provider) or professional misconduct; patient information needed for coordination of benefits, subrogation, peer review or utilization review; or of certain patient information to self-insured plans. [*Id.*]

A medical service corporation may not disclose information it acquires about any subscriber or covered family member pertaining to outpatient diagnosis or treatment of a mental or nervous condition without the informed written consent of the covered individual. [Mass. Gen. Laws, ch. 176G, § 20.] The corporation may not condition the receipt of covered benefits upon the provision of such consent. [*Id.*] This provision does not prohibit the disclosure of non-privileged information; aggregate patient data; patient utilization data in connection with an investigation into fraud (by the patient or provider) or professional misconduct; patient information needed for coordination of benefits, subrogation, peer review or utilization review; or of certain patient information to self-insured plans. [*Id.*]

An insurance company (providing accident or health insurance) may not condition the receipt of benefits upon an insured's provision of consent to disclose information pertaining to outpatient diagnosis or treatment of a mental or nervous condition. [Mass. Gen. Laws ch. 175, § 108E.] This provision does not prohibit the disclosure of non-privileged information; aggregate patient data; patient utilization data in connection with an investigation into fraud (by the patient or provider) or professional misconduct; patient information needed for coordination of benefits, subrogation, peer review or utilization review; or of certain patient information to self-insured plans. [*Id.*]

See Section I (A through C) above for discussion of access to mental health records.

F. Substance Abuse

Treatment facilities must maintain the confidentiality of each patient's treatment records. [Mass. Gen. Laws, ch. 111E, § 18.] Disclosure is only permitted with a judicial order or with the patient's informed written consent. [*Id.*] A consent must be signed by the patient, state the name of the person or entity to whom the disclosure will be made, the type of information to be disclosed and the purpose of the disclosure. [*Id.*]

MICHIGAN

Michigan statutorily requires health facilities to have policies allowing patients access to their medical records. The state does not have a general, comprehensive law 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 Facilities and Agencies, Including Hospitals

Michigan statutorily provides policy guidelines for licensed health facilities and agencies that provide services directly to patients or residents. These guidelines apply to hospitals, clinical laboratories, surgical outpatient facilities, HMOs, nursing homes and others. [Mich. Comp. Laws § 333.20106 (defining “health facility or agency”).] Under these guidelines, health facilities and agencies are required to adopt policies describing the rights and responsibilities of patients and residents. [Mich. Comp. Laws § 333.20201.] The policies are to include the right of a patient or resident to inspect or receive for a reasonable fee a copy of his medical record upon request. [*Id.*] The medical record generally includes a record of tests and examinations performed, observations made, treatments provided and in the case of a hospital, the purpose of hospitalization. [Mich. Comp. Laws § 333.20175.]

Remedies and Penalties. There is no civil or criminal liability for failure to comply with this provision because it merely prescribes guidelines. [Mich. Comp. Laws § 333.20203.] However, this provision does not diminish other remedies at law that may be available. [*Id.*]

[The right of access to information held by certain mental health service providers is discussed in Section IV.E. below.]

B. State Government

An individual is permitted to review, upon written request, his personal records maintained by the department of public health. The department is to establish procedures for requesting access to and amendment of personal records. The department must keep records of requests for access to or amendments of data in those records. [Mich. Comp. Laws § 333.2639.]

II. RESTRICTIONS ON USE AND DISCLOSURE

A. Anti-Solicitation Rules

In an effort to curb solicitation of personal injury claims, Michigan statutorily prohibits any person, firm or corporation from selling and buying the identity of a patient or information pertaining to the treatment of a patient. [Mich. Comp. Laws § 750.410(2).] Treatment information includes information in the files and records of a health care facility, health care provider or insurance company. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person who violates this provision is guilty of a misdemeanor, punishable by imprisonment for no more than 6 months, by a maximum fine of \$500, or both. [*Id.*]

B. Dentists

Information relative to the care and treatment of a dental patient acquired as a result of providing professional dental services is confidential and generally may not be disclosed without the written consent of the patient. [Mich. Comp. Laws § 333.16648.] Disclosure may be made without the patient's consent: to defend against a claim challenging the dentist's professional competence; in relation to a claim for payment of fees; to a third party payor in relation to fees for services or the type and volume of services; to a police agency as part of a criminal investigation; pursuant to a court order; to peer review committees; and to others. [*Id.*]

C. Health Care Facilities and Agencies, Including Hospitals

Michigan statutorily provides policy guidelines for licensed health facilities and agencies that provide services directly to patients or residents. These guidelines apply to hospitals, clinical laboratories, surgical outpatient facilities, HMOs, nursing homes and others. [Mich. Comp. Laws § 333.20106 (defining "health facility or agency").] Under these guidelines, health facilities and agencies are required to adopt policies describing the rights and responsibilities of patients and residents. [Mich. Comp. Laws § 333.20201.] The policies are to include a patient or resident's right to confidential treatment of his medical records and to refuse the release of these records to a person outside the facility except as required because of a transfer to another health care facility or as required by law or third party payment contract. [*Id.*]

Remedies and Penalties. There is no civil or criminal liability for failure to comply with this provision because it merely prescribes guidelines. [Mich. Comp. Laws § 333.20203.] However, this provision does not diminish other remedies at law that may be available. [*Id.*] Additionally, the department of health may impose administrative remedies, including fines, on a facility that denies a patient's rights. [Mich. Comp. Laws § 333.20165.]

D. Nonprofit Health Care Corporations

A nonprofit health care corporation (such as Blue Cross) may not disclose personal data, including records relating to a member's medical history, care, treatment or

service, without the prior written, specific, informed consent of the member. [Mich. Comp. Laws § 550.1105 (defining “health care corporation”); 550.1107 (defining “personal data”); and 550.1406.] Disclosure without the member’s consent is permitted for the purpose of claims adjudication, claims verification, or when required by law. [Mich. Comp. Laws § 550.1406.] Generally, the recipient of personal data released pursuant to a member’s consent may not redisclose the information unless the member executes another consent authorizing further disclosure. [*Id.*]

The board of directors of a health care corporation must establish and make public the corporation’s policy regarding protection of the privacy of its members and the confidentiality of personal data. The statute requires that the policy include, among other things, the identification of the corporation’s routine uses of personal data and the means by which members will be notified of such uses and the actual release of personal data. [Mich. Comp. Laws § 550.1406.]

To ensure confidentiality of records containing personal data, the health care corporation must use reasonable care to secure the records from unauthorized access and collect only personal data that are necessary for the proper review and payment of claims. [*Id.*]

Remedies and Penalties

Right to Sue. A member also may bring a civil action for damages against the corporation and recover actual damages or \$200, whichever is greater, as well as reasonable attorneys’ fees and costs. [Mich. Comp. Laws § 550.1406.]

Fines and Penalties. A health care corporation that violates this provision is guilty of a misdemeanor, punishable by a maximum fine of \$1000 for each violation. [*Id.*]

D. Pharmacies

A prescription or equivalent record on file in a pharmacy is not a public record. [Mich. Comp. Laws § 333.17752.] A person having custody or access to prescriptions generally may not disclose their contents or provide copies of them without the patient’s authorization. [*Id.*] Disclosure without the patient’s consent may be made to: the patient; the prescriber who issued the prescription or licensed health professional who is currently treating the patient; a government agency responsible for the enforcement of laws relating to drugs and devices; a person authorized by a court order; and a person engaged in research projects or studies with protocols approved by the board of pharmacy. [*Id.*]

Remedies and Penalties

Fines and Penalties. A pharmacist who violates this provision may be subject to disciplinary action by the board of pharmacy, including fines, reprimands, or actions taken with respect to his license. [Mich. Comp. Laws § 333.17768.]

E. State Government

Medical, counseling or psychological facts or evaluations that are in the possession of a state agency and that contain patient-identifying information are exempt from

disclosure under the state Freedom of Information Act. [Mich. Comp. Laws § 15.243(13)(1)(m).] Likewise, information or records subject to the physician-patient or psychologist-patient privilege or any other privilege recognized by statute or court rule are not accessible to the general public. [Mich. Comp. Laws § 15.243(13)(1)(h).] Records or information specifically described and exempted from disclosure by statute are also exempt from the access provisions of the Freedom of Information Act. [Mich. Comp. Laws § 15.243(13)(1)(d).]

The information, records of interviews, written reports or records which came to be in the possession of the department of health through a medical research project are confidential and may be used solely for statistical, scientific and medical research purposes relating to the cause or condition of health. [Mich. Comp. Laws § 333.2631.] This information is not admissible as evidence in any forum. [Mich. Comp. Laws § 333.2632.] A person participating in a designated medical research project may not disclose the information obtained except in strict conformity with that project. [*Id.*]

F. Third Party Health-claims Administrators

Under the Third Party Administrator Act, a third party administrator, *i.e.*, a person who processes medical claims pursuant to a service contract, may not disclose records which contain identifying information pertaining to the diagnosis, treatment or health of an individual covered by a plan without the subject's prior consent. [Mich. Comp. Laws §§ 550.902 (defining "third-party administrator" and "personal data"); 550.934.] The recipient of information released pursuant to a consent is prohibited from redisclosing the information absent a new authorization permitting further disclosure. [*Id.*] The third-party administrator may disclose information without the authorization of the subject for any of the following reasons: for claims adjudication or verification; for proper plan administration; for an audit conducted pursuant to ERISA; to an insurer for the purchase of excess loss insurance and for claims under the excess loss insurance; to the plan or a fiduciary of the plan; to the insurance commissioner; and as otherwise required by law. [*Id.*]

Remedies and Penalties

Fines and Penalties. Violators of this act may be subject to administrative penalties imposed by the insurance commissioner, including monetary penalties, and suspension or revocation of a third-party administrator's certificate of authority if the administrator knowingly and persistently violates this act. [Mich. Comp. Laws § 550.950.] This provision does not create or diminish a person's right to bring an action for damages. [*Id.*]

III. PRIVILEGES

Michigan 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 information acquired by the health care professional in attending the patient in a professional capacity that was necessary for the professional to prescribe or act. [Mich. Comp. Laws §§ 330.1700 (defining "privileged communication") and 330.1750 (psychiatrist or psychologist-patient); 333.16648 (dentist-patient);

333.18117 (licensed professional counselor-client); 333.18237 (psychologist-client); 600.2157 (physician- patient).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer

Michigan requires that diagnosed cases of cancer and other specified tumorous diseases be reported to the department of health. [Mich. Comp. Laws § 333.2619.] These reports are confidential and subject to the same protections provided in Mich. Comp. Laws § 333.2631 for data and records concerning medical research projects. [*Id.*; see also State Government, Section III.E. above.]

B. Communicable Diseases

All reports, records and data pertaining to testing, care, treatment, reporting and research, as well as partner notification information associated with a serious communicable disease are confidential. [Mich. Comp. Laws § 333.5131.] A person who violates these provisions is guilty of a misdemeanor, punishable by imprisonment, fine or both. [*Id.*]

C. Genetic Test Results

1. Physicians

In general, a physician may not order a presymptomatic genetic test without an individual's written, informed consent. [Mich. Comp. Laws § 333.17020.] The consent must inform the individual of his right to confidential treatment of his sample and the information obtained from the genetic test and any future uses of that sample and information. It also must include information about who will have access to the samples taken from the individual and the information derived from the test. [*Id.*]

“Genetic test” is defined as the analysis of human DNA, RNA, chromosomes, and proteins and metabolites used to detect heritable or somatic diseases-related genotypes or karyotypes for clinical purposes. [Mich. Comp. Laws §§ 37.1202 and 550.1401 (defining “genetic test”).] “Genetic information” is information about an individual's gene, gene product or inherited characteristics derived from his family history or a genetic test. [*Id.* (defining “genetic information”).]

2. Employers

In general, an employer may not directly or indirectly acquire or have access to genetic information concerning an employee or applicant for employment or that individual's family member. [Mich. Comp. Laws § 37.1202.] Furthermore, an employer may not require an individual to submit to a genetic test or provide genetic information as a condition of employment or promotion. [Mich. Comp. Laws § 37.1202.]

3. Nonprofit Health Care Corporation

A health care corporation may not require an applicant, a member or their dependents to undergo genetic testing before issuing, renewing, or continuing health care coverage. [Mich. Comp. Laws § 550.1401.] The corporation also may not disclose whether a genetic test has been performed, the test results or genetic information. [*Id.*]

D. HIV/AIDS

All reports, records and data pertaining to testing, care, treatment, reporting and research, as well as partner notification information, that are associated with HIV/AIDS are confidential and may be disclosed only in accordance with specified statutory requirements. [Mich. Comp. Laws § 333.5131.] Generally, the results of an HIV/AIDS test and the fact that such a test was ordered are privileged information [*Id.*] A court generally may order the disclosure of this information only after it has made specific findings that other ways of obtaining the information are not available or would not be effective and that the public interest and need for disclosure outweigh the potential for injury to the patient. [*Id.*] Should disclosure be ordered, it is further limited to those who need to know. Disclosure without the patient's consent or court order is allowed in a number of specified circumstances, such as to a person who is known to have had contact with the patient, if there is a foreseeable risk of transmission. [*Id.*]

Remedies and Penalties

Right to Sue. A person whose HIV/AIDS related information has been improperly disclosed in violation of this provision has the right to maintain a civil action and may be awarded actual damages or \$1000, whichever is greater, as well as costs and attorney's fee. [Mich. Comp. Laws § 333.5131(8).]

Fines and Penalties. Additionally, a person who violates these provisions is guilty of a misdemeanor, punishable by imprisonment, fine or both. [*Id.*]

E. Mental Illness

1. Patient Access

Upon request, a recipient of mental health services may have access to his records, if the recipient does not have a guardian and has not been found legally incompetent. [Mich. Comp. Laws § 330.1748.] The holder of the record must comply with the recipient's request no later than 30 days after receipt of the request, or if the recipient is receiving treatment from the record holder, before the recipient is released from treatment, whichever is earlier. [*Id.*] If the recipient is a minor or has a guardian, his parent or guardian may authorize disclosure of confidential medical information to the recipient. [Mich. Comp. Laws § 330.1748(6).] The recipient's access may be denied if in the written judgment of the holder of the record the disclosure would be detrimental to the recipient or others. [*Id.*]

After gaining access to the treatment records, a recipient, guardian or parent of a minor recipient has the right to challenge the accuracy, completeness, timeliness or relevance of the information in the records and be permitted to add a statement to the

record correcting or amending the information. The statement becomes part of the recipient's record. [Mich. Comp. Laws § 330.1749.]

2. Restrictions on Disclosure

Information in the record of a recipient of mental health services is confidential and is not open to public inspection. [Mich. Comp. Laws § 330.1748.] The information may be disclosed only as specifically provided for by law. [*Id.*] All disclosures are to be limited to information that is germane to the authorized purpose for which the disclosure was sought. [*Id.*] Confidential information may be disclosed upon the written consent of the mental health services recipient (or his parent or guardian). [Mich. Comp. Laws § 330.1748(6).]

Disclosure *without* the recipient's consent is permitted in a number of circumstances, including: pursuant to court orders or subpoenas, unless the information is privileged; to a prosecuting attorney as necessary for participation in a mental health legal proceeding; as necessary for the purpose of outside research, with certain restrictions; and others. [Mich. Comp. Laws § 330.1748(5), (7) and (8).]

A minor 14 years or older may request and receive outpatient mental health services without the consent or knowledge of the minor's parent, guardian or person on loco parentis. The mental health professional may not inform the minor's parent, guardian or person in loco parentis of the services rendered without the minor's consent unless the professional treating the minor determines that there is a compelling need for disclosure and the minor has been notified of the professional's intent to disclose that information. [Mich. Comp. Laws § 330.1707.]

F. Substance Abuse

Records of the identity, diagnosis, prognosis, and treatment of an individual maintained in connection with the performance of a licensed substance abuse treatment and rehabilitation service or prevention service are confidential and generally may be disclosed only with the subject's written consent. [Mich. Comp. Laws §§ 333.6111 and 333.6112.] This consent may be revoked at any time by giving written notice. [Mich. Comp. Laws § 333.6112.] Disclosure may be made without the subject's consent to: medical personnel to the extent necessary to meet a bona fide emergency; to qualified personnel for the purpose of conducting scientific research, financial audits, or program evaluation, but the personnel may not identify individuals in any reports or otherwise disclose an identity in any manner; to a court, but only information as to whether a specific individual is under treatment by an agency; and for court hearings related to the treatment of minors. [Mich. Comp. Laws § 333.6113.]

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MINNESOTA

Minnesota statutorily grants a patient the right of access to his medical records that are maintained by the state or local government; health care providers, including physicians; health care facilities, including hospitals; and insurance entities, including HMOs. The state also restricts disclosures of confidential health information by these entities.

I. PATIENT ACCESS

A. Health Care Providers and Health Care Facilities

1. Scope

The Minnesota Health Records Act grants patients the right of access to their medical records that are maintained by providers. [Minn. Stat. § 144.335, subd. 2.] The term “providers” is defined as any person who furnishes health care services including: doctors of medicine and osteopathy, physician assistants, acupuncturists, respiratory care practitioners, chiropractors, social workers, marriage and family counselors, dentists, pharmacists, podiatrists, and hearing instrument dispensers, as well as health care facilities, including hospitals, nursing homes and home care providers. [Minn. Stat. § 144.335, subd. 1(b) and chapters cited therein.]

The term “patient” is broadly defined as including the person who has received the health care services from a provider for treatment or examination of a medical, psychiatric, or mental condition, the surviving spouse and parents of a deceased patient, or a person the patient appoints in writing as a representative. With certain exceptions, parents generally have the right of access to the medical records of minors. [Minn. Stat. § 144.335, subd. 1(a).]

The Act gives the right of access to the patient’s health record including, but not limited to, laboratory reports, X-rays, prescriptions, and other technical information used in assessing the patient’s health condition. [Minn. Stat. § 144.335, subd. 2(b).]

2. Access Requirements

Upon request, a provider must supply to a patient complete and current information concerning any diagnosis, treatment and prognosis of the patient in terms and language the patient can reasonably be expected to understand. [Minn. Stat. § 144.335, subd. 2(a).]

In order to obtain a copy of his medical record, a patient should submit a written request to his provider. [Minn. Stat. § 144.335, subd. 2(b).] The provider must promptly furnish to the patient a copy of the requested health record or the pertinent part of the record relating to a condition specified by the patient. [*Id.*] With the

patient's consent, the provider or facility may furnish only a summary of the record. [Minn. Stat. § 144.335, subd. 2(b).]

Copying fees. The provider may charge no more than 75¢ per page, plus a \$10 fee for retrieving and copying records may be imposed. [Minn. Stat. §§ 144.335, subd. 5.] No cost may be charged, however, when a patient requests a copy of his record for purposes of reviewing current medical care. [*Id.*]

Denial of access. The provider or facility may exclude from the health record provided written speculations about the patient's health, except to the extent such information is necessary for the patient's informed consent. [Minn. Stat. § 144.335, subd. 2(b).] Additionally, they may withhold information if they reasonably determine access to be detrimental to the physical or mental health of the patient or that it is likely to cause the patient to inflict harm on himself or others. [Minn. Stat. § 144.335, subd. 2(c).] The provider may supply the withheld information to an appropriate third party or to another health care provider, who may at his discretion, release the information to the patient. [*Id.*]

3. Other Requirements

A health care provider or facility must give patients, in a clear and conspicuous manner, written notice concerning the right of patients to have access to and obtain copies of their health records. [Minn. Stat. § 144.335, subd. 5a.]

4. Remedies and Penalties

Fines and Penalties. A violation of these provisions may be grounds for disciplinary action against a provider by the appropriate licensing board or agency. [Minn. Stat. § 144.335, subd. 6.]

B. Insurance Entities, Including HMOs

1. Scope

The Minnesota Insurance Fair Information Reporting Act applies to insurance entities including fee for service insurers, HMOs, insurance agents and insurance support organizations. [Minn. Stat. § 72A.491 (defining "insurer" as including HMOs, and detailing entities and persons covered).]

The Act covers "personal information," including most "health record information," which is gathered in connection with an insurance transaction. "Health record information" is personal information that (1) relates to an individual's physical or mental condition, health history or health treatment and (2) is obtained from a health professional, health care institution, from an individual, or from the individual's spouse, parent or legal guardian or other person. [Minn. Stat. § 72A.491, subd. 10 (defining "health record information").] This Act does not, however, give access to health record information that is maintained by an HMO in its capacity as a health provider. [See Minn. Stat. § 72A.491, subd. 17 and § 72A.497.]

With respect to health insurance, the rights granted by the Act extend to Minnesota 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. [Minn. Stat. § 72A.492.]

2. Access 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. [Minn. Stat. § 72A.497.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Minn. Stat. § 72A.497, subd. 1(b).]

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. [Minn. Stat. § 72A.494.]

Requested health record information that was originally provided to the insurance entity by a health professional or health care institution may be supplied either directly to the requesting individual or to a medical professional designated by the individual, whichever the individual elects. [Minn. Stat. § 72A.497, subd. 3.]

Copying fees. The insurance entity can impose a reasonable fee to cover copying costs. [Minn. Stat. § 72A.497, subd. 4.]

Denial of access. When a health professional or a health care institution has made a written determination that the release of the health record information would be detrimental to the physical or mental health of the person, or is likely to cause the individual to inflict self-harm or to harm another, the insurance entity may not release such information without the approval of the health professional with treatment responsibility for the condition to which the information relates. If approval is not obtained, the information must be provided to the health professional designated by the individual. [Minn. Stat. § 72A.497, subd. 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. [Minn. Stat. § 72A.498.] 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.*]

3. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Statute § 72A.494.] 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 who improperly has been denied access to his health record information under this statute has the right to file a civil action for equitable relief and may also recover actual damages sustained plus costs and attorney's fees. [Minn. Stat. § 72A.503; *see also* Minn. Stat. § 13.08.] In the case of a willful violation, exemplary damages from \$100 to \$10,000 may be awarded. [*Id.*]

C. State Government

Under the Minnesota Government Data Practices Act, an individual has a right to see, without charge, data that has been created, collected, received or maintained by the state government or its subdivisions and that is identifiable with that individual. [Minn. Stat. §§ 13.04; 13.02, subd. 5 (defining "data on individuals").] This right extends to data collected, received or maintained by the department of health or statewide systems for public health purposes. [Minn. Stat. § 13.3805.] The individual is also entitled to be informed of the content and meaning of the data. [Minn. Stat. § 13.04, subd. 3.]

Upon request, the government must provide copies to the individual and may require the requesting person to pay the actual costs of making, certifying and compiling the copies. [*Id.*] The government should respond immediately to the request, if possible, or within 5 business days if more time is needed. [*Id.*]

The subject of the data may contest the accuracy or completeness of the data. [Minn. Stat. § 13.04, subd. 4.] If the subject's challenge is successful, the data must be completed, corrected or destroyed, accordingly. [*Id.*]

As a general rule, parents have the right of access to data about minors. [Minn. Stat. §§ 13.04 and 13.02, subd. 8 (defining "individual").] However, upon the request of the minor, the government authority may withhold data from parents if it determines that doing so would be in the best interest of the minor. [*Id.*]

Remedies and Penalties

Right to Sue. The government has waived its sovereign immunity with respect to violations of these provisions and allows a person who suffers any damage as a result of a violation to maintain a civil suit for damages sustained plus costs and attorney's fees. [Minn. Stat. § 13.08.] In the case of a willful violation, the court also may impose exemplary damages from \$100 to a maximum of \$10,000 per violation. [*Id.*] Additionally, an aggrieved person may bring an action in district court to compel compliance and may recover costs and disbursements, including reasonable attorney's fees. [Minn. Stat. § 13.08, subd. 4.]

II. RESTRICTIONS ON DISCLOSURE

A. Health Care Providers and Health Care Facilities

1. Scope

The Minnesota Health Records Act governs the manner in which providers and those who receive health records from providers may disclose a patient's health records. [Minn. Stat. § 144.335, subd. 3a.] The term "providers" is defined as any person who furnishes health care services including: doctors of medicine and osteopathy, physician assistants, acupuncturists, respiratory care practitioners, chiropractors, social workers, marriage and family counselors, dentists, pharmacists, podiatrists, and hearing instrument dispensers, as well as health care facilities, including hospitals, nursing homes and home care providers. [Minn. Stat. § 144.335, subd. 1(b) and chapters cited therein.]

The term "patient" is broadly defined as including the person who has received the health care services from a provider for treatment or examination of a medical, psychiatric, or mental condition, the surviving spouse and parents of a deceased patient, or a person the patient appoints in writing as a representative. With certain exceptions, parents generally have the right to control the health records of minors. [Minn. Stat. § 144.335, subd. 1(a).]

2. Consent Requirements

Generally, a health care provider, or a person who receives health records from a provider, may not release a patient's health records to anyone without the patient's signed and dated consent, unless the release is specifically authorized by law. [Minn. Stat. § 144.335, subd. 3a.] The consent is generally valid for one year, unless a lesser period is specified in the consent (or another period is provided by another law.) [*Id.*]

The one year time limit does not apply for the release of records to a provider who is being advised or consulted with in connection with the current treatment of the patient. [*Id.*] Neither does the one-year expiration date apply to consents releasing health information to health insurers and HMOs for the purposes of payment of claims, fraud investigations or quality of care review, provided certain conditions are met. [*Id.*] In order for the greater expiration period to apply to consents for disclosure to health insurers, the use or release must comply with the Minnesota Fair Information Reporting Act, further use or disclosure of the records in identifiable form to a person other than the patient without the patient's consent is prohibited, and the recipient must establish adequate safeguards to protect the confidentiality of the records, including a procedure for removal of identifying information. [Minn. Stat. § 144.335, subd. 3a(c).]

Consent is *not* required for releases of health information for a medical emergency or to other providers within related health care entities when necessary for the current treatment of the patient. [Minn. Stat. § 144.335, subd. 3a(b).] Neither is consent required to release health records created as part of an independent medical examination to the third party who requested or paid for the examination. [Minn. Stat. § 144.335, subd. 3a(g).]

Special rules apply to the release of health information to an external medical or scientific researcher. [Minn. Stat. § 144.335, subd. 3a(d).] Health records generated prior to January 1, 1997, may be released if the patient has not objected to the release. In order to release records generated after January 1, 1997, the provider must first advise the patient in writing that his records may be released for research purposes. The records may not be released if the patient objects. [*Id.*] A patient can sign a general authorization for release for research purposes (which does not identify a particular researcher). This type of authorization does not expire but can be revoked or limited at any time. [*Id.*] Finally, an authorization for release for research purposes may also be established by a patient's failure to respond to a mailed notice that his records may be released if he does not object. The provider must follow certain procedures set out in the statute to establish this sort of authorization. [*Id.*] In releasing health information for research purposes under any of the above circumstances, the provider must make a reasonable effort to determine that: the use or disclosure does not violate any limitations under which the record was collected; the use or disclosure in individually identifiable form is necessary to accomplish the research or statistical purpose for which the use or disclosure is to be made; the recipient has established and maintains adequate safeguards to protect the records from unauthorized disclosure, including a procedure for removal or destruction of information that identifies the patient; and further use or release of the records in individually identifiable form to a person other than the patient without the patient's consent is prohibited. [*Id.*]

In cases where a provider releases health records without patient consent as authorized by law, the release must be documented in the patient's health record. [Minn. Stat. § 144.335, subd. 3a(g).]

3. Remedies and Penalties

Right to Sue. A patient has the right to bring a civil action for compensatory damages, plus costs and attorney's fees against the following: (1) a person who negligently or intentionally releases his health records in violation of these provisions; (2) a person who forges a signature on a consent form or who alters a consent form without the patient's consent; or (3) a person who obtains under false pretenses the consent form [Minn. Stat. § 144.335, subd. 3a(e).]

Fines and Penalties. A violation of this section may be grounds for disciplinary action by the appropriate licensing board. [Minn. Stat. § 144.335, subd. 6.]

B. Hospitals and Other Health Care Facilities

Under the Patients Bill of Rights, medical records maintained by hospitals and other health care facilities are confidential. [Minn. Stat. § 144.651, subd. 16.] (Medical information maintained by public hospitals is also subject to the Government Practices Act. See "State Government" below.) The patient (or resident) has the right to refuse to release the records to any individual outside the facility. [*Id.*] These protections apply to patients who have been admitted to an acute inpatient facility for a continuous period longer than 24 hours and to residents of certain nonacute facilities, such as nursing homes. [Minn. Stat. § 144.651, subd. 2.] Disclosure without the patient's consent may be made for complaint investigations and inspections by the department of health, where required by third-party payment contracts, or where otherwise provided by law. [Minn. Stat. § 144.651, subd. 16.]

The Bill of Rights contains detailed provisions for disclosing health information to family members. [Minn. Stat. § 144.651, subd. 10.] A patient has the right to include a family member or other chosen representative in discussions and conferences concerning health care treatment and alternatives. [Id.] If the patient is unable to communicate his desires (e.g., is comatose), the facility must make reasonable efforts to notify either a family member or a person designated in writing by the patient as the person to contact in an emergency that the patient or resident has been admitted to the facility. [Id.] The facility must allow the family member to participate in treatment planning, unless the facility knows or has reason to believe the patient or resident has an effective advance directive to the contrary or knows the patient or resident has specified in writing that they do not want a family member included in treatment planning. [Id.] After notifying a family member but prior to allowing a family member to participate in treatment planning, the facility must make reasonable efforts to determine if the patient has executed an advance directive relative to the patient's health care decisions. [Id.]

Hospitals and others must post the Patients Bill of Rights conspicuously in the health care facility. [Minn. Stat. § 144.651, subd. 4.] Additionally, they must furnish copies of the law to the patient or resident upon admittance to the facility. The policy statement must include the address and telephone number of the board of medical practice and/or the name and phone number of the person within the facility to whom inquiries about the medical care received may be directed. The notice shall include a brief statement describing how to file a complaint with the office of health facility complaints established pursuant to section 144A.52 concerning a violation of section 144.651 or any other state statute or rule. This notice must include the address and phone number of the office of health facility complaints. Admission may not be conditioned on a waiver of these rights. [Minn. Stat. § 144.651, subd. 1.]

Remedies and Penalties

Fines and penalties. A substantial violation of the rights of any patient or resident as defined in the Patients Bill of Rights may result in the issuance of a correction order by the state commissioner of health. [Minn. Stat. § 144.652.] The issuance or nonissuance of a correction order does not preclude, diminish, enlarge, or otherwise alter a private action by or on behalf of a patient or resident to enforce any unreasonable violation of the patient's or resident's rights. [Id.]

C. Insurance Entities, Including HMOs

1. Scope

The Minnesota Insurance Fair Information Reporting Act (IFIRA) applies to insurance entities including fee for service insurers, HMOs, insurance agents and insurance support organizations. [Minn. Stat. § 72A.491 (defining "insurer" as including HMOs, detailing entities and persons covered.)]

The Act covers "personal information," including most "health record information," which is gathered in connection with an insurance transaction. "Health record information" is personal information that (1) relates to an individual's physical or mental condition, health history or health treatment and (2) is obtained from a health professional, health care institution, from an individual, or from the individual's spouse, parent or legal guardian or other person. [Minn. Stat. § 72A.491, subd. 10]

(defining “health record information”).] This Act does not, however, protect health record information that is maintained by an HMO in its capacity as a health provider. [See Minn. Stat. § 72A.491, subd. 17 and § 72A.497.]

With respect to health insurance, the rights granted by the Act extend to Minnesota 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. [Minn. Stat. § 72A.492.]

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 IFIRA. 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. [Minn. Stat. § 72A.501.] 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 26 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. [Minn. Stat. §§ 72A.491, subd. 14; 72A.502.]

c. Notice Requirements

The insurance entity must provide to all applicants and policyholders written notice of its information practices. [Statute § 72A.494.] 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 has been improperly disclosed in violation of this statute has the right to file a civil action for equitable relief and may also recover actual damages sustained plus costs and attorney’s fees. [Minn. Stat. § 72A.503; see also Minn. Stat. § 13.08.] In the case of a willful violation, exemplary damages from \$100 to \$10,000 may be awarded. [*Id.*]

D. State Government

1. Government Data Practices Act

The Government Data Practices Act governs the manner in which various identifiable data collected by the state government and its subdivisions may be disclosed. The sections that are particularly relevant to health information are discussed below.

a. Public Health Data

Health information on individuals that has been created, collected, received or maintained by the department of health, its subdivisions, or statewide reporting systems for public health purposes is considered private data under the Government Data Practices Act. [Minn. Stat. §§ 13.02, subd. 12 (defining “private data”), 13.04 (allowing disclosure to subject); 13.38.] Such data may not be disclosed without the individual’s signed consent except to the individual who is the subject of the information, to his physician as necessary, or to government officials to control or prevent the spread of disease.

b. Public Hospitals and Clinics

Information collected because a person was or is a patient of a state-run hospital, nursing home, medical center, clinic or health or nursing agency is generally considered to be private. Such data generally may not be disclosed except to the individual who is the subject of the information without the individual’s informed consent. [Minn. Stat. § 13.384.] An informed consent must, among other things, be in plain language, dated, signed and specify the type of information to be disclosed. [Minn. Stat. § 13.05.]

A public hospital’s directory information, however, is public data unless the patient requests otherwise. [Minn. Stat. § 13.384.] In that circumstance, the directory information is private. Directory information consists of the name of the patient, date admitted, and general condition. (See “Mental Health” below for rules pertaining to patients who have been committed to public hospitals.) Directory information about an emergency patient who is unable to communicate may not be released until a reasonable effort has been made to notify the next of kin. Health information may be disclosed to communicate a patient’s or client’s condition to a family member or other appropriate person in accordance with acceptable medical practice, unless the patient or client directs otherwise. [*Id.*]

There are a number of circumstances where patient information can be released without the patient’s consent and without affording the patient an opportunity to object. Disclosure without consent can be made to administer federal funds or programs; pursuant to a valid court order; as required by law; and for other specified purposes. [Minn. Stat. § 13.384.]

c. Remedies and Penalties

Right to Sue. A person whose information has been improperly disclosed in violation of this statute has the right to file a civil action for equitable relief and may also recover actual damages sustained plus costs and attorney’s fees. [Minn. Stat. §13.08.] In the case of a willful violation, exemplary damages from \$100 to \$10,000 may be awarded. [*Id.*]

III. PRIVILEGES

Minnesota recognizes a health care provider-patient privilege that allows a person, in a legal proceeding, to refuse to disclose and to prevent others from disclosing information the health care professional acquired while attending the patient in a professional capacity. [Minn. Stat. § 595.02, subd. 1.] This privilege extends to physicians, nurses dentists, chiropractors, psychologists and sexual assault counselors and their respective patients and clients. [Minn. Stat. § 595.02, subd. 1(d); (g); and (j).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Cancer

Minnesota has a cancer surveillance system under which persons licensed to practice the healing arts are required, upon request of the commissioner of health, to report to the commissioner of health each case of cancer treated or seen by the person professionally. [Minn. Stat. §§ 144.671; 144.68 and Minnesota Rules part 4606.3303 and 4606.3304.] Data collected on individuals, including names and personal identifiers, are private and may only be used for specified public health purposes, including, but not limited to, promoting high quality research to provide better information for cancer control. [Minn. Stat. § 144.69.] Generally, an officer or employee of the commissioner of health may interview patients named in any such report only after the consent of the attending physician or surgeon is obtained. [*Id.*]

Remedies and Penalties.

Fines and penalties. Any disclosure other than those specifically provided for by the statute is considered to be a misdemeanor, punishable by a sentence of not more than 90 days or a maximum fine of \$1000, or both. [Minn. Stat. §§ 144.69; 609.02 (providing for penalties for misdemeanors).]

B. Communicable Diseases

See Public Health Data above.

C. Genetic Test Results

A health plan company may not, in connection with the offer, sale, or renewal of a health plan, require or request an individual or his blood relative to take a genetic test. Neither may the health plan make an inquiry as to whether the individual has taken or refused to take a genetic test, or what the results of any such test were. [Minn. Stat. § 72A.139.] A “genetic test” means a presymptomatic test of a person’s genes, gene products, or chromosomes for the purpose of determining the presence or absence of a gene or genes that exhibit abnormalities, defects, or deficiencies, including carrier status, that are known to be the cause of a disease or disorder, or are determined to be associated with a statistically increased risk of development of a disease or disorder. “Genetic test” does not include a cholesterol test or other test not conducted for the purpose of determining the presence or absence of a person’s gene or genes. [*Id.*]

Life insurance companies and fraternal benefit societies may require applicants for life insurance to take a genetic test. [*Id.*] They must, however, obtain an individual’s

written informed consent for genetic testing. Written informed consent must include, at a minimum, a description of the specific test to be performed; its purpose, potential uses, and limitations; the meaning of its results; and the right to confidential treatment of the results. [Minn. Stat. § 72A.139.]

D. Mental Health

During the time that a person is a patient in a hospital operated by a state agency or political subdivision under legal commitment, directory information (patient's name, date admitted, and general condition) is public data. [Minn. Stat. § 13.384.] The directory information becomes private information when the commitment ends. [*Id.*]

MISSISSIPPI

Mississippi statutorily grants a patient the right of access to his hospital records and to his records maintained by a mental health treatment facility. 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

Hospitals

Hospitals must provide reasonable access to the information contained in hospital records to patients (or their representatives) who show good cause and pay the reasonable charges for service. [Miss. Code Ann. § 41-9-65.] “Hospital records” include medical histories, records, reports, summaries, diagnoses and prognoses, records of treatment and medication, X-rays and other written or graphic data prepared, kept, made or maintained in hospitals pertaining to services and care provided to patients at the hospital. They do not include the hospital business records or records regarding nursing and physician audits and department evaluations. Hospital records are the property of the hospitals. [Miss. Code Ann. § 41-9-65.]

II. RESTRICTIONS ON DISCLOSURE

A. HMOs, Preferred Provider and Other Prepaid Benefit Plans

Generally, HMOs, preferred provider organizations and other prepaid benefit plans 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. [Miss. Code Ann. § 83-41-355.] Disclosure without the enrollee’s or applicant’s consent is allowed to the extent it is necessary to carry out the purposes of the statutory provisions governing these entities; 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 commissioner of insurance has a number of administrative remedies that are available, after proper procedure, for violations of these confidentiality provisions. He may issue an order directing an HMO to cease and desist from engaging in any act or practice in violation of this provision. [Miss. Code Ann. § 83-41-349.] If he elects not to issue a cease and desist order, or in the event of noncompliance with a cease and desist order, he may institute a proceeding to obtain

injunctive or other appropriate relief in the Chancery Court of the First Judicial District of Hinds County, Jackson, Mississippi. [*Id.*] The commissioner may also impose an administrative penalty between \$100 and \$1,000 per violation, or for substantial failures to comply may suspend or revoke a certificate of authority. [Miss. Code Ann. §§ 83-41-339; 83-41-349.]

B. Hospice

Information received by persons employed by or providing services to a hospice are privileged and confidential and may not be disclosed without the written consent of the patient, his guardian or his family, except to the patient or his family. [Miss. Code Ann. § 41-85-23.]

C. Insurers

1. Scope

The Mississippi 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 Mississippi Insurance Law) with respect to the disclosure of "nonpublic personal health information" of insurance consumers and customers. [Code Miss. R. 28 000 080 § 4(Q) (defining "licensee").] "Nonpublic personal health information" is individually identifiable health information that identifies an individual or there is a reasonable basis to believe that the information could be used to identify an individual. [Code Miss. R. 28 000 080 § 4(O) (defining "health information") and (U) (defining "nonpublic personal health information").] Insurance "consumers" are individuals who seek to 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. [Code Miss. R. 28 000 080 § 4(F), (I) & (J) (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. [Code Miss. R. 28 000 080 § 20.]

2. Requirements

The regulation generally prohibits the disclosure of any nonpublic personal health information about a consumer or customer without individual authorization. [Code Miss. R. 28 000 080 § 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. [Code Miss. R. 28 000 080 § 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. [Code Miss. R. 28 000 080 § 17.]

This regulation does not supercede existing Mississippi law related to medical records, health or insurance information privacy. [Code Miss. R. 28 000 080 § 21.]

3. Remedies and Penalties

Fines and Penalties. A violation of these rules is subject to the penalty provisions of Miss. Code Ann. §§ 83-5-29 to 83-5-51 (unfair methods of competition and unfair or deceptive acts or practices), and other applicable provisions of Mississippi insurance laws. [Code Miss. R. 28 000 080 § 24.]

D. Managed Care Plans

Under the Patient Protection Act, managed care plans must establish procedures to ensure compliance with all applicable state and federal laws designed to protect the confidentiality of medical records in order to be certified and recertified. [Miss. Code Ann. § 83-41-409.] This requirement applies to licensed insurance companies, hospital or medical service plans, HMOs, employer or employee organizations, and managed care contractors that operate a managed care plan. [*Id.* (defining “managed care plan” and “managed care entity”).]

E. Professional Counselors and Social Workers

Licensed professional counselors and licensed social workers may not disclose any information that was acquired from clients for the purposes of seeking professional services without that person’s written consent. [Miss. Code Ann. §§ 73-30-17 (professional counselors); 73-53-29 (social workers).] Disclosure without the patient’s consent may be made when the communication reveals the contemplation of a harmful act or when a patient brings a charge against a counselor for breach of privileged communication or any other charges. [*Id.*]

F. State Government

In General. Records designated by statute or common law as confidential or privileged that are in the possession of state or local agencies are exempt from the Mississippi Public Records Act. [Miss. Code Ann. § 25-61-11.] Records that are transferred to the Mississippi Department of Archives and History, including medical records, which are required by law to be closed to the public will not be made open to the public. [Miss. Code Ann. § 25-59-27.]

State Department of Health. The State Department of Health is authorized to receive a variety of data concerning different health conditions. The Department may not reveal the name of a patient with his case history without the patient’s prior authorization. [Miss. Code Ann. § 41-41-11.]

G. Utilization Review Agents

Utilization review agents may not disclose individual medical records or any other confidential medical information obtained in the course of performing utilization review activities without the patient’s authorization or a court order, except to the third party with whom the agent is acting on behalf of or under contract. [Miss. Code Ann. § 41-83-17.]

III. PRIVILEGES

A. General Medical Privilege

Mississippi has a broad health care provider-patient privilege, which prohibits a health care provider from disclosing in a legal proceeding communications with a patient or a person seeking professional advice. The privilege applies to communications made to a physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor by a patient or person seeking professional advice. [Miss. Code Ann. § 13-1-21.] Waiver of the medical privilege of patients regarding the release of medical information to health care personnel, the state board of health or local health departments is implied for the purposes of carrying out their official duties. [Miss. Code Ann. §§ 13-1-21; 41-41-11 (“waiver of privilege”).] A patient’s medical records may be disclosed to others when the patient has waived the medical privilege or has consented to such disclosure. [Miss. Code Ann. § 41-41-11.]

Remedies and Penalties

Fines and Penalties. Disclosures that are willful violations of the law are punishable as a misdemeanor. [Miss. Code Ann. § 13-1-21(3).] Furthermore, willful or reckless and wanton acts constituting violations may result in civil damages. [*Id.*]

B. Physician and Psychotherapist Privilege

Mississippi also recognizes a physician and psychotherapist-patient privilege under which a patient has a right to refuse to disclose and to prevent others from disclosing knowledge derived by these professionals by virtue of their professional relationship with the patient or confidential communications made for the purpose of diagnosis or treatment. [Miss. Rules of Evidence R. 503; Miss. Code Ann. § 73-31-29 (psychologist-patient privilege).] The privilege may be claimed by the patient, his guardian or conservator, or the personal representative if the patient is deceased. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege on behalf of the patient. [Miss. Rules of Evidence

□ Although the term “privilege” often refers to a right an individual may exercise to prohibit disclosure of information in legal or quasi-legal proceedings, the term as it is used in the Mississippi Code appears to prohibit disclosures in a broader range of circumstances.

R. 503.] An HMO is entitled to claim any statutory privileges against disclosure that the provider of the information is entitled to claim. [Miss. Code Ann. § 83-41-35.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Mississippi requires physicians, hospitals, clinical laboratories and others to submit information on persons born with birth defects to a central registry in order to identify risk factors and possible causes of birth defects, provide for the development of strategies to prevent birth defects, and provide for interview studies about the causes of birth defects. [Miss. Code Ann. § 41-21-205.] Data that is obtained directly from the medical records of a patient is for the confidential use of the Department of Health and to persons or public or private entities that the department determines are necessary to carry out the purposes of the registry. [*Id.*] Those who use the data are prohibited from divulging it in a manner that discloses the identity of an individual whose records have been reviewed. [*Id.*] Furthermore, identifying data is exempt from disclosure under the Mississippi Public Records Act. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person or entity who misuses the information provided to the registry is subject to a civil penalty of \$500 per instance. [Miss. Code Ann. § 41-21-205(10).]

B. Cancer

Mississippi maintains a central registry of cancer patients. [Miss. Code Ann. §§ 41-91-1; 41-91-5.] Data that is obtained directly from the medical records of a patient is for the confidential use of the Department of Health and to persons or public or private entities that the department determines are necessary to carry out the purposes of the registry. [Miss. Code Ann. §§ 41-91-5; 41-91-11.] Those who use the data are prohibited from divulging it in a manner that discloses the identity of an individual whose records have been reviewed. [*Id.*] Furthermore, identifying data is exempt from disclosure under the Mississippi Public Records Act. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person or entity that misuses the information provided to the registry is subject to a civil penalty of \$50 per instance. [Miss. Code Ann. § 41-91-15.]

C. Communicable Diseases including Sexually Transmitted Diseases

The Mississippi State Board of Health requires the reporting, monitoring and establishment of preventive procedures for communicable diseases that are a danger to health. [Miss. Code Ann. § 41-23-1.] Persons who receive notification of an infectious condition of an individual under this subsection must maintain the confidentiality and privilege, may not reveal the information to others, and may take only those actions necessary to protect the health of the infected person or other

persons where there is a foreseeable, real or probable risk of transmission of the disease. [*Id.*]

Testing and treatment of sexually transmitted diseases by county health departments must be kept confidential. [Miss. Code Ann. § 41-23-30.]

A hospital or physician is permitted to conduct appropriate tests for infectious diseases without specific consent if a physician determines that the test is necessary to provide appropriate care or treatment to the subject of the test or to protect the health and safety of other patients or persons providing treatment. [Miss. Code Ann. § 41-41-16.] The subject of the test must be informed of the test that is to be conducted in advance. [Miss. Code Ann. § 41-41-16.]

D. HIV

Required reports of HIV carrier status are confidential and are exempt from the provisions of the Mississippi Public Records Act. [Miss. Code Ann. § 41-34-7.] See also the discussion of “Communicable Diseases” above. [See Code Miss. R. 12 000 028 for designated reportable communicable diseases, including AIDS/HIV infection.]

A hospital or physician is permitted to conduct an AIDS/HIV test or appropriate tests for any other infectious diseases without specific consent if a physician determines that the test is necessary to provide appropriate care or treatment to the subject of the test or to protect the health and safety of other patients or persons providing treatment. [Miss. Code Ann. § 41-41-16.] The subject of the test must be informed in advance of the test that is to be conducted. [Miss. Code Ann. § 41-41-16.]

E. Mentally Ill

Patient Access. Unless disclosure is determined to be detrimental to the physical or mental health of the patient and is so noted in his record, a patient at a hospital, community mental health center, or other institution qualified to provide care and treatment for mentally ill, mentally retarded or chemically dependent persons has the right of access to his medical records. [Miss. Code Ann. §§ 41-21-61 (defining “treatment facility”); 41-21-102(7).]

Disclosure. Hospital records of and information pertaining to patients being treated for mental illness or mental retardation are confidential and may only be released upon written authorization of the patient. [Miss. Code Ann. § 41-21-97.] Disclosure without the patient’s authorization is allowed: upon court order; when necessary for the continued treatment of the patient; when necessary to determine eligibility for benefits, compliance with statutory reporting requirements or other lawful purpose; and when the patient has threatened imminent harm to an identifiable victim. [*Id.*] Disclosures regarding imminent harm may only be made to the potential victim(s), a law enforcement agency, or parent or guardian of a minor who is identified as a potential victim. [*Id.*]

F. Substance Abuse

Under the Comprehensive Alcoholism and Alcohol Abuse Prevention, Control and Treatment Act, the records of services by approved alcohol abuse treatment facilities including detoxification centers, licensed hospitals, community or regional mental health facilities, clinics or programs, halfway houses, and rehabilitation centers, whether in-patient, intermediate or outpatient, are confidential. [Miss. Code Ann. §§ 41-30-1; 41-30-3; 41-30-33.] Generally, no part of the records may be disclosed without the consent of the person to whom it pertains. [*Id.*] Disclosure without the subject's consent may be made: to treatment personnel for use in connection with treatment; to counsel representing the person in commitment proceedings; and upon court order when good cause is shown. [*Id.*] Additionally, the records of those committed to the Mississippi State Hospital or East Mississippi State Hospital for treatment, care or rehabilitation are confidential and may not be disclosed except by patient consent or by court order. [Miss. Code Ann. § 41-31-17.]

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MISSOURI

Missouri statutorily grants a patient the right of access to his medical records that are maintained by health care providers, including physicians and hospitals. 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

Health Care Providers, Including Practitioners and Hospitals

Upon a patient's written request, physicians, chiropractors, hospitals, dentists and other duly licensed practitioners ("providers") must furnish to the patient a copy of his health history and treatment rendered. [Mo. Rev. Stat. § 191.227.] The copies must be furnished within a reasonable time. They need not be furnished until the patient has paid a handling fee of \$15 plus a fee of 35¢ per page for photocopies of documents. [Id.] For items that cannot be copied on a photocopy machine (such as x-rays), the provider may charge for the reasonable cost of duplication. [Id.] A patient's right is limited to access consistent with the patient's condition and sound therapeutic treatment as determined by the provider. [Id.]

II. RESTRICTIONS ON DISCLOSURE

A. HMOs

Generally, health maintenance organizations (HMOs) may not disclose any data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant without express consent of that person. [Mo. Rev. Stat. § 354.515.] Exceptions to this general rule allow disclosures *without* the person's consent to carry out the purposes of the statutory provisions governing HMOs; in response to a claim or litigation between an enrollee/applicant and the HMO; and pursuant to statute or court order for the production or discovery of evidence. [Id.]

Remedies and Penalties

Fines and Penalties. The director of the department of insurance may issue a cease and desist order to an HMO violating this provision. [Mo. Rev. Stat. § 354.500.] In the case where a HMO fails to substantially comply with this provision, it may have its certificate of authority suspended, revoked or subject to conditions or restrictions. [Mo. Rev. Stat. § 354.470.]

B. Pharmacies

Records maintained by a pharmacy that contain medical or drug information on patients or their care are confidential. [Mo. Rev. Stat. § 338.100.] Upon request, a copy of the original prescription must be furnished to the prescribing physician and may be furnished to the patient. [*Id.*]

Remedies and Penalties

Fines and Penalties. A licensed pharmacist who violates these disclosure provisions is guilty of a misdemeanor, punishable by fine up to \$1,000, imprisonment of up to one year, or both. [Mo. Rev. Stat. §§ 338.190; 557.011; 560.016; 558.011 (specifying punishment for misdemeanors).]

C. Social Workers and Marital and Family Therapists

Social workers and marital and family therapists are prohibited from disclosing any information acquired from persons consulting them in their professional capacity without the written consent of the client. [Mo. Rev. Stat. §§ 337.636 (social worker); 337.736 (marital and family therapist).] Disclosure without the consent of the client may be made in the following circumstances:

- When the information pertains to a criminal act;
- When their client is a minor and the information indicates that the child was the victim of a crime;
- When the person brings charges against the licensee;
- When the counselor or social worker is called upon to testify in any court or administrative hearings concerning matters of adoption, adult abuse, child abuse, child neglect or other matters pertaining to the welfare of clients; or
- When the social worker or counselor is collaborating or consulting with professional colleagues or an administrative superior on behalf of the client.

[*Id.* See also “Privileges,” Section III below.]

Remedies and Penalties

Fines and Penalties. A professional who discloses privileged communications in violation of these provisions is guilty of a misdemeanor, punishable by fine, imprisonment, or both. [Mo. Rev. Stat. §§ 337.633 (social workers); 337.733 (marital and family therapists); 560.016; 557.011; 558.011 (specifying punishment for misdemeanors).] Additionally, disclosing privileged information in violation of the law is grounds for discipline from the appropriate licensing board or agency. [Mo. Rev. Stat. §§ 337.730 (marital and family counselor); 337.630 (social workers).]

D. State Government

1. Charge Data Submitted by Hospitals

Hospitals and ambulatory surgical centers must provide the department of public health and welfare with data concerning patients, including date of birth, sex, race, diagnoses, principal procedures, total billed charges, and other information. [Mo. Rev. Stat. § 192.667 (defining “health care provider” and “patient abstract data”).] The information obtained by the department is not public information and may not be released in a form that could be used to identify a patient. [*Id.*]

Remedies and Penalties

Right to Sue. A person whose rights under these provisions have been violated may bring a civil action for equitable relief, actual damages and reasonable attorney's fees and appropriate court costs. [*Id.*]

Fines and Penalties. If the violation results from willful or grossly negligent conduct, the court may also award damages of up to \$5,000 in addition to any economic loss. [*Id.*] Disclosure of this identifying information is a misdemeanor, punishable by fine, imprisonment or both. [Mo. Rev. Stat. §§ 192.667; 560.016; 557.011; 558.011 (specifying punishment for misdemeanors).]

2. Epidemiological Studies

The department of health, for purposes of conducting epidemiological studies, is authorized to receive information from patient medical records. [Mo. Rev. Stat. § 192.067.] The information is confidential except that it may be shared with other public health authorities and coinvestigators of a health study if they abide by the same confidentiality restrictions required of the department. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any department of health employee, public health authority or co-investigator of a study who knowingly releases information that violates the provisions of this section shall be guilty of a Class A misdemeanor, punishable by fine, imprisonment or both. [Mo. Rev. Stat. §§ 192.067; 560.016; 557.011; 558.011 (specifying punishment for misdemeanors).]

III. PRIVILEGES

Missouri recognizes a number of health care professional-patient privileges that allow a patient in a legal proceeding to prevent disclosure of privileged communications that the professional acquired in the course of professional services rendered. [Mo. Rev. Stat. §§ 337.055 (psychologist); 337.540 (professional counselor); 337.636 (social worker); 337.736 (marital and family counselor); 491.060 (physicians, licensed psychologist and dentist).] An HMO is entitled to claim any statutory privilege against disclosure that the provider who furnished the information is entitled to claim. [*Id.*] But the HMO may not assert any such claim or privilege against disclosure against the director of the department of insurance. [Mo. Rev. Stat. § 354.515.]

Remedies and Penalties

Fines and Penalties. A professional who discloses privileged communications in violation of these provisions is guilty of a misdemeanor, punishable by fine, imprisonment, or both. [Mo. Rev. Stat. §§ 337.065 (psychologists); 337.530 (professional counselors); 337.633 (social workers); 337.733 (marital and family therapists); 560.016; 557.011; 558.011 (specifying punishment for misdemeanors).] Additionally, disclosure of privileged information in violation of the law is grounds for discipline from the appropriate licensing board or agency. [Mo. Rev. Stat. §§ 337.035 sub. 2(13) (psychologist); 337.730 (marital and family counselor); 337.525 (professional counselor); 337.630 (social workers).]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Birth Defects

Missouri maintains a central registry to collect and store data on the causes, treatment, prevention and cure of genetic diseases including birth defects. [Mo. Rev. Stat. § 191.323.] Identifying information reported to the Missouri board of health and other health care agencies is confidential. [*Id.*]

B. Cancer

The Missouri department of health maintains a cancer information reporting system, under which physicians and others must report diagnoses of cancer. [Mo. Rev. Stat. §§ 192.650; 192.653.] The department generally may not disclose identifying information without the patient's written consent. [Mo. Rev. Stat. § 192.655.] The department may request a patient to consent to the release of his medical information to a cancer researcher only upon a showing by that researcher that obtaining the identities of certain patients is necessary for his cancer research and that the research is worthwhile. [*Id.*] Disclosure without the patient's consent is permitted to a cancer registry that is maintained by another governmental entity that agrees to protect the patient's identity. [*Id.*]

Remedies and Penalties

Fines and Penalties. A person or organization that divulges confidential information in violation of these provisions is guilty of an infraction, punishable by a fine of up to \$200. [Mo. Rev. Stat. §§ 192.657; 560.016 (specifying punishments for infractions).] If the violator has derived gain from the violation he may receive a fine that does not exceed double the amount of financial gain, up to \$20,000. [Mo. Rev. Stat. § 560.016.]

C. Communicable Diseases

At the request of any first responders or Good Samaritans who attended or transported a patient, a licensed facility must notify such first responder or Good Samaritan if the department has reason to believe exposure has occurred which may present a significant risk of a communicable disease. [Mo. Rev. Stat. § 192.802.]

D. Genetics Test Results

Missouri restricts the manner in which genetic tests and information may be required, used and disclosed. [See Mo. Rev. Stat. §§ 375.1300 through 1309.] For purposes of these statutory provisions, a genetic test is a laboratory test of DNA or RNA used to identify the presence or absence of inherited alterations in the DNA or RNA that causes predisposition to disease or illness. [Mo. Rev. Stat. § 375.1300.] "Genetic information" is defined as the results of a genetic test. Genetic information does not include family history, the results of routine physical measurements, or the results of chemical, blood, urine analysis, or the results of tests for drugs or the presence of the human immunodeficiency virus, or from results of any other tests commonly accepted in clinical practice at the time. [*Id.*]

1. In General

A person who, in the ordinary course of business, practice of a profession or rendering of a service, creates, stores, receives or furnishes genetic information, must treat the

genetic information as a confidential medical record. [Mo. Rev. Stat. § 375.1309.] In general, genetic information may not be disclosed without the written authorization of the person to whom such information pertains. [*Id.*] Disclosure of identifying genetic information may be made without authorization: for health research conducted in accordance with the provisions of the federal common rule protecting the rights and welfare of research participants (45 CFR 46 and 21 CFR 50 and 56); pursuant to legal or regulatory process; or for purposes of body identification. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any person who discloses confidential genetic information in violation of this provision is subject to a fine not more than \$500. [Mo. Rev. Stat. § 375.1309.]

2. Employers

Employers may not discriminate against, or restrict any right or benefit otherwise due or available to an employee or prospective employee on the basis of a genetic test. [Mo. Rev. Stat. § 375.1306.] This general rule does not apply to a number of circumstances including: underwriting in connection with individual or group life, disability income or long-term care insurance; any action required or permissible by law or regulation; action taken with the written permission of an employee or prospective employee; or the use of genetic information when such information is directly related to a person's ability to perform assigned job responsibilities. [*Id.*]

Remedies and Penalties

Fines and Penalties. Any person who violates the provisions of this section will be fined not more than \$500 for each violation. [Mo. Rev. Stat. § 375.1306.]

3. Insurers

Insurers may not require or request a person or blood relative of such person to take a genetic test to determine eligibility for coverage or establish premiums. [Mo. Rev. Stat. § 375.1303.]

Remedies and Penalties

Fines and Penalties. A violation of these provisions is considered to be an unfair trade practice and is subject to the rules and regulations promulgated by the director of the department of insurance. [Mo. Rev. Stat. §§ 375.1303 and 375.930 to 375.948 (relating to unfair trade practices).]

E. HIV/AIDS

1. In General

Any person knowing, holding or maintaining information concerning an individual's HIV infection status or the results of any individual's HIV testing must keep that information confidential and generally may disclose it only with the written authorization of the test subject. [Mo. Rev. Stat. § 191.656.] These restrictions apply to private individuals and private and public bodies (both political and corporate), partnerships, trusts, and unincorporated associations, state agencies, departments and subdivisions and their officers, directors, agents, or employees. [Mo. Rev. Stat. §§ 191.656 and 191.650 (defining "person").]

“Disclose” generally means to disclose, release, transfer, disseminate or otherwise communicate all or any part of any record orally, in writing, or by electronic means to any person or entity. [Mo. Rev. Stat. § 191.650 (defining “disclose”).] The term does not encompass entering the results of an HIV test into the medical record if the medical record is given the same confidentiality protections afforded other medical records. [Mo. Rev. Stat. § 191.656(4).]

There are a number of exceptions under which disclosure of HIV information may be made *without* the individual’s authorization including to: public employees and agencies who need to know to perform their public duties; non-public employees who are entrusted with the regular care of those under the care and custody of a state agency, including but not limited to operators of day care facilities, group homes and adoptive or foster parents; to the spouse of the subject of the test result; to the victim of any sexual offense; pursuant to a court order; and to others. [Mo. Rev. Stat. § 191.656.] There are detailed procedures and standards that a court must adhere to in order to issue an order for the disclosure of HIV related information. [Mo. Rev. Stat. § 191.657.]

Additionally, there are circumstances under which some persons and organizations are required to release HIV test results. For example physicians, hospitals, or other persons authorized by the department of health who perform or conduct HIV sampling must report to the department of health the identity of any individual confirmed to be infected with HIV. [Mo. Rev. Stat. § 191.653.]

Public employees and agencies that receive HIV testing results generally may not further disclose them. [Mo. Rev. Stat. § 191.656.]

Remedies and Penalties

Right to Sue. Any individual aggrieved by a violation of this section may bring a civil action for damages and may collect actual or liquidated damages; court costs and reasonable attorney’s fees; and such other relief, including injunctive relief, as the court may deem appropriate. [Mo. Rev. Stat. § 191.656.] Where the disclosure was willful, intentional or reckless the court may also assess exemplary damages. [*Id.*] A provider who made a good faith report to the department of health, cooperated with such an investigation or participated in any judicial proceeding is immune from civil liability. [*Id.*]

2. Insurers

An insurance applicant’s HIV test results may not be disclosed by an insurer, health services corporation or HMO, unless the applicant specifically authorizes the disclosure in writing. [Mo. Rev. Stat. § 191.671.] An insurer, however, *must* disclose positive test results to a physician designated by the individual. [*Id.*] If the individual fails to designate a physician to receive such test results, the insurer must disclose the identity of the individual testing positive to the department of health. In either event, the disclosure must be made in a manner that ensures confidentiality. [*Id.*]

Remedies and Penalties

Fines and Penalties. A violation of these provisions is considered to be an unfair trade practice and is subject to the rules and regulations promulgated by the director of the

department of insurance. [Mo. Rev. Stat. §§ 191.671 and 375.930 to 375.948 (relating to unfair trade practices).]

F. Mental Health

Patient Access. A person who is admitted to a residential facility or a day program or who is admitted on a voluntary or involuntary basis to any mental health facility or mental health program where people are civilly detained pursuant to statute has the right of access to his mental and medical records. [Mo. Rev. Stat. § 630.110.]

“Residential facility” and “day program” are defined as premises providing prevention, evaluation, treatment, habilitation or rehabilitation for those affected by mental illness, mental retardation, developmental disabilities or alcohol or drug abuse. [Mo. Rev. Stat. § 630.005(7); (31).] Access may be limited to the extent that the head of the residential facility or day program determines that it is inconsistent with the person’s therapeutic care, treatment, habilitation or rehabilitation, the safety of other facility or program clients, and public safety. [Mo. Rev. Stat. § 630.110.]

Restrictions on Disclosure. Generally, the records of mental health facilities and mental health programs are confidential and may not be disclosed without the patient’s authorization. [Mo. Rev. Stat. § 630.140(1); (8).] This restriction applies to day and residential programs providing prevention, evaluation, treatment, habilitation or rehabilitation for those affected by mental illness, mental retardation, developmental disabilities or alcohol or drug abuse, including those in which people may be civilly detained pursuant to statute. [Mo. Rev. Stat. §§ 630.005(7) and (31); 630.140.] Information concerning medication given, dosage levels and the individual ordering the medication *must* be given, upon request, to: the parent of a minor patient; legal guardian of a patient; an attorney; or a personal physician as authorized by the patient; law enforcement officers (restricted to information about patients committed pursuant to law); and others. [Mo. Rev. Stat. § 630.140.]

Mental health facilities and mental health programs may disclose confidential information without the patient’s consent to: persons responsible for providing health care services to the patient; research personnel (provided, that such personnel will not identify the patient); to the extent necessary for claims of aid, insurance, court orders and law enforcement; and others. [*Id.*]

A residential facility or day program operated, funded or licensed by the department of mental health may release to a patient’s or resident’s next of kin, attorney, guardian or conservator the fact that the person is presently a patient, resident or client in the facility or program, or that the person is seriously physically ill. [Mo. Rev. Stat. § 630.145.] In the case of a voluntary patient/resident, the facility or program must notify any person who may be responsible for the costs incurred by such patient or resident of the admittance of such patient or resident. [*Id.*]

G. Substance Abuse

The records of a pregnant woman receiving substance abuse treatment must be kept confidential. [Mo. Rev. Stat. § 191.731.]

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MONTANA

Montana statutorily grants a patient the right of access to his medical records that are maintained by a health care provider or an insurance entity. The state also restricts the disclosures these entities may make of confidential medical information. Additionally, there are restrictions on disclosure contained in statutes governing other specific entities or medical conditions.

I. PATIENT ACCESS

A. Health Care Providers

The Uniform Health Care Information Act [Mont. Code Ann. § 50-16-501 through 50-16-553] governs a patient's right of access to his medical records that are maintained by a health care provider.

1. Scope

The access provisions of the Uniform Health Care Information Act apply to any "health care provider," a term defined as any person (including individuals, corporations, government agencies and others) who is licensed, certified or otherwise authorized by Montana law to provide health care, such as physicians and psychologists. [Mont. Code Ann. §§ 50-16-541; 50-16-504(7) (defining "health care provider" and "persons").] Health care information in the possession of a local health board, local health officer, or the health department because a health care provider employed by any of these entities provided health care to a patient, either individually or at a public health center or other publicly owned health care facility, is subject to the Uniform Health Care Information Act and not subject to the Government Health Care Information Act. [Mont. Code Ann. § 50-16-606.]

Pharmacists are not subject to the access provisions of the Uniform Health Care Information Act. [See Mont. Code Ann. §§ 50-16-541; 50-16-504(7) (defining "health care provider").]

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 includes any record of disclosures of health care information. [Mont. Code Ann. §§ 50-16-541; 50-16-504(6) (defining "health care information").]

The persons who are entitled to access under these provisions include any "patient," a term defined as an individual who receives or has received health care, including deceased individuals. [See Mont. Code Ann. § 50-16-504(10) (defining "patient").] A person authorized to consent to health care for another may exercise the rights of that person to the extent necessary to effectuate the terms or purposes of the grant of authority. [Mont. Code Ann. § 50-16-521.] Similarly, a personal representative of a deceased patient may exercise all of the deceased patient's rights. [Mont. Code Ann. §

50-16-522.] If there is no personal representative, a deceased patient's rights under this part may be exercised by the surviving spouse, a parent, an adult child, an adult sibling, or any other person who is authorized by law to act for him. [*Id.*]

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. [Mont. Code Ann. § 50-16-521.] Minors in Montana may consent to health care in a limited number of circumstances including, but not limited to, health care for the prevention, diagnosis, and treatment of: pregnancy; any reportable communicable disease, including a sexually transmitted disease; or drug and substance abuse, including alcohol. [See Mont. Code Ann. § 41-1-402.]

2. Requirements for Requesting and Providing Access

Within 10 days of receiving a written request from a patient to examine or copy all or part of the patient's recorded health care information, a health care provider, must do one of the following:

- make the information available to the patient for examination, without charge, during regular business hours or 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 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.

[Mont. Code Ann. § 50-16-541.]

Upon request, the health care provider must provide an explanation of any code or abbreviation used in the records upon the patient's request. [Mont. Code Ann. § 50-16-541.]

Fees. The provider may require the patient to pay a reasonable fee (not to exceed his cost) for copies and may require that the fees be paid in advance. [Mont. Code Ann. § 50-16-541.] The Act establishes 50¢ per page as the maximum reasonable fee allowed for paper or photocopies. [Mont. Code Ann. § 50-16-540.] Additionally, the provider may include an administrative fee of a maximum of \$15 for searching and handling recorded health care information. [*Id.*]

Denial of Access. A provider may deny a patient access to information in a variety of circumstances, including, but not limited to, 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 could reasonably be expected to lead to the patient's identification of an 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 cause danger to the life or safety of any individual;
- the health care information is data, such as written reports and notes, that is compiled and used solely for utilization review, peer review, medical ethics review, quality assurance, or quality improvement; or
- the health care provider obtained the information from a person other than the patient.

[Mont. Code Ann. § 50-16-542(1)(a)-(g).]

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. [Mont. Code Ann. § 50-16-542(3).]

Additionally, when a health care provider denies access, in whole or in part, to a patient, he must permit examination and copying of the information by the patient's spouse, adult child, parent or guardian, or another physician designated by the patient. [Mont. Code Ann. § 50-16-542(4).]

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. [Mont. Code Ann. § 50-16-543.] Within 10 days of receiving the request the provider must do one of the following:

- make the requested correction or amendment and inform the patient of the action and of the patient's right to have the correction or amendment sent to previous recipients of the health care information in question;
- inform the patient if the record no longer exists or cannot be found;
- if the health care provider does not maintain the record, inform the patient and provide him with 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 correction or amendment request, inform the patient and specify in writing the earliest date, not later than 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, the reason for the refusal, and the patient's right to add a statement of disagreement and to have that statement sent to previous recipients of the disputed health care information.

[Mont. Code Anno., § 50-16-543.]

The health care provider must add the amending information as part of the health care record. [Mont. Code Anno., § 50-16-544.] 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 contested entry to indicate that the patient disputes it and indicate where in the record the statement of disagreement is located. [*Id.*]

Upon request, the provider must take reasonable steps to provide copies of the corrected or amended information or of the statement of disagreement to all persons designated by the patient and identified in the health care information as having examined or received copies of the information at issue. The health care provider may charge the patient a reasonable fee, not exceeding the statutory copying fee (see "Fees" above), for distributing corrected or amended information or the statement of disagreement, unless the provider's error necessitated the correction or amendment. [Mont. Code Ann. § 50-16-545.]

3. Notice Requirements

A health care provider who operates a health care facility must post a notice, advising patients of their rights to view and correct their records. [Mont. Code Ann. § 50-16-512.] Upon request, the provider must furnish a copy of the notice to the patient. [*Id.*]

4. Remedies and Penalties

Right to Sue. A person who was improperly denied access to his records may maintain a civil suit. [Mont. Code Ann. § 50-16-553.] In such a suit the burden of proof is on the health care provider to establish that the information was properly withheld. [*Id.*] If the patient prevails, he may be awarded equitable relief as well as damages for pecuniary losses. [*Id.*] In the case of willful or grossly negligent conduct, in addition to damages for pecuniary losses, the aggrieved party may recover up to a maximum of \$5,000. [*Id.*]

The attorney general and appropriate county attorney are also authorized to maintain a civil action to enforce these provisions. [Mont. Code Ann. § 50-16-552.] The same relief is available. [*Id.*]

B. Insurance Entities, Including HMOs

1. Scope

The access provisions of the Montana Insurance Information and Privacy Protection Act apply to insurance institutions (including HMOs and health service corporations), insurance producers and insurance-support organizations (referred to in this summary as "insurance entities"). [Mont. Code Ann. §§ 33-19-103 (detailing entities covered); 33-19-104(11) (defining "insurance institutions"); 33-19-301.]

The access provisions cover recorded "personal information," including "medical record information," which is gathered in connection with an insurance transaction. [Mont. Code Ann. §§ 33-19-104(21) (defining "personal information") and 33-19-301.] "Medical record information" is personal information that (1) relates to an individual's physical or mental condition, medical history, medical claims history, or medical

treatment; and (2) is obtained from a medical professional, medical care institution, from the individual, or from the individual's spouse, parent or legal guardian. [Mont. Code Ann. § 33-19-104(19) (defining "medical record information").] The Act does not apply to medical information that has had all personal identifiers removed. [Mont. Code Ann. § 33-19-104(21).]

The access provisions only apply to information that is reasonably locatable and retrievable by the insurance institution. [Mont. Code Ann. § 33-19-301.]

With respect to health insurance, the rights granted by the Act extend to Montana 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. [Mont. Code Ann. § 33-19-103.]

2. 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 for access and proper identification from an individual. [Mont. Code Ann. § 33-19-301.] If the personal information is in coded form, an accurate translation in plain language must be provided in writing. [Mont. Code Ann. § 33-19-301(1)(b).]

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. [Mont. Code Ann. § 33-19-301(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 and licensed to provide medical care with respect to the condition to which the information relates, at the option of the insurance entity. [Mont. Code Ann. § 33-19-301(3).]

Fees. The insurance entity may impose a reasonable fee to cover copying costs. [Mont. Code Ann. § 33-19-301(4).]

In its response to the request for access, the insurance entity must also provide the individual with a summary of the procedures he may use to request correction, amendment, or deletion of recorded personal information. [Mont. Code Ann. § 33-19-301(1).]

Right to Amend. Within 30 business days from the date of receipt of a written request to correct, amend, or delete any recorded personal information in its possession about the individual, an insurance entity 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. [Mont. Code Ann. § 33-10-302.]

If the insurance entity takes the requested action, it must so notify the individual in writing. If the insurance entity refuses to make the requested change, the individual may file with the insurance entity a concise statement setting forth what the individual thinks is the correct, relevant, or fair information; and a concise statement of the reasons why the individual disagrees with the insurance entity's refusal to make the requested change.

The insurance entity must furnish any correction, amendment, fact of deletion, or statement of disagreement (where the insurer has refused to make the change) to:

- any person specifically designated by the individual who may have, within the preceding 2 years, received recorded personal information about the individual;
- to any insurance support organization that has systematically received recorded personal information from the insurance institution within the preceding 7 years; and
- to the insurance-support organization that furnished the personal information that has been corrected, amended, or deleted. [Mont. Code Ann. § 33-10-302.]

If the insurance entity has refused to take the requested action, it must also file the statement of disagreement with the disputed personal information and provide a means by which anyone reviewing the disputed personal information will be made aware of the individual's statement and have access to it. Additionally, in any subsequent disclosure by the insurance entity of the information that is the subject of disagreement, the insurance entity must clearly identify the matter in dispute and provide the individual's statement along with the recorded personal information being disclosed. [*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. [Mont. Code Ann. § 33-19-407.] The court may award costs and reasonable attorney's fees to the prevailing party. [*Id.*]

Fines and Penalties. The insurance commissioner may review a refusal by an insurance entity to correct, amend, or delete recorded personal information in order to determine if the information is correct. The commissioner may order the insurance entity to correct, amend, or delete information that the commissioner determines is erroneous in an individual's recorded information file. [Mont. Code Ann. § 33-10-302.]

Additionally, the Insurance Commissioner may hold hearings and, upon the finding of a violation, impose a fine not to exceed \$25,000 (\$5,000 per violation in the case of insurance producers or adjusters). [Mont. Code Ann. §§ 33-19-405; 33-1-317.]

II. RESTRICTIONS ON DISCLOSURES

A. Health Care Providers

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. [Mont. Code Ann. 50-16-525.] For purposes of these provisions a “health care provider” is defined as any person (including individuals, corporations, government agencies and others) who is licensed, certified or otherwise authorized by Montana law to provide health care, such as physicians and psychologists. [Mont. Code Ann. § 50-16-504(7) (defining “health care provider” and “persons”).] Pharmacists are *not* covered by the disclosure provisions of the Uniform Health Care Information Act. [See Mont. Code Ann. §§ 50-16-541; 50-16-504(7) (defining “health care provider”).]

The Act governs 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. [Mont. Code Ann. §§ 50-16-525; 50-16-504(6) (defining “health care information”).]

The persons who may exercise rights under these provisions include any “patient,” a term defined as an individual who receives or has received health care, including deceased individuals. [See Mont. Code Ann. § 50-16-504(10) (defining “patient”).] A person authorized to consent to health care for another may exercise the rights of that person to the extent necessary to effectuate the terms or purposes of the grant of authority. [Mont. Code Ann. § 50-16-521.] Similarly, a personal representative of a deceased patient may exercise all of the deceased patient’s rights. [Mont. Code Ann. § 50-16-522.] If there is no personal representative, a deceased patient’s rights under this part may be exercised by the surviving spouse, a parent, an adult child, an adult sibling, or any other person who is authorized by law to act for him. [*Id.*]

If the patient is a minor and is authorized by statute to consent to health care without parental consent, only the minor may exclusively exercise the rights of a patient under these provisions as to information pertaining to health care to which the minor lawfully consented. [Mont. Code Ann. § 50-16-521.] Minors in Montana may consent to health care in a limited number of circumstances including, but not limited to, health care for the prevention, diagnosis, and treatment of: pregnancy; any reportable communicable disease, including a sexually transmitted disease; or drug and substance abuse, including alcohol. [See Mont. Code Ann. § 41-1-402.]

2. Disclosure 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. [Mont. Code Ann. § 50-16-525.] In order to be valid, a disclosure authorization must be dated and signed by the patient, identify the nature of the information to be disclosed and identify the person to whom disclosure is to be made. [Mont. Code Ann. § 50-16-526.] An authorization encompasses existing health care information and, with the exception of authorizations for disclosure to third party payors, information derived from health care received no more than 6 months after the authorization was signed. [Mont. Code Ann. § 50-16-527.] Generally, an authorization to disclose becomes invalid after the expiration date contained in the authorization, which may not exceed 30 months. If the authorization does not contain an expiration date, it expires 6 months after it is signed. [*Id.*] Authorizations to disclose for workers' compensation purposes are subject to different rules. [*Id.*]

A patient may revoke a disclosure authorization to a health care provider at any time unless disclosure is required to effectuate payments for health care that has been provided or other substantial action has been taken in reliance on the authorization. [Mont. Code Ann. § 50-16-528.]

There are a number of circumstances where disclosure *without* the patient's authorization is permitted to the extent the recipient needs to know the information including:

- To a person who is providing health care to the patient;
- To immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, if made in accordance with the laws of the state and good medical or other professional practice, unless the patient has instructed the health care provider not to make the disclosure;
- For use in a research project that an institutional review board has determined:
 - is of sufficient importance to outweigh the intrusion into the privacy of the patient that would result from the disclosure;
 - is impracticable without the use or disclosure of the health care information in individually identifiable form;
 - contains reasonable safeguards to protect the information from improper disclosure;
 - contains reasonable safeguards to protect against directly or indirectly identifying any patient in any report of the research project; and
 - contains procedures to remove or destroy at the earliest opportunity, consistent with the purposes of the project, information that would enable the patient to be identified, unless an institutional review board authorizes retention of identifying information for purposes of another research project;
- To any person who requires health care information for health care education, or to provide planning, quality assurance, peer review or administrative, legal, financial or actuarial services to the health care provider provided the health care provider reasonably believes that the person will not use or disclose the health care information for any other purpose and take appropriate steps to protect the health care information; and

- Others.

[Mont. Code Ann. § 50-16-529.]

There are also a number of circumstances where providers are permitted to disclose health care information without the patient's authorization that are not subject to the "need to know" standard. These circumstances include disclosures:

- To directory information, unless the patient has instructed the health care provider not to make the disclosure;
- To federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information or when needed to protect the public health;
- To federal, state, or local law enforcement authorities to the extent required by law;
- To the state medical examiner or a county coroner for use in determining cause of death;
- Pursuant to compulsory process in accordance with the detailed statutory procedures for such disclosures (Mont. Code Ann. §§ 50-16-535 and 50-16-536); and
- Others.

[Mont. Code Ann. § 50-16-530.]

3. Notice Requirements

A health care provider who operates a health care facility must post a notice, generally advising patients of their disclosure policies. [Mont. Code Ann. § 50-16-512.] Upon request, the provider must furnish a copy of the notice to the patient. [*Id.*]

4. Other Requirements

A health care provider must have safeguards for the security of all health care information it maintains. [Mont. Code Ann. § 50-16-511.]

5. Remedies and Penalties

Right to Sue. A person whose health information was disclosed in violation of the statute may maintain a civil suit and may be awarded equitable relief and damages for pecuniary losses. [Mont. Code Ann. § 50-16-553.] In the case of willful or grossly negligent conduct, an additional maximum amount of \$5,000 may be awarded. [*Id.*]

Fines and Penalties. A person who by bribery, theft or misrepresentation examines or obtains, in violation of these provisions, health care information maintained by a health care provider is guilty of a misdemeanor and upon conviction is punishable by a fine not exceeding \$10,000, imprisonment for a period not exceeding 1 year, or both. [Mont. Code Ann. § 50-16-551.] A person who, knowing that a disclosure authorization is false, purposely presents the certification or disclosure authorization to a health care provider is guilty of a misdemeanor and upon conviction is punishable by a fine not exceeding \$10,000, imprisonment for a period not exceeding 1 year, or both. [*Id.*]

B. HMOs

In addition to the Insurance Information and Privacy Protection Act (see discussion under “Insurers” below) the Montana Code contains provisions that are specifically applicable just to 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. [Mont. Code Ann. § 33-31-113.] There are several exceptions to this general rule. Information may be disclosed to the extent necessary to carry out the purposes of the statutes governing HMOs. Additionally, an HMO may disclose a person’s medical information pursuant to a court order for the discovery or production of evidence, or to defend itself against claims or litigation by that person. An HMO is entitled to claim any statutory privilege against such disclosure that the provider who furnished such information to the HMO could claim. [*Id.*]

Remedies and Penalties

Fines and Penalties. There are a number of administrative remedies available for violations of these provisions. The insurance commissioner may meet informally with an HMO to arrive at an adequate and effective means of correcting or preventing a violation. [Mont. Code Ann. § 33-31-405.] Alternatively, the commissioner may issue an order directing an HMO to cease and desist from engaging in an act or practice in violation of this chapter, the issuance of which entitles the HMO to a hearing. [Mont. Code Ann. § 33-31-405.] In the case where an HMO fails to substantially comply with this provision, it may have its certificate of authority suspended, revoked or subject to conditions or restrictions. [Mont. Code Ann. § 33-31-402.] In addition to suspension or revocation, after notice and hearing, the commissioner may impose an administrative penalty in an amount not less than \$500 or more than \$10,000 if he gives reasonable notice in writing of the intent to levy the penalty and the HMO has a reasonable time within which to remedy the defect in its operations that gave rise to the penalty citation. [Mont. Code Ann. § 33-31-405.]

C. Insurance Entities, Including HMOs

1. Scope

The disclosure restrictions of the Montana Insurance Information and Privacy Protection Act apply to “licensees” including insurance institutions (including HMOs and health service corporations), insurance producers, and others who are required to be licensed under the insurance code. [Mont. Code Ann. §§ 33-19-306; 33-19-104(16) (defining “licensee”).]

The Act covers “personal information,” including “medical record information,” which is gathered in connection with an insurance transaction. [Mont. Code Ann. §§ 33-19-306 and 33-19-104(21) (defining “personal information”).] “Medical record information” is personal information that (1) relates to an individual’s physical or mental condition, medical history, medical claims history, or medical treatment; and (2) is obtained from a medical professional, medical care institution, from the individual, or from the individual’s spouse, parent or legal guardian. [Mont. Code Ann. § 33-19-104(19) (defining “medical record information”).] The Act does not apply to medical information that has had all personal identifiers removed. [Mont. Code Ann. § 33-19-104(21).]

With respect to health insurance, the rights granted by the Act extend to Montana 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. [Mont. Code Ann. § 33-19-103.]

2. Disclosure Authorization Requirements and Exceptions

Generally, a licensee may not disclose personal information, including medical record information, without the written authorization of the individual. [Mont. Code Ann. § 33-19-306(1).] A licensee may not condition enrollment, coverage, benefits, or rates on an individual's signing an authorization unless the disclosure is necessary for the licensee to perform an insurance function. [Mont. Code Ann. § 33-19-206(5).]

To be valid, an authorization to disclose personal information must be in written or in electronic form (as provided by applicable law), signed and dated by the subject of the data and must contain the following:

- The identity of the subject of the information;
- A description of the type of information to be disclosed;
- A description of the intended recipient of the information, including the purpose of the disclosure and how the information will be used;
- Notice of the length of time for which the authorization is valid and notice of the individual's right to revoke the authorization and the procedure for revocation.

[Mont. Code Ann. § 33-19-206.]

An authorization is valid for 24 months or the period stated in the authorization, whichever is shorter. [*Id.*] An individual has the right to revoke the authorization at any time. [*Id.*]

Authorization Exceptions. There are numerous circumstances under which a licensee can disclose information without the individual's authorization including:

- To a medical care institution, a medical professional, or the subject of the information for the purpose of: verifying insurance coverage or benefits; informing an individual of a medical problem of which the individual may not be aware; conducting an operations or services audit; or determining the reasonableness or necessity of medical services;
- Between licensees if the information disclosed is limited to that which is reasonably necessary: to detect fraud in connection with insurance transactions;
- Pursuant to a facially valid administrative or judicial order, including a search warrant;
- To the extent it is reasonably necessary, as otherwise permitted or required by law; and
- Others.

[Mont. Code Ann. § 33-19-306.]

The IIPPA contains detailed provisions governing the use and disclosure of personal information (and particularly medical record information) for marketing purposes. [See Mont. Code Ann. § 33-19-307.] The requirements vary with the recipient of the information, the type of information to be disclosed and the type of product that is to be marketed. A licensee may use or disclose to other licensees medical record information that is reasonably necessary to enable the licensee to market insurance products or services without the individual's authorization. [Mont. Code Ann. § 33-19-307.] Similarly, a licensee does not need an individual's authorization to disclose medical record information that is reasonably necessary to an affiliate for marketing insurance products and services. [*Id.*]

Disclosures to these entities for other marketing purposes require the written authorization of the individual. [*Id.*] Similarly, written authorization is required for disclosures to entities other than licensees or affiliates for any marketing purpose. [*Id.*]

In addition to meeting the general requirements for authorization forms (*see* Mont. Code Ann. § 33-19-206), an authorization to disclose medical record information for marketing purposes must:

- Clearly and conspicuously state that the disclosed information is intended to be used for marketing purposes;
- Specify each entity or type of entity to which the licensee intends to disclose the information;
- Specify what information the licensee intends to disclose; and
- Specify the type of marketing the individual might receive pursuant to the disclosures.

[Mont. Code Ann. § 33-19-307.]

3. Notice Requirements

A licensee must provide to all applicants and policyholders written notice of its information practices. [Mont. Code Ann. § 33-19-202.] The notice must be in writing and must state:

- The categories of personal information that may be collected from persons other than the individual or other individuals covered;
- If a licensee discloses personal information to a third party without an authorization pursuant to an exception contained in § 33-19-306 or § 33-19-307 (see discussion above), a separate description of the categories of information and the categories of third parties to whom the licensee discloses personal information;
- The licensee's policies and practices with respect to protecting the confidentiality and security of personal and privileged information;
- A description of the rights to see, copy and amend personal information and how those rights may be exercised
- Other specified items.

[Mont. Code Ann. § 33-19-202.]

4. Remedies and Penalties

Right to Sue. A person whose rights under this statute are violated has the right to file a civil action and may recover actual damages sustained as a result of the disclosure. [Mont. Code Ann. § 33-19-407.] 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, upon the finding of a violation, impose a fine not to exceed \$25,000 (\$5,000 per violation in the case of insurance producers or adjusters). [Mont. Code Ann. §§ 33-19-405; 33-1-317.]

D. In-Hospital Medical Staff Committees

Montana allows a hospital, its agents and employees to disclose medical records and information to in-hospital medical staff committees. [Mont. Code Ann. § 50-16-201, et seq.] All information provided to the hospital committee remains confidential and privileged “as though the hospital patients were the patients of the members of such committee,” and the committee and its members are prohibited from disclosing the name or identity of any patient whose records have been studied. [Mont. Code Ann. §§ 50-16-203; 50-16-204.]

E. State Government

Under the Government Health Care Information Act, health care information in the possession of the health department, a local board, a local health officer or their authorized representative generally may not be released without the subject’s written, specific consent. [Mont. Code Ann. § 50-16-603.] Disclosure without the subject’s consent is permitted: to medical personnel in a medical emergency as necessary to protect the health of the named person; as allowed by the statutory provisions governing the control of tuberculosis and sexually transmitted diseases; to another state or local public health agency whenever necessary to continue health services to the named person or to undertake public health efforts to prevent the transmission of a communicable disease; and to others. [*Id.*]

Health care information in the possession of a local health board, local health officer, or the health department because a health care provider employed by any of these entities provided health care to a patient, is subject to the Uniform Health Care Information Act and not subject to the Government Health Care Information Act. [Mont. Code Ann. § 50-16-606.] (For restrictions, see discussion above under “Health Care Providers.”)

Remedies and Penalties

Fines and Penalties. A person who knowingly discloses health information in violation of these provisions is guilty of a misdemeanor and upon conviction will be fined between \$500 and \$10,000, be imprisoned in the county jail for 3 months to 1 year, or both. [Mont. Code Ann. § 50-16-611.]

Department of Health

Information received by the department of health through mandatory reports filed by hospitals and other health care facilities may not be disclosed in a way that would identify any patient, unless authorized by the patient. [Mont. Code Ann. § 50-5-106.]

Remedies and Penalties

Fines and Penalties. A department employee who discloses information that would identify a patient in violation of these provisions must be dismissed from employment. If the employee knowingly violated the provisions, he may be subject to criminal penalties. [Mont. Code Ann. §§ 45-7-401; 50-5-106 (referring to other applicable provisions); and 50-16-551.]

III. PRIVILEGES

Montana 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 for the purpose of diagnosis or treatment. The relationships covered by this evidentiary privilege include: doctor-patient [Mont. Code Ann. § 26-1-805], speech-language pathologist-client [Mont. Code Ann. § 26-1-806]; psychologist-client [Mont. Code Ann. § 26-1-807], school counselor or nurse-student [Mont. Code Ann. § 26-1-809.] There is also a privilege covering department of health employees, who may not be examined in a judicial, legislative, administrative or other proceeding (except those concerning disease control) about individually identifiable health care information unless all individuals whose names appear in the records give written consent to the release of information identifying them. [Mont. Code Ann. § 50-16-605.] An HMO is entitled to claim any statutory privilege against such disclosure that the provider who furnished such information to the HMO could claim. [Mont. Code Ann. § 33-31-113.]

IV. CONDITION-SPECIFIC REQUIREMENTS

A. Genetic Test Results

Generally, an insurer, health service corporation, HMO, fraternal benefit society, or other issuer of an individual or group policy may not require an individual to submit to a genetic test unless the test is otherwise required by law (such as to establish parentage or for remains identification). [Mont. Code Ann. § 33-18-902.] A genetic test includes testing for a presymptomatic genetic factor, including analysis of human deoxyribonucleic acid or ribonucleic acid, chromosomes, proteins, or metabolites. [Mont. Code Ann. § 33-18-901 (defining “genetic test”).]

Neither may these entities seek genetic information about an individual for a purpose that is: unrelated to assessing or managing the individual’s current health; inappropriate in an asymptomatic individual; or unrelated to research in which a subject is not personally identifiable. [Mont. Code Ann. § 33-18-904.] “Genetic information” means information derived from genetic testing or medical evaluation to determine the presence or absence of variations or mutations, including carrier status,

in an individual's genetic material or genes that are scientifically or medically believed to cause a disease, disorder, or syndrome or are associated with a statistically increased risk of developing a disease, disorder, or syndrome that is asymptomatic at the time of testing. [Mont. Code Ann. § 33-18-901 (defining "genetic information").]

B. HIV

The identity of a person who has been the subject of an HIV test and the results of the test generally may not be disclosed except as allowed under the Uniform Health Care Information Act or the Government Health Care Information Act. [Mont. Code Ann. § 50-16-1009.] A health care provider may notify a person who had contact with an HIV-infected individual regarding potential exposure but may not specify the identity of the test subject or the time or place of possible exposure. [Mont. Code Ann. § 50-16-1009(3).]

Remedies and Penalties

Right to Sue. An individual who negligently discloses confidential HIV information is liable for damages of \$5,000 or actual damages, or whichever is greater. [Mont. Code Ann. § 50-16-1013.] An individual who intentionally or recklessly discloses confidential HIV information is liable for damages of \$20,000 or actual damages, whichever is greater; reasonable attorney fees; and other appropriate relief, including injunctive relief. [*Id.*] This statutory right to sue does not limit the rights of a subject of an HIV-related test to recover damages or other relief under any other applicable law or cause of action. [*Id.*]

Fines and Penalties. A person who discloses or compels another to disclose confidential health care information in violation of this section is guilty of a misdemeanor, punishable by a fine of \$1,000 or imprisonment for 1 year, or both. [Mont. Code Ann. § 50-16-1009(4).]

C. Mental Health

Unless specifically stated in an order by the court, a person involuntarily committed to a mental health facility for a period of evaluation or treatment does not forfeit his legal rights. [Mont. Code Ann. § 53-21-141.] All communication between an alleged mentally ill person who has been involuntarily committed and a professional person is privileged under the normal privileged communication rules unless it is clearly explained to the person in advance that the purpose of an interview is for evaluation and not treatment. [*Id.*] All information obtained and records prepared in the course of providing services to the seriously mentally ill, including evaluations and voluntary and involuntary commitments, are confidential and remain so after the individual has been discharged from the facility. [Mont. Code Ann. § 53-21-166.] This confidential information may be disclosed only in specified circumstances including: between professionals in the provision of services or appropriate referrals; for research, provided the researcher sign an oath of confidentiality; to the extent necessary to make claims on behalf of the recipient; and others. [*Id.*]

D. Sexually Transmitted Diseases

Information concerning persons infected or suspected of being infected with a sexually transmitted disease may be released only in limited circumstances such as to: a department of health employee; a physician who has written consent of the person whose record is requested; or to a local health officer. [Mont. Code Ann. § 50-18-109.] Sexually transmitted diseases include HIV, syphilis, gonorrhea, and others. [Mont. Code Ann. § 50-18-101.] The legislature intends that the principle of confidentiality in sexually transmitted disease work “remain inviolate.” [Mont. Code Ann. § 50-18-109(3).]

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