

# **Subpoenaing Medical Records – The Rules Have Changed**

MSBA Annual Convention

June 16, 2005

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# Privacy of Medical Information

- **Background on Medical Confidentiality- Need? & Hippocratic Oath**
- **Constitutional Parameters**
  - *Westinghouse* (FD), *Tarasoff* (CA) & *Dr. K.* (MD)
- **Federal Pockets of Protection**
  - **Drug & Alcohol Confidentiality Regulations**
  - **Medicaid**
- **State Patchwork**
  - **Some Comprehensive Laws & Evidentiary Privileges**

# **Maryland Confidentiality of Medical Records Act- Origins**

- **Testimonial Privileges**
- **1978 Medical Records Act**
- **Conflicting Mental Health Statutes**
- **The Incarcerated Mentally Ill**
- **1986 Attorney General Report**
- **1988-1990 Legislative Enactment**
  - Amended in 1994, 1997, 2000, and 2001

# **Federal Legal Authority- 1996 HIPAA “Administrative Simplification” (Title II)**

- Advisory Opinions
- Safe Harbor Reports
- Uniform Standards for Electronic Exchange of Information
  - State preemption
- Privacy Requirements
- Security Requirements

# HIPAA Medical Data Privacy

## 42 U.S.C. § 1320d

- HIPAA confidentiality as tradeoff for increased speed in transmission
- Privacy & security requirements
- Privacy protection in electronic data interchange
- Federal penalties
- Selective preemption

# HIPAA Preemption Inapplicable-

- “More Stringent State Law”

Public Law 104-191 § 264(c)(2); 45 CFR § 160.203(b)

If the state law provision is more stringent than the federal provision, then the state law provision is not preempted.

“More stringent” is equivalent to providing more privacy protection to the individual and more access to an individual’s own records,

*see* 45 CFR § 160.202

# Coverage: Person - HIPAA “Covered Entities” v. MCMRA’s Broader Scope

## HIPAA

- Health Care Providers  
[Those who conduct certain financial and administrative transactions electronically]
- Health Plans
- Health Care Clearinghouses
- Extended to Business Associates [Contract]

## MCMRA

- Health Care Providers
  - Licensed health providers
    - Agents
    - Employees
- Health care facilities
  - Employees
  - Officers
  - Directors
- **Redislosure** Prohibited

# Coverage: What?- HIPAA's PHI v. MCMRA's Medical Record

## HIPAA

### ■ Protected Health Information

**45 CFR §§160.103,164.501**

- Requires element of electronic transmission
- Specifies de-identification elements

## MCMRA

### ■ Medical Record

**Health-General § 4-301(g)**

- Must relate to the health care of the patient
- Must be entered into the record
- Excludes information not "individually identifiable"

# Patient Remedies & Provider Protections

## HIPAA

- **Administrative Enforcement**
  - Excludes “incidental”
  - Mitigate through due diligence
- **Criminal Penalties**
- **No Private Right of Action, but Establishes Standard**

## MCMRA

- **Good Faith Immunity**
  - HG § 4-308
- **Criminal Penalties**
  - HG § 4-309(d) & (e)
- **Private Right Of Action & Civil Penalties**
  - HG § 4-309(a) & (f)

# Confidentiality Rule

## HIPAA

- General rule protecting confidentiality
- Distinguishes treatment, payment, and health care operations [TPHO] from other uses of PHI
- Directory Accede

## MCMRA

- General rule protecting confidentiality
- Includes most TPHO disclosures as permissive disclosures under HG § 4-305
- Directory Opt-out

# Mandatory Disclosures: HIPAA & MCMRA

- Required disclosures are limited to:
  - Disclosures to the individual who is the subject of information
  - Disclosures to OCR to determine compliance
- All other uses and disclosures in the Rule are permissive, but may be compelled under Maryland Law, see HG § 4-306(b)

# Judicial Litigation

## ■ Court Order

- Both state and federal law allow disclosure pursuant to court order

## ■ Discovery Process-Subpoenas

- Former Interplay between 45 USC § 512(e) & Health General 4-306 & 307
- “satisfactory assurances” & 2005 Maryland Laws, Chapter 503

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# **Federal Oversight- One Hospital's Experience**

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# **The Simple Solution**



# Maryland's New Process for Health Record Subpoenas

Notice to patient  
+ 30 days  
+ Written “assurance”

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= Disclosure

# How to Subpoena Health Records

1. Send Statutory Notice, subpoena and a copy of HG 4-306 to “person in interest” via certified mail
2. Wait 30 days

# How to Subpoena Health Records (2)

3. Send subpoena, copy of the notice, a copy of HG 4-306 and **written “assurance”** to record holder that:
  - 30 days have passed without objections being raised; or
  - any objections have been resolved and the requested disclosure is in compliance with that resolution

# Alternatives

- Obtain Court Order requiring disclosure on different terms, possibly with waiver of notice
- Obtain patient's written authorization;
  - Must meet HIPAA requirements – form at [www.msba.org](http://www.msba.org) Health Law Section “HIPAA Documents”

# To Further Investigate:

- Read the policy guidance provided:  
<http://www.hhs.gov/ocr/hipaa/privacy.html>
- Consult the Maryland State Bar forms:  
[http://www.msba.org/sec\\_comm/health/hipaa.htm](http://www.msba.org/sec_comm/health/hipaa.htm)
- For summary background on the Federal Privacy Rule's effect on Maryland's confidentiality law:  
[www.oag.state.md.us/Opinions/2003/03-022.pdf](http://www.oag.state.md.us/Opinions/2003/03-022.pdf)