

Research Guide: Medical Records in Criminal Cases

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Questions frequently arise concerning whether the Health Insurance Portability and Accountability Act (HIPAA) or other confidentiality laws protect a defendant's medical records against search warrants, subpoenas or other disclosure to the Commonwealth. This memo will outline the extent of medical record confidentiality in the context of a Virginia criminal prosecution. What is given is not comprehensive, but should provide an outline of the law protecting medical records from law enforcement and a starting point for further research.

In brief, the laws providing the strongest protections, in descending order, are:

1. Public Health Safety Act (PHSA), which establishes that disclosure of drug treatment records require the patient's consent or a court order after notice and a good cause hearing.
2. Virginia Code Ann. §32.1-127.1:03(d), which protects mental health therapy treatment notes.
3. Virginia Code Ann. §32.1-127.1:03, which only protects medical records against disclosures without a search warrant or court-ordered subpoena.
4. HIPAA, which likewise only protects against disclosures without a search warrant or court-ordered subpoena.

The last part of the memo (section 5) addresses the available remedies for violations of the statutes.

1. PUBLIC HEALTH SERVICE ACT

The Public Health Service Act (PHSA) provides stringent nondisclosure rules for drug and alcohol abuse treatment. 42 U.S.C. § 290dd-2 provides:

- (a) Requirement. 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 **shall**, except as provided in subsection (e), **be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).**

42 U.S.C. § 290dd-2.

Step 1: Determine whether the agency giving treatments was a federally assisted program:

Regulations further define a "federally assisted" program:

(b) Federal assistance. An alcohol abuse or drug abuse program is considered to be federally assisted if:

(1) It is conducted in whole or in part, whether directly or by contract or otherwise by any department or agency of the United States (but see paragraphs (c)(1) and (c)(2) of this section relating to the Veterans' Administration and the Armed Forces);

(2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States including but not limited to:

(i) Certification of provider status under the Medicare program;

(ii) Authorization to conduct methadone maintenance treatment (see 21 CFR 291.505); or

(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of alcohol or drug abuse;

(3) It is supported by funds provided by any department or agency of the United States by being:

(i) A recipient of Federal financial assistance in any form, including financial assistance which does not directly pay for the alcohol or drug abuse diagnosis, treatment, or referral activities; or

(ii) Conducted by a State or local government unit which, through general or special revenue sharing or other forms of assistance, receives Federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program; or

(4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

42 C.F.R. 2.12.

Step 2: Determine whether disclosure requirements were met:

After determining whether the treatment was given by a federally-assisted agency, they next step is to see whether the disclosure restrictions were met. And they are strict:

(b) Permitted disclosure.

(1) Consent. The content of any record referred to in subsection (a) may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g).

(2) Method for disclosure. Whether or not the patient, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed as follows: [. . .]

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 U.S.C. § 290dd-2.¹

¹ "Good cause" is further defined in the regulations. 42 C.F.R. 265 provides:

(d) Criteria. A court may authorize the disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient only if the court finds that all of the following criteria are met:

(1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

(2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.

(3) Other ways of obtaining the information are not available or would not be effective.

(4) The potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.

(5) If the applicant is a person performing a law enforcement function that:

(i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and

(ii) Any person holding the records which is an entity within Federal, State, or local government has in fact been represented by counsel independent of the applicant.

Step 3: Remedy

There are two possible grounds for suppression. If a warrant or probable cause were lacking, a defendant could ask for suppression for a pure Fourth Amendment violation. The Fourth Circuit has held that, although PHSA does not grant a private cause of action under §1983, it does establish a reasonable expectation of privacy necessary for a Fourth Amendment claim. *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).

However, there is an argument that even with a warrant or probable cause, a violation of PHSA (by, for example, failing to conduct a good cause hearing) should also result in suppression. The Supreme Court has held that suppression for a statutory violation is appropriate when "the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006).

2. AND 3. VIRGINIA'S PROTECTION OF MEDICAL RECORDS

First, "[t]here exists . . . no physician[-]patient privilege in a criminal prosecution in Virginia. The common law recognized no such privilege in either civil or criminal proceedings. While Virginia has enacted a statutory privilege, it is expressly confined to civil proceedings." *Gibson v. Commonwealth*, 216 Va. 412, 414 (1975) (internal citations omitted).

Va. Code Ann. § 32.1-127.1:03 governs the privacy of medical records in Virginia. *Hairston v. Commonwealth*, 50 Va. App. 64, 68 (2007) (upholding the Commonwealth's motion to quash a subpoena duces tecum requested for failure to comply with the statute). The statute codifies a right to privacy in medical records:

Only one reported case was found that applied the above factors: *United States v. Hughes*, 95 F. Supp. 2d 49, 60 (D. Mass. 2000), *reversed on other grounds*, 279 F.3d 86 (1st Cir. 2002) (failing to find "good cause" for disclosing alcoholism treatment records in a prosecution for illegal purchase and possession of firearms).

There is hereby recognized an individual's right of privacy in the content of his health records. Health records are the property of the health care entity maintaining them, and, except when permitted or required by this section or by other provisions of state law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

Va. Code Ann. § 32.1-127.1:03(a). The definition of "health records" includes any materials "acquired by the provider in connection with the provision of health services." Va. Code Ann. § 32.1-127.1:03(b).

Unfortunately, Virginia law, like HIPAA, provides no protection for those records against search warrants. Va. Code Ann. § 32.1-127.1:03(d)(2) states:

Health care entities may, and, when required by other provisions of state law, shall, disclose health records . . . [i]n compliance with a subpoena issued in accord with subsection H, pursuant to a search warrant or a grand jury subpoena, pursuant to court order upon good cause shown or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413.

Unlike HIPAA, the text of the Virginia statute does not even require that the warrant be "[i]n compliance with and as limited by the relevant requirements of" a warrant. *Compare* 45 C.F.R. 164.512(f) *with* Va. Code Ann. § 32.1-127.1:03(d)(2). It appears that simply showing the hospital a warrant absolves it from liability under the Virginia statute. In this respect at least, HIPAA preempts the Virginia statute. 45 C.F.R. § 164.203 (stating that any state laws that are less protective of medical records are superseded by applicable HIPAA regulations).

Virginia – Psychotherapy Notes

Psychotherapy notes get special protection. A health care provider requires the patient's consent to release psychotherapy notes. Va. Code Ann. § 32.1-127.1:03(d) (at the conclusion of the subsection). Psychotherapy notes are defined as:

comments, recorded in any medium by a health care provider who is a mental health professional, documenting or analyzing the contents of conversation during a private counseling session with an individual . . . that are separated from the rest of the individual's health record [and does] not include annotations relating to

medication and prescription monitoring, counseling session start and stop times, treatment modalities and frequencies, clinical test results, or any summary of any symptoms, diagnosis, prognosis, functional status, treatment plan, or the individual's progress to date.

Va. Code Ann. § 32.1-127.1:03(b). If any of the records that the Commonwealth received fall within that definition, a health care provider can only release the records without the patient's authorization under enumerated exceptions:

[A] health care entity shall obtain an individual's written authorization for any disclosure of psychotherapy notes, except when disclosure by the health care entity is (i) for its own training programs in which students, trainees, or practitioners in mental health are being taught under supervision to practice or to improve their skills in group, joint, family, or individual counseling; (ii) to defend itself or its employees or staff against any accusation of wrongful conduct; (iii) in the discharge of the duty, in accordance with subsection B of § 54.1-2400.1, to take precautions to protect third parties from violent behavior or other serious harm; (iv) required in the course of an investigation, audit, review, or proceeding regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity; or (v) otherwise required by law.

There seems to be no caselaw interpreting this provision as of early 2009. It should be noted that while section (d)(2) explicitly mentions warrants, this section does not. It could be argued that since the search warrant exception is specifically excluded, a disclosure "otherwise required by law" cannot include disclosures pursuant to warrants.

Virginia – Subpoena Duces Tecum Protection

If the Commonwealth requests medical records by subpoena, Virginia law provides substantial protection. Va. Code Ann. § 32.1-127.1:03(h) sets the procedures by which hospitals may release information pursuant to a subpoena, and applies to both parties in criminal proceedings. First, the hospital cannot release the records for 15 days after receiving the subpoena (except for good cause shown), to give the party an opportunity to challenge it. *Id.* at (h)(1). The Commonwealth must include a notice to the hospital of both its right and the defendant's right to challenge the subpoena. *Id.* The hospital would initially submit one copy of

the records, in a sealed envelope, to the clerk of the court. *Id.* at (h)(4). The court, when considering a motion to quash, would be guided by the following statutory factors:

(i) the particular purpose for which the information was collected; (ii) the degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual; (iii) the effect of the disclosure on the individual's future health care; (iv) the importance of the information to the lawsuit or proceeding; and (v) any other relevant factor.

Va. Code Ann. § 32.1-127.1:03(h)(6). Only after the motion to quash had been resolved, and the hospital notified, would the Commonwealth get access to the records. *Id.* at (h)(4). If the motion to quash is granted, the records are returned *still sealed. Id.*

Perhaps for this reason, the Commonwealth has preferred to use search warrants to obtain private records, even after adversarial proceedings have started. This practice was challenged in *Commonwealth v. Kentrell Sanderson* (motions filed Spring 2009); VC3 memoranda on why that should not be allowed can be found in the Sanderson file.

4. HIPAA

Covered Entities

Health Care Providers

The first question is whether the keeper of the medical records is governed by the confidentiality provisions of HIPAA. HIPAA applies to health plans, health care clearinghouses, and any "health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103. A "health care provider" is "any . . . person or organization who furnishes, bills, or is paid for health care in the normal course of business." *Id.* So generally, health care providers are doctors, hospitals, clinics, drug treatment centers, etc.

Correctional institutions and detention centers also provide or oversee medical care to inmates. See <http://www.vadoc.virginia.gov/offenders/institutions/programs/medical.shtm>, <http://www.vadoc.virginia.gov/offenders/institutions/programs/mental-health.shtm>.

An institution like a detention center that only provides medical care incidental to another function is still falls within the definition of a "covered entity." However, if it designates only the part that provides medical services as a covered entity, it becomes a "hybrid entity." 45 C.F.R. §§ 164.103, 164.105(a)(2)(iii)(C). In that case, HIPAA only applies to the designated medical services section of the detention center. 45 C.F.R. § 164.105(a)(1). The organization must then set up a firewall so that "[i]ts health care component does not disclose protected health information to another component of the covered entity." 45 C.F.R. § 164.105(a)(2)(ii). The health care component of a hybrid entity must comply with the HIPAA Privacy Rule. The hybrid entity also has to maintain a record of the designation of a part of it as the health care component. 45 C.F.R. § 164.105(c).

The upshot of all this is that either the entire detention center will be covered by the Privacy Rule, or only its health care component will be covered, depending on whether it designated itself a hybrid entity. In either case, unauthorized disclosures of protected health information will violate HIPAA.

Transmission of Health Care Information

To be a covered entity, the health care provider must transmit health information in electronic form regulated by the Department of Health and Human Services (HHS). 45 C.F.R. § 160.103. HHS regulations cover nearly all types of health care information transmissions regarding payment, including requests for payment, insurance claims, and inquiries about benefits or coverage. 45 C.F.R. §§ 162.1101, .1201, .1301, .1401, .1501, .1601, .1701, .1801.

Nearly all doctors, hospitals, and clinics are covered by this provision. Detention centers are also covered, as long as they communicate with anyone about payment. For example, the Virginia Department of Corrections has a contract with the University of Virginia to provide telemedicine support, and it must make inquiries regarding payment or claims.

<http://www.vadoc.virginia.gov/offenders/institutions/programs/medical.shtm>.

HHS has also published a guide to determining whether an entity is a covered entity under HIPAA. <http://www.cms.hhs.gov/HIPAAGenInfo/Downloads/CoveredEntitycharts.pdf>

Protected Health Information

The next question is whether the records themselves are covered. In the typical criminal case, there will be three requirements: the records must be (1) health information, that is (2) individually identifiable, and (3) recorded in some form.

First, "health information" "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." *Id.* "Health care" is broadly defined: it means, "care, services, or supplies related to the health of an individual," and includes:

(1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and

(2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

Health care information is "individually identifiable" if "there is a reasonable basis to believe the information can be used to identify the individual." *Id.* Protected health information means individually identifiable health information:

- (1) Except as provided in paragraph (2) of this definition, that is:
- (i) Transmitted by electronic media;
 - (ii) Maintained in electronic media; or
 - (iii) *Transmitted or maintained in any other form or medium.*

45 C.F.R. § 160.103.

So the records covered by HIPAA include not only electronic documents, but even handwritten notes of medical personnel. The rule is generally broad enough to cover every document in the defendant's patient file.

The Privacy Rule

In General

The general rule is that a covered entity cannot disclose protected health information (PHI) without the patient's consent, except in limited circumstances. 45 C.F.R. 164.502. A covered entity *may* disclose PHI "to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. 164.512. Note that the language is permissive. If the Commonwealth tries to obtain PHI from a health care provider, the provider should be notified that it can refuse to disclose the information and challenge the request, subpoena, or search warrant in court.

Law Enforcement Exceptions to the Privacy Rule

There is a list of exceptions to the Privacy Rule at 45 C.F.R. 164.512. In general, the pertinent exceptions list circumstances where the government's interests in protecting the public and investigating crimes outweigh the patient's privacy interest.

Among the specific exceptions is disclosure for law enforcement purposes. 45 C.F.R. 164.512(f).

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law

enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

* * * *

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

Id. Further provisions in subsection (f) allow release of records for purposes of identification of suspects and victims of crime, investigating crimes on hospital premises, and in emergency situations. Note again that the language is permissive ("*may*" and "*Permitted disclosures*"), not mandatory, and that the covered entity can refuse to disclose the information subject to a court challenge.

There is another exception describing disclosures "for judicial and administrative proceedings." 45 C.F.R. 164.512(e).

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

If a party is seeking PHI with a subpoena and no attached court order, 45 C.F.R. 164.512

(e)(1)(ii) effectively *forbids* the covered entity from releasing records unless notice of the subpoena was given to the patient, or reasonable efforts were made to do so.

A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: . . .

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. . . .

The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

The assurance must assert that there had been enough time "to permit the individual to raise an objection to the court" and that the time to challenge had passed, or that the parties had agreed to a protective order. The effect of this provision is that an indicted defendant with a lawyer should always have notice and an opportunity to challenge the disclosure of his medical records when the Commonwealth seeks them by subpoena.

5. SUPPRESSION

If the records were disclosed to the Commonwealth in violation of HIPAA, PHSA, or the Virginia Code, then the records should be suppressed in any event and HIPAA provides no additional protection. It is arguable that the requirement that a disclosure "compl[y] with and [be] limited to the relevant requirements of such law" mandates suppression when the warrant is found not to comply with the law. However, research shows that the only courts to consider this

argument have rejected it. In *State v. Straehler*, 745 N.W.2d 431 (Wis. 2007), the court held that, even assuming a HIPAA violation, remedy was not an available remedy under the statute. *Straehler* points to comments issued during the rulemaking process in which the Department of Health and Human Services said, “under the HIPAA statutory authority, we cannot impose sanctions on law enforcement officials or require suppression of evidence.” *Straehler*, 745 N.W.2d at 436 (quoting 65 Fed.Reg. at 82,679). A further survey of all reported cases revealed identical reasoning in each.²

However, there is language in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) which could support such a reading. The Supreme Court found that suppression was not a valid remedy for violations of the Vienna Convention requirement that consulates be notified upon arrest of foreign nationals. *Sanchez-Llamas*, 548 U.S. at 348. However, the Court noted that in all cases where it had applied the exclusionary rule, “the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests.” *Id.* at 349. It noted that the exclusionary rule applies when “the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations” – surely a motivating concern of HIPAA's privacy rule. *Id.*

² See *State v. Yenzer*, 195 P.3d 271, 273 (Kan.App. 2008) (rejecting the argument that the remedy for a HIPAA violation is suppression). *State v. Downs*, 923 So.2d 726, 728 (La. App. 2005) (holding that the health care provider, not the prosecutor, is liable under the statute, and that the only remedy available was to “file a complaint with the Office of Civil Rights, Department of Health and Human Services”); *U.S. v. Lane*, 2007 WL 2301107 at *5 (A.F.Ct.Crim.App. 2007) (rejecting the argument that the remedy for a HIPAA violation is suppression); *State v. Eichhorst*, 879 N.E.2d 1144, 1154-1155 (Ind.App. 2008) (same); *State v. Mubita*, 188 P.3d 867, 878 (Idaho 2008)(same)(citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (holding that suppression is not a proper remedy for violation of the Vienna Convention, art. 36)).