

# Appendix: Legal Background

Prepared by:

Jonathan Karmel  
Associate Counsel, Division of Legal Affairs  
NYS DOH  
September 5, 2007

# “General” Health Information

- The law generally recognizes that the confidentiality of medical records creates an incentive for patients to seek care and engage in open and honest communication with providers.
- New York was the first state to enact a physician-patient privilege statute, and providers continue to assert a physician-patient privilege under CPLR 4504(a).

# Provider Disclosures to Other Providers for Treatment

- HIPAA allows such disclosures without patient consent, so long as the Notice of Privacy Practices gives the patient adequate notice of the disclosures.
- New York State law prohibits providers from disclosing patient information to third parties without the consent of the patient.

# Provider Disclosures to Other Providers for Treatment

- HIPAA allows such disclosures without patient consent, so long as the Notice of Privacy Practices gives the patient adequate notice of the disclosures.
- New York State law prohibits providers from disclosing patient information to third parties without the consent of the patient.

# Patient Consent for Provider to Disclose General Health Information to Third Parties

- Education Law § 6530(23): It is professional misconduct for a physician to reveal a patient's health information to a third party without the consent of the patient.
- The patient must have knowledge of and have a willingness in fact to the disclosure.

# Additional Rules for Physicians

- HMOs: (PHL § 4410(2));
- Hospitals: (PHL § 2803(1)(g), 10 NYCRR 405.7(b)(12), (13), 405.7(a)(1), 405.7(c)(13)); and
- Nursing Homes: (PHL § 2803-c(3)(f), 10 NYCRR 415.3(d)).
- These laws are under the jurisdiction of the State Department of Health (DOH).

# Distinguishing “Third Parties” From Agents

- New York State law does not require patient consent for providers to use patient information.
- Providers typically hire contractors to perform certain functions, such as medical transcription services.
- Such a contractor using information as an agent of a provider, under a HIPAA business associate agreement, is not a “third party”; such contractors can use patient information on behalf of providers without patient consent.

# “Sensitive” Health Information

Various laws (State and federal) require more specific consent to disclose sensitive health information to third parties.

# Confidential HIV-Related Information

- A provider may disclose confidential HIV-related information without patient consent to “a health care provider or health facility when knowledge of the HIV related information is necessary to provide appropriate care or treatment. . . .” (PHL § 2782(1)(d)).
- Determination that disclosure is necessary for treatment must be made before disclosure can take place.

# MSSNY Resolution

On June 14, 2007, the Council and House of Delegates of the Medical Society of the State of New York (MSSNY) passed the following resolution:

# MSSNY Resolution

“RESOLVED, That the Medical Society of the State of New York concludes that given the advances in comprehensive treatment and drug therapy of a patient with HIV/AIDS from 1986 to 2007, the exchange of HIV/AIDS information by one medical provider to other treating/consulting medical provider of the patient is routinely necessary for proper evaluation and treatment of the patient by that second treating/consulting medical provider; and be it further”

# MSSNY Resolution

“RESOLVED, That the Medical Society of the State of New York, in keeping with MSSNY’s support of the CDC’s *‘Revised Recommendations for HIV Testing of Adults, Adolescents and Pregnant Women in Healthcare Settings – 2006,’* support the policy that general consent is sufficient for disclosure of health information, including HIV/AIDS information, through electronic means among providers for treatment purposes.”

# Confidential HIV-Related Information

- Nevertheless, assume for purposes of this slide that there are situations where it is not necessary for a provider to have confidential HIV-related information to provide appropriate treatment.
- Information cannot be disclosed under a “general release” but disclosure is permitted under a “specific release” that has been “approved by [DOH]” (10 NYCRR § 63.5(a)).
- The release must “specify to whom disclosure is authorized [and] the purpose” (PHL § 2780(9)).

# Health Information From a Facility Licensed Under the Mental Hygiene Law (MHL)

- NY law permits disclosure of PHI among MHL-licensed providers for treatment purposes without obtaining patient consent (Mental Hygiene Law § 33.13(d); <http://www.omh.state.ny.us/omhweb/hipaa/hipaaprivacy.pdf>).
- Disclosure “shall be limited to that information necessary in light of the reason for disclosure.” (Mental Hygiene Law § 33.13(f)).

# Health Information From a Facility Licensed Under the Mental Hygiene Law (MHL)

- Mental health records may be released to non-MHL licensed providers: “with the consent of the patient or client or of someone authorized to act on the patient's or client's behalf, to persons and entities who have a demonstrable need for such information and who have obtained such consent, provided that disclosure will not reasonably be expected to be detrimental to the patient, client or another” (Mental Hygiene Law § 33.13(c)(7)).
- Mental Hygiene Law § 33.13 is under the jurisdiction of OMH and OMRDD.

# Treatment of Alcohol or Other Drug Problems by Providers that Receive Federal Assistance

- Except in a medical emergency, providers generally cannot disclose patient information without a specific consent that complies with requirements in 42 CFR Part 2.
- 42 CFR Part 2 is under the jurisdiction of the federal government (SAMHSA).
- The State Office of Alcoholism and Substance Abuse Services (OASAS) also regulates New York providers.

# Genetic Testing Information

- No person shall perform a genetic test without prior written consent that includes “the name of the person or categories of persons or organizations to whom the test results may be disclosed” (Civil Rights Law § 79-1(2)(b)(6)).
- Civil Rights Law § 79-1 is under the jurisdiction of the Office of the Attorney General (OAG).

# Surrogate Consent

- If another person is consenting to disclosure on behalf of the patient, other issues will arise.
- For example, a parent could generally consent to a child's health information being included in an eHIE.
- But a parent could not consent to the inclusion of “records concerning the treatment of [a minor child] for venereal disease or the performance of an abortion operation” where the child and not the parent gave the consent for the treatment (Public Health Law § 17).

# Medicaid Data Disclosure With Consent

- The Medicaid program discloses data when the Medicaid program has received a signed consent from a beneficiary requesting disclosure of data to a particular party, such as the beneficiary's attorney.
- How else can the Medicaid program verify that consent has been obtained?

# Medicaid Data Disclosure Without Consent

- Under 1902(a)(7) of the Social Security Act (42 USC § 1396a(a)(7)), the State Medicaid program must “provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the [Medicaid program].”
- The Medicaid program has a Data Exchange Application and Agreement (DEAA) process for applicants who wish to contract with the Medicaid program to use Medicaid data.

# Medicaid Transformation Grant

- Medicaid Health Information Exchange and Quality Improvement Initiative
- Partnership with four regional health information organizations (RHIOs) to allow sharing of Medicaid data to support clinical decision making by providers.
- The RHIOs are:
  - Bronx RHIO
  - Health Information Exchange of New York (HIXNY)
  - Taconic Health Information Network and Community (THINC)
  - Greater Rochester RHIO (gRrhio)

# Including Payer Claims Data

- HIPAA and State Insurance Regulation 169 allow disclosure of health information by payers in certain cases, without consent, for treatment, payment or health care operations (45 CFR §§ 164.501, 164.506; 11 NYCRR § 420.17).
- The State Medicaid program requires consent to disclose identifiable data (unless the disclosure is for purposes directly connected with the administration of the Medicaid program).

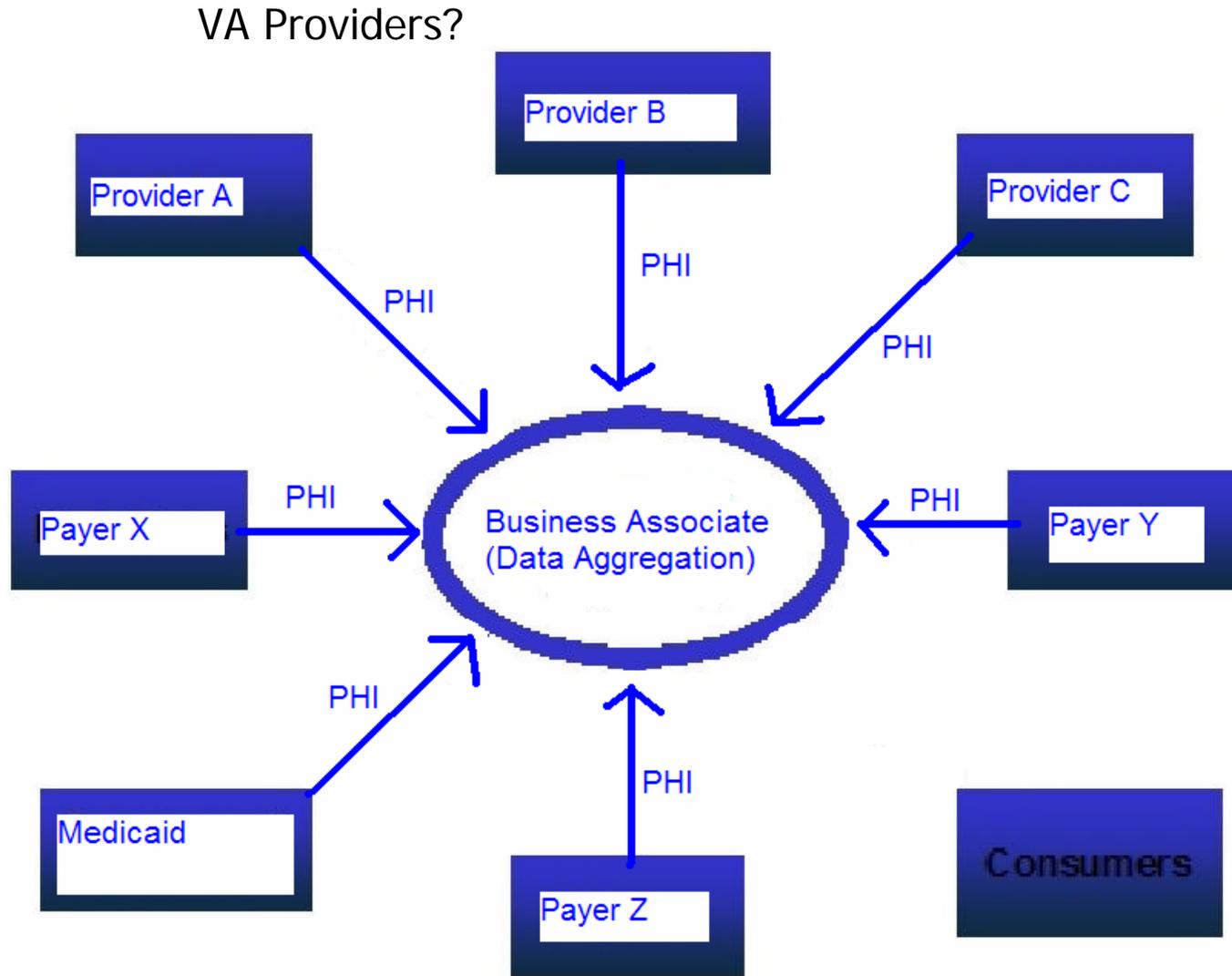
# Using Patient Information Without Consent

- A provider's business associate (contractor) can use identifiable patient information on behalf of the provider without consent.
- Such a contractor can provide data aggregation services for the purpose of "quality improvement," which is considered part of the provider's health care operations.

# Disclosing De-Identified Information Without Consent

- Firms that provide data aggregation services can enter into business associate contracts with multiple providers and payers and receive identifiable information from many sources.
- Without patient consent, de-identified information can be re-disclosed for quality improvement purposes.

# Disclosure to a Contractor for "Quality Improvement"



# Re-disclosure of De-identified Information for "Quality Improvement"

