

**ACCESS AND DISCLOSURE OF MEDICAL AND MENTAL HEALTH RECORDS
Summary of Maryland Law**

By:

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A. Patient Medical Records

1. Definition

A “medical record” is defined as any oral, written or other transmission in any form or medium of information that: (1) is entered in the record of a patient¹ or recipient²; (2) identifies or can readily be associated with the identity of a patient or recipient; and (3) relates to the health care of the patient or recipient. See Md. Code Ann., Health-Gen. I § 4-301 (g) (1) (Supp. 1999); see also id. § 4-301 (g) (2) (listing inclusive examples of “medical records”).

2. Confidentiality Provisions

The Confidentiality of Medical Records Act, as set forth in § 4-301 *et seq.* of the Health-General Article of the Annotated Code of Maryland, was enacted to provide for the confidentiality of medical records, to establish clear and certain rules for the disclosure³ of medical records, and generally to bolster the privacy rights of patients. See Warner v. Lerner, 348 Md. 733, 742, 705 A.2d 1169, 1174 (1998) (Raker, J., concurring).

Section 4-302 *et seq.* of the Health-General Article of the Annotated Code of Maryland addresses the confidentiality of medical records in general. Section 4-302 (a) requires health care providers⁴ to keep medical records confidential and allows disclosure only as provided by Maryland law. Warner, 348 Md. at 738, 705 A.2d at 1172. Section 4-302 (b) provides exceptions for administrative records and disclosures governed by other confidentiality provisions.⁵

A health care provider who in good faith discloses or does not disclose a medical record is not liable in any cause of action arising from the disclosure or nondisclosure of the medical record. See Md. Code Ann., Health-Gen. I § 4-308. Cf. id. § 4-309 (f) (stating that a health care provider that knowingly discloses a medical record in violation of the Confidentiality of Records Act is liable for actual damages).

¹See Md. Code Ann., Health-Gen. I § 4-301 (j) (Supp. 1999) (defining “patient”).

²See id. § 4-301 (m) (defining “recipient”).

³See id. § 4-301 (c) (defining “disclosure”).

⁴See id. § 4-301 (h) (defining “health care provider”).

⁵The exceptions are set out in § 4-302 (b) (2) and (3) of the Health-General Article. They are with respect to medical records relating to a psychiatric or psychological problem and to a medical record kept on a minor which relates to diagnosis or treatment of a venereal disease or to use of a drug.

3. Patient Access

Section 4-303 of the Health-General Article addresses disclosures upon the authorization of a person in interest⁶, which includes the patient to whom the record pertains. This section requires a health care provider to disclose a medical record on the authorization of a person in interest, subject to conditions stated in that section. See Warner, 348 Md. at 738, 705 A.2d at 1172.

4. Procedures for Disclosure to Third Parties

Section 4-303 (a) of the Health-General Article requires a health care provider to disclose a medical record on the authorization of a person in interest. Section 4-303 (b) delineates the form, terms and conditions of such an authorization. Subsection (c) requires a health care provider to disclose a medical record upon receipt of a preauthorized form that is part of an application for insurance. A health care provider shall comply within a reasonable time after a person in interest requests to either receive a copy of a medical record or to see any copy of the medical record. See Md. Code Ann., Health-Gen. I § 4-304 (a). Redisclosure of medical records to any other person is prohibited, except as provided by § 4-302 (d).

Section 4-309 prohibits a health care provider from refusing to disclose a medical record within a reasonable time (but no more than 21 working days) upon request by a person in interest⁷, and provides for civil⁸ and criminal⁹ penalties for violations of the Confidentiality of Medical Records Act.

Disclosure of directory information¹⁰ about a patient is permitted without authorization of a person in interest, except if the patient has instructed the health care provider in writing not to disclose directory information. See id. § 4-302 (c).

Section 4-305 (b) of the Health-General Article is Maryland's permissive disclosure provision, describing generally the situations in which a medical record may be disclosed without the authorization of a person in interest, including: (1) to the provider's authorized employees, agents, medical staff, medical students or consultants cases seeking payment for health care; (2) where the recipient of the medical record acknowledges its obligation not to redisclose any patient identifying information; (3) to a government agency performing its lawful duties; (4) to another

⁶See id. § 4-301 (k) (defining "person in interest").

⁷See id. § 4-309 (a).

⁸See id. § 4-309 (f).

⁹See id. § 4-309 (d).

¹⁰See id. § 4-301 (b) (defining "directory information").

health care provider for treatment purposes; (5) to third party payors meeting the applicable provisions of Title 19, Subtitle 13 of the Health-General Article; (6) to provide for the emergency healthcare needs of a patient; (7) to immediate family members of the patient or any other individual with whom the patient has a close relationship; and (8) to the Department of Health and Mental Hygiene or an organ, tissue or eye donation agency.

In addition to these permissive disclosures, § 4-306 requires a health care provider to disclose a medical record, without authorization of a person in interest, in nine enumerated circumstances, including: (1) to a unit of State or local government for purposes of investigation/treatment of child/adult abuse; (2) to health professional licensing and disciplinary investigation boards; (3) to health care provider or the provider's insurer or legal counsel in cases involving litigation initiated by a person in interest; (4) to medical/dental review committees; (5) to other health care providers; (6) in accordance with compulsory process; (7) to prosecution and law enforcement agencies for purposes of criminal investigation; (8) to the Maryland Insurance Administration for investigation; and (9) to a State or local child fatality review team.

5. Evidentiary Disclosures

In actions brought in the District Court or in any Circuit Court on claims for damages for personal injury, for medical, hospital, insurance or disability benefits, a writing or record of a health care provider is admissible in accordance with the procedures set forth by § 10-104 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland.

Such writing or record of a health care provider made to document a medical, dental, or other health condition, a health care provider's opinion, or the provision of health care is admissible, without the support of the testimony of a health care provider as the maker or custodian of the writing or record, in order to prove the existence of a medical, dental, or health condition, the opinion, and the necessity and the provision of health care. See Md. Code Ann., Cts. & Jud. Proc. § 10-104 (d) (Supp. 1999). Thus, medical records are admissible for the purpose of showing that the patient was hurt in an accident, but the particulars of such accident contained in the record constitute hearsay and should be deleted. See Scott v. James Gibbons Co., 192 Md. 319, 64 A.2d 117 (1949).

Medical records pertaining to the charges made for the care of a plaintiff are also admissible in evidence. See Simco Sales Serv. of Maryland, Inc. v. Schweigman, 237 Md. 180, 205 A.2d 245 (1964). A written statement or bill for health care expenses is admissible without the support of the testimony of a health care provider as the maker or the custodian of the statement or bill to prove the amount, fairness, and reasonableness of the charges for the services or materials provided. See Md. Code Ann., Cts. & Jud. Proc. § 10-104 (e).

Pursuant to the business records exception to the hearsay rule, medical records are admissible in evidence to the extent that they relate to the medical and pathological condition of the patient. See Clarke v. State, 97 Md. App. 425, 429, 630 A.2d 252, 254-55 (1993).

6. Insurance Disclosures

With respect to insurance companies, § 4-403 of the Insurance Article of the Annotated Code of Maryland establishes the conditions for the disclosure of an insured's medical records. If the insured consents, the complete contents of his medical records may be released to third parties. In the absence of any consent to disclosure by the insured or his agent or representative, the general rule is that no medical information, data or statistics may be released by the insurance company even if the identity of the insured is not disclosed. See Md. Code Ann., Ins. §§ 4-403 (b) and 14-138 (b). The intent of the Legislature is that medical records, data, or statistics may be disclosed to a third party without the consent of the patient as long as the patient's identity is not directly or indirectly revealed through the records. Information which would directly or indirectly lead to the identity of the patient should not be released. See 63 Op. Att'y Gen. 432 (1978).

However, § 4-403 (c) provides exceptions to the general rule of nondisclosure of the insured's medical records and permits disclosure of medical information even without the authorization of the insured in the following cases: (1) upon request by or in furtherance of a medical review committee, accreditation board or commission; (2) in response to legal process; (3) to a nonprofit health service plan or Blue Cross or Blue Shield plan to coordinate benefit payments; (4) to investigate possible insurance fraud; (5) for reinsurance purposes; (6) to an insurer information exchange in the normal course of underwriting; (7) to evaluate an application for or renewal of insurance; (8) to evaluate and adjust a claim for policy benefits; (9) to evaluate, settle or defend a claim or suit for personal injury; and (10) in accordance with a cost containment contractual obligation to verify the contractual propriety of benefits paid by the insurer.

7. Retention Policies

Except for a minor patient, unless a patient is notified, a health care provider may not destroy a medical record or laboratory or X-ray report about a patient for five years after the record or report is made. See Md. Code Ann., Health-Gen. I § 4-403 (b). Section 4-403 (c) provides, with exceptions, that in the case of a minor patient, a medical record or laboratory or X-ray report about a minor patient may not be destroyed until the patient attains the age of majority plus three years or for five years after the record or report is made, whichever is later.

B. Mental Health Records

1. Definition

A mental health record is any "medical record," defined in A.1, supra, kept pursuant to the rendering of mental health services. "Mental health services" is defined as health care rendered to a recipient primarily in connection with the diagnosis, evaluation, treatment, case management or rehabilitation of any mental disorder. See id. § 4-301 (i); see also part A.1, supra.

2. Confidentiality Provisions

All mental health records are made confidential under Health-General §§ 4-301 through 4-309. See Shady Grove Psychiatric Group v. State, 128 Md. App. 163, 169, 736 A.2d 1168, 1172 (1999); Reynolds v. State, 98 Md. App. 348, 365, 633 A.2d 455, 463 (1993); Dr. K v. State Board of Physician Quality Assurance, 98 Md. App. 103, 116, 632 A.2d 453, 460 (1993), cert. denied, 334 Md. 18, 637 A.2d 1191, cert. denied, 513 U.S. 817 (1994).

Health-General § 4-307 delineates both permissive and mandatory disclosures of mental health records without the authorization of a person in interest. See id. § 4-307 (g) and (h). Maryland has recognized that there is a constitutional right to privacy in a patient's mental health records; however, that right must be balanced against legitimate state interests. See Shady Grove, 128 Md. App. at 179, 736 A.2d at 1177 (holding that Health-General § 4-306 (b) (7) requires a health care provider to disclose a medical record to a prosecution agency pursuant to a subpoena issued in a criminal investigation only if the prosecution agency first proves that it has written procedures to protect the confidentiality of that record); Dr. K. v. State Bd. of Physician Quality Assurance, 98 Md. App. 103, 632 A.2d 453 (1993), cert. denied, 334 Md. 18, 637 A.2d 1191, cert. denied, 513 U.S. 817 (1994) (holding that a patient's constitutional right to privacy does not bar the disclosure of mental health records to the Board of Physician Quality Assurance where that right is outweighed by the state's compelling interest in obtaining those records for the purpose of investigating possible disciplinary action against the treating psychiatrist).

3. Patient Access

See part A.3, supra; see also Health-Gen. I § 4-304 (a) (2) (permitting a health care provider to refuse to disclose mental health records if injurious to the health of a patient or recipient).

4. Procedures for Disclosure to Third Parties

See part A.4, supra; see also Health-Gen. I § 4-307 (disclosure of mental health records).

5. Evidentiary Disclosures

See part A.5, supra.

6. Insurance Disclosures

See part A.6, supra.

7. Retention Policies

See part A.7, supra.

C. Hospital Records

1. Definition

See part A.1, supra.

2. Confidentiality Provisions

A hospital is a “health care provider” as defined in Health-General § 4-301 (h). As such, a hospital must keep the medical records of a patient or recipient confidential and disclose the medical records only as provided by law. See Health-Gen. I § 4-302 (a); see also part A.2, supra.

3. Patient Access

Despite the statutory provisions set forth above in part A.3, supra, regarding patient access to medical records, there appears to be an absence of uniform procedures with respect to patient access to hospital records. See Franklin Square Hosp. v. Laubach, 318 Md. 615, 620-21, 569 A.2d 693, 696 (1990). Nevertheless, the Confidentiality of Medical Records Act serves to compel disclosure of medical records under prescribed circumstances and to attain uniformity by having all facilities bound by the same rules.

4. Procedures for Disclosure to Third Parties

See part A.4, supra.

5. Evidentiary Disclosures

A hospital record is admissible under the business records exception to the hearsay rule as long as the information is “pathologically germane.” See Chadderton v. M.A. Bongivonni, Inc., 101 Md. App. 472, 485, 647 A.2d 137, 143 (1994); Joseph F. Murphy, Jr., Maryland Evidence Handbook, § 804(C) (2nd ed. 1993); Md. Code Ann., Cts. & Jud. Proc. § 10-101 (explaining what is admissible as business records); see also part A.5, supra.

6. Insurance Disclosures

See part A.6, supra.

7. Retention Policies

See part A.7, supra.

D. Electronic Medical Records

There is no Maryland statute governing the specific area of electronic medical records. Moreover, there is no Maryland case law addressing electronic medical records to date. However, the Confidentiality of Medical Records Act, discussed in part A, supra, governs all medical records, including electronic records.

E. Peer Review Records

1. Definition

A peer review¹¹ record is defined as the proceedings, records, or files of the State Board of Physician Quality Assurance (the “Board”). See Md. Code Ann., Health Occ. § 14-411 (a) (Supp. 1999).

2. Confidentiality Provision

Generally, the Board or any of its investigatory bodies may not disclose any information contained in a record. See id. §§ 14-411 (b); 14-501 (d); see also Unnamed Physician v. Commission on Med. Discipline, 285 Md. 1, 13, 400 A.2d 396, 403, cert. denied, 444 U.S. 868 (1979) (stating that the “fundamental reason for preserving confidentiality . . . is to ensure a high quality of peer review activity leading to the primary goal . . . to provide better health care.”). However, this confidentiality is not absolute. See Md. Code Ann., Health Occ. §§ 14-411 (c) - (l); 14-501 (e). Section 14-501 (f) immunizes any person acting in good faith and within the scope of jurisdiction of a medical review committee from civil liability for giving information to, participating in, or contributing to the function of the committee.

3. Physician Access

In a civil action¹² initiated by a physician who is the subject of the medical review committee investigation, the medical review committee records are not insulated from either discovery or admissibility in evidence. See id. § 14-501 (e) (1); Baltimore Sun Co. v. University of Maryland

¹¹“Peer review” means an evaluation according to procedures, set forth by the faculty and approved by the Board of Physician Quality Assurance, by physicians within the involved medical specialty or specialties, of an act or acts of medical or surgical care, or other acts connected with medical or surgical practice, by an applicant or licensee. See Md. Regs. Code tit. 10, § 32.02.02B (20) (1999).

¹²“Civil action,” within the contemplation of Health Occ. § 14-501 (d), is an adversary proceeding before a court of law encompassing a tort action for medical malpractice. See Baltimore Sun, 321 Md. at 666, 584 A.2d at 686; Unnamed Physician, 285 Md. at 12, 400 A.2d at 402.

Med. Sys. Corp., 321 Md. 659, 663-64, 584 A.2d 683, 685 (1991). This exception providing physician access to medical review committee records is premised on the due process rights of a physician aggrieved by the decision of the medical review committee. See Baltimore Sun, 321 Md. at 668, 584 A.2d at 687.

4. Procedures for Disclosure to Third Parties

The § 14-501 (e) (1) exception, when applicable, does not foreclose all rights of public access to the otherwise confidential committee proceedings, records and files. “[N]othing in the statute even remotely suggests that once the committee records are properly subjected to pretrial discovery, and may be admitted in evidence in the course of the civil action, they remain insulated from public disclosure for all other purposes.” Baltimore Sun, 321 Md. at 668, 584 A.2d at 687 (holding that § 14-501 (d) does not bar press access to confidential records of a hospital’s peer review committee when they are discoverable under subsection (e) and have been filed with and considered by the court in connection with a dispositive motion such as a motion for summary judgment); see also Md. Code Ann., Health Occ. § 14-411 (c) - (l).

5. Evidentiary Disclosures

Section 14-501 of the Health Occupations Article of the Annotated Code of Maryland relates to “medical review committees” and provides that the proceedings, records and files of a medical review committee are not discoverable and are not admissible in evidence in any civil action arising out of matters that are being reviewed and evaluated by the medical review committee. See id. § 14-501 (d) (2). But see id. § 14-501 (e) (providing exceptions to this rule). Section 14-410 mandates that the Board’s records and decisions are not discoverable in criminal or civil proceedings unless all parties stipulate to disclosure, a civil action is brought by the party being investigated, or the information is otherwise admissible as evidence.

The “minutes and notes” and the “proceedings, records, and files” of a medical review committee, as well as its report, would be insulated from discovery by a malpractice plaintiff. See Unnamed Physician, 285 Md. at 14, 400 A.2d at 403. Moreover, materials subpoenaed by the Commission on Medical Discipline are not statutorily protected from discovery. See id. at 12, 400 A.2d at 402. Reports of staff conferences established by the governing board of a hospital as an integral part of the administration of patient care at the hospital, functioning generally as round table discussions of the problems involved in treating schizophrenic patients, were entitled to immunity from disclosure under § 14-501 and were, therefore, properly excludable from admission into evidence. See Kappas v. Chestnut Lodge, Inc., 709 F.2d 878, 881 (4th Cir.), cert. denied, 464 U.S. 852 (1983) (applying Maryland law).

6. Retention Policies

There is no Maryland statute governing the retention of peer review records, nor is there any Maryland case law addressing the retention of peer review records. However, both the Maryland State Medical Society (also known as the Medical Chirurgical Faculty of Maryland, or “MedChi”)¹³ and the Board of Physician Quality Assurance¹⁴ (“BPQA”) have their own internal policies for the retention of peer review records.

MedChi has retained peer review files from 1988 to the present. Material included in the permanent case file may include: the transmittal letter from the BPQA to MedChi requesting a peer review; the transmittal letter from the Peer Review Management Committee to the Peer Review Committee assigned the case; correspondence between MedChi and the reviewers; letters requesting extensions for additional time to complete review of the case; continuing medical education (CME) letters granting the reviewer’s CME credits for participating in peer review; independent reviewers’ comments; copies of signed Reviewer’s Statements; and a copy of the signed final Peer Review Report. Case files are considered the property of the BPQA, which are maintained in trust by MedChi.

The BPQA also has its own internal retention policies for peer review records. Open investigation files on physicians, including complaint, response, subpoenas, medical records, investigative and peer review records, board deliberations and patient medical records are retained by the BPQA until the case is closed. A copy of the automated file on diskette is retained at the state documents center for an additional 25 years.

Closed investigative files with no formal sanction are retained by the BPQA for one year after closure and are then transferred to the State Records Center for an additional three years before being destroyed. Originals of patient records are returned three months after closure, while copies of same are destroyed three months after closure.

Closed investigative files with a formal sanction, such as reprimands, terminations of probation, suspensions, revocations, surrender, probation, as well as disposition agreements, investigative material and hearing transcripts, are retained by the BPQA for five years and then transferred to the State Records Center for an additional five years before being destroyed. The automated database summary is retained by the BPQA for 20 years. Original medical records are returned three months after execution of the Final Order, while copies of same are destroyed three months after the Final Order is executed. Copies of Hearing transcripts are retained by the BPQA for three years before being destroyed.

¹³See <<http://www.medchi.org>>.

¹⁴One of the missions of the BPQA is to protect the health and safety of the citizens of Maryland through an effective disciplinary program. See <<http://www.bpqa.state.md.us>>.

Automated Complaint Tracking History of persons investigated contain names, addresses, incidents, renewal status, dates, actions taken, amounts listed and liability. All electronic data is backed up daily at the BPQA and is stored offsite weekly for retrieval and can be recovered through the Department of Health and Mental Hygiene Disaster Recovery Procedures, if necessary. Data of this kind is retained permanently.